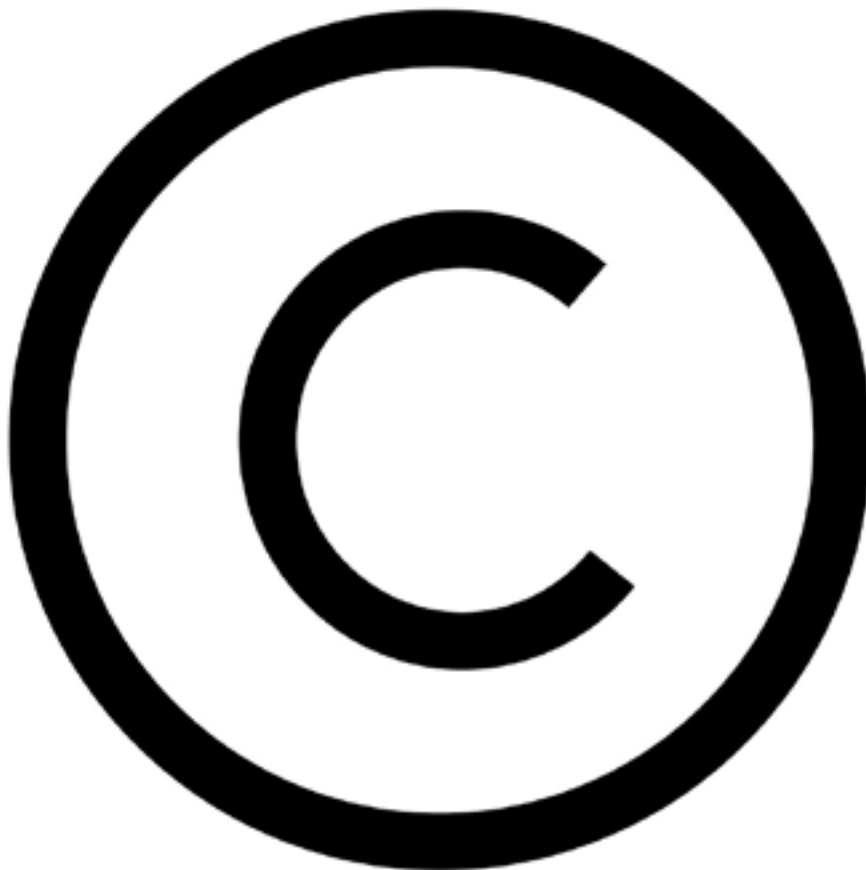


European Commission's Public Consultation on the Review of the EU Copyright Rules

Response of the European Law Institute



**Response to the European Commission's
Public Consultation on the review of the EU
copyright rules
by the
European Law Institute Working Group
on EU Copyright Law**

The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such its work covers all branches of the law: substantive and procedural; private and public.

The ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

President: Diana Wallis
Vice-President: Christiane Wendehorst
Treasurer: Johan Gernandt
Speaker of the Senate: Irmgard Griss

European Law Institute
Schottenring 14
1010 Vienna
Austria
Tel.: + 43 1 4277 22101
Mail: secretariat@europeanlawinstitute.eu
Website: www.europeanlawinstitute.eu

ISBN: 978-3-9503458-2-7

© European Law Institute 2014

Following publication of the European Commission's Public Consultation on the review of the EU copyright rules, members of the ELI Working Group on EU Copyright Law, led by Reto Hilty and Axel Metzger, with advice of members of the Advisory Committee, have prepared this document as a response to some of the European Commission's questions. This paper was considered and approved by the ELI Council as an official Statement of the ELI on 28 February 2014.

Working Group

- **Project Leaders**

RETO HILTY (*1958) is Director of the Max Planck Institute for Innovation and Competition, Munich, Full Professor at the University of Zurich and Honorary Professor at the University of Munich, Germany. He graduated from the University of Zurich and received a "Doctor iuris" for a thesis on Swiss and European Patent Law. From 1994 to 1997 he acted as Head of Department and Member of Board of Directors at Swiss Federal Institute of Intellectual Property (Patent and Trademark Office), Berne. Hilty completed his "Habilitation" on licensing contracts in 2000; subsequently he became Full Professor for Technology and Information Law at Swiss Federal Institute of Technology Zurich (ETH Zurich) before being appointed Scientific Member of the Max Planck Society in 2002.

AXEL METZGER (*1971) is Professor of Law at the Leibniz University of Hanover, Germany, where he teaches civil law, intellectual property and private international law. He graduated from the University of Hamburg and passed the First and the Second State Examination at the Hamburg Court of Appeals. He received a "Doctor iuris" from the Universities of Munich and Paris II (Panthéon-Assas) for a thesis on German and French copyright law and an LL.M. from Harvard. From 2001-2008 he worked as a Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, where he finished his "Habilitation" in 2008 with a thesis on European private law. Metzger has been visiting professor at University of Basel (2011) and Bucerius Law School (2012).

- **Other members of the Working Group**

LIONEL BENTLY is Herchel Smith Professor of Intellectual Property, Director of CIPIIL at Cambridge University. He served as Lecturer in Law, University of Keele, Professor of Law, King's College, London, Yong Shook Lin Visiting Professor, National University of Singapore (2007) and Visiting Professor of European Law, Columbia University (2008). He is Associate Tenant, 11 South Square, Grays Inn., Member of the Copyright Expert Panel, Strategic Advisory Board on Intellectual Property (2008-10), Council Member, Intellectual Property Institute and Executive Board Member, British Literary and Artistic Copyright Association. Advisory Board, Institute of Brands and Innovation Law, UCL.

THOMAS DREIER (*1957) is Professor of Law at the Karlsruhe Institute of Technology (KIT), Karlsruhe, Germany, where he teaches civil law, intellectual property and internet law. Dreier studied at the Universities of Bonn, Geneva and Munich. He received a “Doctor iuris” from the University of Munich (1990) and, at the same university, finished his “Habilitation” (2000). In addition, he received an M.C.J. degree from New York University’s School of Law and was admitted to the New York Bar. From 1986-1999 he worked as Head of Department at the Max Planck Institute for Intellectual Property in Munich, before joining the KIT (formerly University of Karlsruhe). He has been visiting professor at the Universities of Toulouse, New York (NYU), Haifa and Singapore.

CHRISTOPHE GEIGER (*1972) is Associate Professor, Director General and Director of the Research Department of the Centre for International Intellectual Property Studies (CEIPI) at the University of Strasbourg (France). In addition, he is an affiliated senior researcher at the Max Planck Institute for Innovation and Competition in Munich (Germany). He specializes in national, European, international and comparative intellectual property law, has drafted reports for the European institutions and acts as external expert for the European Parliament and the Office for Harmonization in the Internal Market (OHIM). He has published numerous articles as well as authored and edited many volumes in this field.

VYTAUTAS MIZARAS (*1974) is an advocate, partner at Professional Law Firm “Lawin” and Professor at the Law Faculty of Vilnius University (Lithuania) since 2009. Currently he is the head of the Department of Private Law. From 1992-1997 he studied law at the University of Vilnius. He graduated from the University of Vilnius in 1997. Afterwards he studied at the J. W. Goethe University of Frankfurt am Main and he received a LL.M. degree in 1998. He received a Ph.D. degree in 2002 and a postdoctoral qualification (Habilitation) in 2009 from the Vilnius University. Vytautas Mizaras has been working at the Law Faculty of Vilnius University since 1997 as assistant professor, lecturer, associate professor. He had a research fellowship at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich (Germany) in 2001, 2006, 2007, 2008, 2010. He was a visiting scholar at University of Frankfurt (2006) and University in Pavia (1999).

MARCO RICOLFI (*1952) is Professor of Intellectual Property at the Turin Law School, co-director of the Nexa Center on Internet and Society of the Turin Polytechnic and Partner of the law firm Tosetto, Weigmann e Associati. Since 2000 he has been the Director of the Intellectual Property Masters Program organised by the World Intellectual Property Organisation (WIPO) and Turin University. He graduated from Turin University and received an LL.M. from Yale Law School (1976). He was Chairman of the Copyright Sub-group for the High Level Group appointed by the European Commission for the Digital Libraries Initiative (2006-2009) and member of the Fachbeirat of the Max Planck Institute for Intellectual Property and Competition (2004 to 2012). He has taught in Alessandria, Brisbane (2013), Cleveland (2006, 2008) and Lecce (1992-1995).

Advisory Committee

GABRIELLA MUSCOLO entered the Judiciary in 1985. She currently sits in the Specialist Section for Intellectual Property and Competition Law at the District Court of Rome. She is the Italian member of the Enlarged Board of Appeal of the European Patent Office. Gabriella Muscolo lectures in Commercial Law at the postgraduate School of *La Sapienza Università di Roma* and has also lectured at Italian and European Universities and at the University of Washington Center for Advanced Studies and Researches in Patent Law in Seattle. She has published in both Italian and English in the fields of company law, intellectual property law and competition law. She is a frequent participant in Italian and European conferences and workshops in the field.

RADIM POLČÁK is the head of the Institute of Law and Technology at the Faculty of Law, Masaryk University, the Czech Republic. His research interests include ICT law and legal philosophy. He is the general chair of the Cyberspace Symposium, the editor-in-chief of the Masaryk University Journal of Law and Technology (MUJLT) and a founding member of the European Academy of Law and ICT. He is a panelist of the *adr.eu* arbitration tribunal and ad hoc expert advisor of various Czech and EU judicial and governmental institutions.

JAN ROSÉN is Professor of Private Law at the Stockholm University. In his research he focuses on contract law and indefeasible rights, intellectual property - predominantly copyright and trademark law - and media law, embracing IT law, control of media content, broadcasting, freedom of information and expression, integrity, advertising and market law and norms on the flow of information. He is a member of the Swedish Government's IT Commission. He was the Government's special investigator on the revision of the Swedish Copyright Act in 2008-2011 and continues serving as an expert to the Swedish Government working on a new Patent Act and *Droit de suite*. He is a member of various intellectual property rights associations.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	5
I. INTRODUCTION.....	6
II. RIGHTS AND THE FUNCTIONING OF THE SINGLE MARKET	7
III. LIMITATIONS AND EXPECTATIONS IN THE SINGLE MARKET	12
IV. PRIVATE COPYING AND REPROGRAPHY	15
V. FAIR REMUNERATION OF AUTHORS AND PERFORMERS	18
VI. RESPECT FOR RIGHTS.....	20
VII. A SINGLE EU COPYRIGHT TITLE.....	22

I. INTRODUCTION

On December 5 2013 the European Commission (the Commission) launched a public consultation as part of its on-going efforts to review and modernise EU copyright rules.* This consultation builds on previous consultations and public hearings, but is broader in scope and raises questions of fundamental importance for the future development of EU copyright law.

The European Law Institute's Working Group on EU Copyright Law, which was established in January 2014, welcomes this fundamental approach. Copyright has been harmonised since the early 1990s by nine EU Directives. In addition to the Directives, Recommendations and Green Papers and the ever growing body of case law of the Court of Justice of the European Union have to be taken into account as an essential part of European copyright. Additionally, copyright law is subject to a tight net of international conventions.

This diversity of legal sources, many of which provide for minimum harmonisation or allow for different options for Member States, has led to friction and incoherence. Although subject to EU Directives, fundamental issues like copyright limitations and exceptions are not yet harmonised to an extent that would suffice for the establishment of a truly Single Market for copyright-protected works. Moreover, some of the core principles of copyright law have still not been addressed by EU law. Moral rights have so far been excluded from EU copyright law, which in the long run will undermine their importance. Other areas almost untouched by the European Union are contract law in the area of copyright, e.g. publishing or licensing contracts, and initial ownership in copyright, especially in employment relationships.

Members of the Working Group take the opportunity given by the consultation to provide answers to some of the general questions raised by the Commission. This document follows the order of questions of the consultation document. Questions addressing specific experiences of stakeholders have been omitted.

* http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.

II. RIGHTS AND THE FUNCTIONING OF THE SINGLE MARKET

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

Questions 1-7 address specific experiences of stakeholders.

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

8. *Is the scope of the “making available” right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?*
9. *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)?*

The questionnaire correctly describes the act of “making available” as an act, which not only may occur in the State where the upload is effected, but which affects all countries in which the service can be effectively accessed. This second aspect of making works available was discussed in the CJEU's ruling in *Football Dataco v. Sportradar* (C-173/11), where the Court held that “re-utilisation” in terms of the Directive No. 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (“Database Directive”) occurs only in those countries, which are targeted by an Internet service provider. This criterion had already been applied by the CJEU in the trade mark case *L'Oréal v. eBay* (C-324/09). This approach strikes a reasonable balance between interests of right holders and users and should be used by the European legislator as a starting point when considering a statutory clarification. However, the legislator should take into account that copyright is not a purely market-oriented exclusive right. It may therefore be justified to adjust the criterion of targeted markets to the special nature of copyright as an economic and moral right. The legislator should resist any attempt to expand the territorial scope of the “making available” right by merely focusing on the technical availability of content; instead, countries in which the content has not been accessed (at all or at least not by a substantial number of users) should not be encompassed. The CJEU was not very clear on this point in the case *Pinckney v. Mediatech* (C-170/12), which is cited in the questionnaire. However, one should keep in mind that the case was not related to the “making available” right but to the online distribution of physical copies only. Moreover, the decision was criticized thoroughly by commentators for its broad interpretation of the rules on jurisdiction for copyright infringement. Thus, *Pinckney v. Mediatech* should not be used as a model for future legislation with regard to the making available right.

10. 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?

The question and the explanation given in the questionnaire are based on two assumptions: 1) the “reproduction right” and the “making available right” are held by different parties; 2) the holder of the reproduction right is in the position to prevent licensing of the “making available right” due to the unavoidable reproductions that are generated for a transmission in a network. This second assumption is highly questionable: The grant of a licence for “making a work available” typically includes – explicitly or implicitly – the licence for the making of incidental copies. Moreover, Art. 5 para. 1 of 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 (“Information Society Directive”) covers certain incidental reproductions. Therefore, the Working Group considers the parallel application of the making available right and the reproduction right with regard to digital transmissions as not being problematic.

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 right holder?

The question of whether referencing to publicly available websites by hyperlinks involves an act of communicating to the public and, as such, is subject to the right holder's authorisation, was decided by the CJEU on February 13 2014 in the case *Svensson* (C-406/12). The CJEU ruled that Article 3(1) of the Information Society Directive must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’. However, one should bear in mind that the CJEU was also of the opinion that linking could, in principle, amount to such a communication if the hyperlink allowed a “new public”, which was not addressed by the targeted original website, to access the content. Thus, the CJEU's approach is not without limits. In cases in which specific protected material, although technically available to the public, was not found by a higher number of users before the hyperlink was published, e.g. if the content is uploaded to a one-click hosting service (also called cyber-locker or sharehoster) and the hyperlink sent to the individual user is afterwards published on the Internet, the provision of a hyperlink may well be regarded as a communication to a new public in the sense of *Svensson*. For so-called “frames” by which a website uses a link to incorporate parts of a targeted website into a frame of its own service, additional criteria may become relevant, especially where the incorporation is effected in a way that substitutes the visit of the original website entirely, in particular if the user is no longer aware that he is linked to another website (“embedding”). Under such circumstances, the fact that the content was already available to the public is still true; however, it can hardly be argued that such uses of third-party content would not be an appropriation.

The delineation of such forms of framing and linking is complex and admittedly, it would not be easy to find an appropriate legal regulation at this stage of the technical and legal development. Since the question of whether frames should be qualified as communication to the public is currently pending before the CJEU in the case *Bestwater International* (C-348/13), it seems advisable to wait for the CJEU's judgment. In case a legislative initiative

proves to be appropriate, Recital 23 of the Information Society Directive might be amended with a list of criteria. Such an approach would still leave room for further clarifications by case law with regard to new types of hyperlinks. By contrast, any static rule in the regulatory part of a Directive would be at risk to be outdated before its implementation in the Member States.

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 right holder?

According to Art. 2 of the Information Society Directive, temporary reproductions are as a matter of principle already subject to the right holder's authorisation. However, Art. 5 provides for an exemption of temporary acts of reproduction, which are an integral and essential part of a technological process and whose sole purpose is to enable lawful usage. Recital 33 specifies that temporary reproductions, which are necessary for browsing or caching, should be exempt from the reproduction right. Therefore, under the current rules, the mere viewing of a website does not require the authorisation of the right holder. This solution is in line with the general conception of copyright law according to which mere consumption (like reading a book, hearing music or viewing a painting) is free. This conception should be upheld in future legislative instruments irrespective of the technology that applies.

Question 13 addresses specific experiences of stakeholders.

14. 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.

With a view to a possible legal framework enabling the resale of previously purchased digital content, the Commission should bear in mind that a right holder's response to a liberal approach might be an application of technical measures to avoid the allowed resale. If the exhaustion approach applied in the offline world shall be mirrored in the online world, the legislation should provide for certain flanking measures, for instance similar to those in Art. 6 para. 4 of the Information Society Directive, however, taking into account the circumstances in question and the evidence accumulated in the meantime on the effectiveness of such measures.

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?

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

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

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

Although Art. 5 para. 2 of the Berne Convention provides that the enjoyment and the exercise of the rights under the Convention shall not be subject to any formality, the European legislator should not disregard registration systems as a possible political choice. Art. 5 para. 2 is only applicable to rights covered by the Convention, special agreements supplementing the Convention and other treaties referring to the Berne Convention. Also, the Convention is silent on the protection in the country of origin, see Art. 5 para. 3. Therefore, even under the Berne Convention, there is still some room for manoeuvre.

Registration systems could serve as a source of information through which third parties could find information about the protected works, the scope and term of protection, the identity and contact information of right holders, and – depending on the concrete design of the registration system – about the terms under which the works may be used by potential licensees and users. The creation of a EU-wide registration system could be built in such a way as to provide for the possibility of records of transactions, e.g. along the lines of the Community Trademark, and thereby enable use of copyright assets as collateral for financing, with significant benefits in terms of access to financing. Also, a registration system would allow for the establishment of a similar system as in the case of Community Design: After a first – much shorter – protection period, the right holder could be required to register before enjoying the full term of protection. Such an approach could be of particular interest for works of a functional or technical nature. As such, works with short-term economic interest would fall into the public domain much earlier.

A registration system would entail costs for right holders. During any further consideration of a registration system, care for authors who might not have sufficient capacity to bear costs must be borne in mind. However, a registration would give evidence of the economic interests in the further exploitation of a work; compared to the expected earnings, these costs would be insignificant for copyright industries. Beyond that, a registration system could be accompanied by special incentives, e.g. higher amounts of damages, longer terms of protection etc.

D. How to improve the use and interoperability of identifiers

Question 19 addresses specific experiences of stakeholders.

E. Term of protection – is it appropriate?

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

Economists are sceptical about the idea that an expansion of the copyright term increases creativity. The effects may even be adverse. An overlong copyright term may limit, rather than encourage, a work's dissemination, impact and influence. It can be burdensome to find out the right holder's name and address and to obtain the rights to use older contents. As such, an overlong term of protection may impede the creation of new works. Economists are also sceptical about an undifferentiated regime of copyright terms (see the joint position paper "The Proposed Directive for a Copyright Term Extension, A Backward-Looking Package", http://www.cippm.org.uk/downloads/Term%20Statement%2027_10_08.pdf). It may be justified for some works of quality to accept duration of copyright protection for fifty or seventy years after the death of the author. But for the bulk of minor works of a functional or technical nature, which today are also covered by copyright, such long terms of protection risk being inefficient. The legislator should therefore refrain from further extensions for copyrights or neighbouring rights. In contrast, one should consider whether the term of protection can be reduced for categories of works, which typically go out of use after a shorter period of time, e.g. software.

III. LIMITATIONS AND EXPECTATIONS IN THE SINGLE MARKET

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?*

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?*

The optional nature of Art. 5 para. 2 and 3 of the Information Society Directive has prevented the substantial harmonisation of the Member State's copyright limitations and exceptions. Even some of the core limitations, e.g. the right of reprographic reproduction and the private use exception in Art. 5 para. 2 lit. a) and b), have not been implemented by all Member States. Therefore, if a lawyer reproduces an article from a law review by a reprographic photocopier, this is covered by the implementation of Art. 5 para. 2 lit. a) in Germany and France but not in the UK. The use for reporting current events by press and other media in Art. 5 para. 3 lit. c) provides another example for highly divergent national legislation. A report to the Commission of 2007 by Guibault, Westkamp, Rieber-Mohn, Hugenholtz et al. contains a detailed analysis of the implementation of the Directive, concluding that harmonisation for limitations and exceptions has hardly been achieved due to their optional nature and their broad and categorical terms. This picture has not changed substantially ever since. The problems arising from this heterogeneity obviously thwart a comprehensive implementation of the Internal Market. This is true for physical goods, but also increasingly affects the online markets. Therefore, limitations and exceptions – being the most important tool for balancing all interests involved – should be mandatory for Member States to a large degree.

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

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?*

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.*

One major difficulty with the current closed list of limitations and exceptions in Art. 5 of the Information Society Directive is its lack of flexibility. The fast developing media services and technologies require a more flexible regulatory approach, which allows for prompt adjustment of copyright rules to new legitimate uses of protected materials. The legislative process, especially in the complex EU setting, is not well suited for quick response to the

specific needs of user groups. Legislative instruments are the outcome of long-winded consultations with stakeholders and interest groups. The issue of orphan works has, for instance, shown how burdensome such a process can be. The process to pass the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (“Orphan works Directive”) took more than three years, and the rules are not yet implemented in all Member States. Beyond that, it is questionable, whether a patchwork approach with special Directives for concerns of limited range would provide an appropriate legal framework. Against this background, the further alignment of the limitations and exceptions to newly emerging concerns should primarily be allocated to the courts. Courts are better suited to advance legal development based on specific use cases. This does, of course, not exclude the possibility of condensing established case law into codified law at a later stage. However, judicial development of new copyright limitations and exceptions should be guided by a list of general criteria which define the pre-conditions and limits of the courts’ authority to recognise new limitations and exceptions. The three step test in Art. 5 para. 5 of the Information Society Directive could serve this concern, if it was interpreted as an opening clause (see Declaration on a balanced interpretation of the Three Step test, http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf). Beyond that, section 107 of the US Copyright Act (“Fair use”), could be used as a starting point for a more liberal approach. However, it should be borne in mind that broad fair use exceptions, as blanket clauses in general, come with the inherent risk of legal uncertainty. Only big players, such as service providers for instance, may have the necessary financial resources for long-winded court procedures. At the same time, those service providers may capitalise the time prior to a final decision to establish their services in the market. Experience from previous years has shown that these challenges of the fair use approach are not a mere academic concern.

Therefore, the EU copyright system as a matter of principle should stick to its current approach providing a list of specific statutory limitations and exceptions. However, this list should be supplemented with sufficient flexibility to enable courts to develop tailor-made solutions for newly emerging legitimate uses. At a later stage, established judge-made rules based on legal practice, could, where appropriate, be modified and codified, notably by establishing the requirement of a fair compensation. Such a new European approach would combine flexibility with legal certainty.

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

The territoriality of limitations and exceptions poses a significant legal problem in the context of the pan-European exploitation of works. As mentioned in relation to questions 21/22, usage of protected subject matter may be legal in one Member State, but illegal in another and thus require the authorisation of right holders in the latter. This imposes transaction costs on users and may frustrate the establishment of pan-European services. Moreover, the fragmentation of limitations and exceptions discriminates users vis-à-vis right holders: the most important exclusive rights in the field of copyright are fully harmonized by Art. 2 to 4 of the Information Society Directive. Therefore right holders can rely on almost

identical rules in the 28 Member States of the EU. By contrast, service providers, but also creative users of protected material, are under a duty to manage 28 different legal regimes with significant differences. This problem can only be mitigated by a higher level of harmonisation of limitations and exceptions (see the Commission's Reflection Document "Creative content in a European digital single market: challenges for the future", 22 October 2009, p. 15). With a higher level of harmonisation, the European legislator could also consider establishing the "country of origin principle" with regard to limitations and exceptions. Such an approach could either be implemented in Art. 3 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce ("E-Commerce Directive"), in the Internal Market and its appendix or in a new provision of the Information Society Directive.

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?)

Cross-border effects may only occur if the European legislator mitigates the territoriality principle for limitations and exceptions, e.g. by introducing a country of origin approach. Under this assumption, it would be consequent – and convenient for right holders and users – that a compensation regime was administered centrally in one country. This requires appropriate statutory rules for collecting societies and their suitable organisation. Ultimately, the scope of the Directive on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (text currently agreed by Parliament and Council negotiators) might need to be extended in later revisions. In case of an alteration of the current compensation regime it should be ensured, however, that the total amount paid to right holders would not decrease or increase (subject to adjustments for other reasons, e.g. the implementation of more mandatory exceptions and limitations with compensation requirement could increase the total amount paid to right holders).

It should be noted, however, that problems of cross-border effects of limitations, exceptions and collection of compensation under the current regime may occur as well. In the case *Stichting de Thuiscope v. Opus* (C-462/09) the CJEU invited the national courts to solve these problems by interpretation of the national implementation rules of the Information Society Directive. This suggests indeed a need for action.

Questions 28-63 address experiences of parties privileged by specific limitations and exceptions.

IV. 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?

Case law shows that problems related to Art. 5 para. 2 lit. a) and b) of the Information Society Directive primarily arise from the unclear contours of the required “fair compensation”; not even the CJEU provided for sufficiently clear guidelines. In addition, the previously explained criticism of the optional nature of Art. 5 para. 2 and 3 (see comments to question 22) should be taken into account. A truly Single Market may only be established if the exceptions for private copying and reprography (amongst others) are altered into mandatory provisions and if the compensation systems in the Member States are compatible, notably if they lead to comparable revenues for the different groups of right holders.

Beyond that, however, it is questionable to what extent copyright law should continue to treat digital technologies differently today. Copies and reproduction increasingly – and beyond mere private use in terms of Art. 5 para. 2 lit. b) – are no longer effected on paper; notably companies base their activities (e.g. archives) on digital data storage. It is hardly comprehensible that copyright law, without differentiation, should enable right holders to prevent that. Rather, copyright law should ensure adequate compensation of right holders, and it may narrow down the scope of a technology-neutral exception to a degree that avoids harm to right holders – but copyright law should not produce effects that impede ordinary contemporary business activities.

On the other hand, the ever increasing complexity of copying and reproduction technologies entails an incremental need for specialised intermediaries. They play a very important role in developing new business models for the use of works. This ultimately serves those right holders who are not themselves in the position to develop such platforms – of course under the pre-condition of their adequate compensation. Individual licensing hardly ever provides a convincing alternative today. The overly complicated clearing of rights makes legal certainty impossible. Legal certainty, however, is the pre-condition for the functioning of the copyright related markets. It only may be ensured by copyright law itself; copyright law therefore has to define the allowed activities of intermediaries and to provide for clear contours of an appropriate compensation system.

Related to compensation, two further aspects should be considered. Firstly, individual licensing of intermediaries – which is the basic requirement to establish copyright compliant services under the current EU copyright regime – may benefit those right holders who are in the position of bargaining higher licensing fees, compared to a collective compensation system. These are, however, not the original right holders – the creators of the work – if they entirely depend only on their contractual partners. By contrast, the creators benefit from a collective compensation system – under the condition that copyright law safeguards an indispensable right to partake in the revenues.

Secondly, intermediaries play an important role as to the collection of remuneration for uses of works. With the decreasing relevance of data carriers (like blank CDs etc.) it is no longer realistic to believe that end-users may be charged directly through levies. Instead, forward-looking compensation systems are geared towards intermediaries – for both, the copyright relevant uses of works by the intermediaries themselves (related to their services) and copyright relevant activities of end-users (as clients of the intermediaries). The elaboration of modalities for the re-compensation of intermediaries through end-users (e.g. by an extra charge on flat-rates) should be left to the dynamics of the market forces.

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

In the current system, Art. 5 para. 2 lit. b) of the Information Society Directive interacts with Art. 6 para. 4 subpara. 1 resp. 2. According to these provisions, Member States are not only free to implement a limitation for digital copies for private purposes; they are also not obliged to take appropriate measures to ensure that right holders make available to the beneficiary of Art. 5 para. 2 lit. b) the means of benefiting from that particular exception in case of technological copy protection systems. Member States are solely obliged to ensure fair compensation – if they establish the limitation in national law. In that respect, they also have to take account of the application (or non-application) of technological measures in terms of Art. 6 para. 3.

In view of that, question 65 addresses three different issues. Firstly, the reference to “minimal harm” of the right holder gives reason for discussion. In fact, if the argument of (lacking) – actual – harm of the right holder would play a role to determine compensation, this would constitute a paradigm shift. It is true that the CJEU carved out the criterion of “harm” as justification for “fair compensation” notably stipulated in Art. 5 para. 2 lit. b) (see primarily the case of *Padawan*, C-467/08, paras. 39 and 40). It did, however, not provide a case-by-case analysis, but rather explained the purpose of the stipulated compensation in general. It is inherent to collective compensation systems that they do not provide for individual, but rather for rough justice. Therefore, if a new approach should be established according to which the criterion of actual harm would play a role – which doubtlessly would be worth discussing –, this could hardly be limited to one particular limitation like Art. 5 para. 2 lit. b).

Secondly, question 65 focuses on business models by which the right holder has licensed a service. This means that an intermediary – presumably – is paying a license fee to the right holder for providing his service. This does not mean, however, that end-users – who may access digital content via that service, possibly freely, – would pay (on a contractual basis) as well. Since two different forms of uses of works are involved, the compensation for one of them does not include a compensation for the other one per se. Therefore, it is justified under the current regime that private copying levies apply to such users as well (see CJEU case *VG Wort v. Kyocera*, C-457/11 to C-460/11). If a – new – approach should be established according to which levies to certain private users would not be imposed, this would again require a general discussion beyond Art. 5 para. 2 lit. b).

Lastly, related to the interaction with technical measures, it is currently up to the national legislation to prevent double compensation – notably to the detriment of end-users –, on the one hand based on collective systems, on the other on individual licensing fees. It might be desirable to provide for more guidance for compelling solutions to this challenge at the level of EU law.

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

This question may hardly be answered in the abstract. Answers on the one hand depend on the design of the services respective to their business models. On the other hand, various different levy systems co-exist in the Member States.

Generally, the message in the answer to question 64 should be stressed once more: Online services will increasingly require a shift from levy systems directly charging end-users to settings in which the service provider (intermediary) is liable for both, the compensation of his own use of works and the one of the end-user. The revenue of the right holder should not change overall (subject to adjustments for other reasons), but the efficiency of collective compensation systems could be enhanced substantially.

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

More transparency as a matter of principle would not be detrimental to the credibility of copyright law. In the current system, it would certainly be of interest for consumers to know which amount included in the sales price for blank devices (like CDs, DVDs, USB-sticks, but also smart phones etc.) – depending on their capacity – is conveyed to collective compensation systems. In the online world, a service provider could be compelled to provide similar information, according to which a differentiation of the price for his service as such and compensation for copyright law, would be possible.

Even more important with a view to the social acceptance of costs produced by copyright law would be the information about the partition of revenues amongst different groups of right holders. Numerous studies show that consumers are sensitive for the argument of justice; a great majority particularly does not want to harm individual creators (see the Report of the EU Observatory, “European Citizens and Intellectual Property: Perception, Awareness and Behaviour”, OHIM, November 2013). Based on information about the partition of revenues, it would be very easy to show consumers how by behaving legally they may contribute to the advancement of creativity. Pre-condition, however, would be that fair partitioning is imposed by EU law (see also questions 72-74).

Questions 68-71 address specific experiences of stakeholders.

V. FAIR REMUNERATION OF AUTHORS AND PERFORMERS

72. *What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?*

The principles of copyright contract law should ensure that exclusive rights may only be transferred or licensed to the extent that they are explicitly mentioned in the contract. Judges should have the legal means to narrow the scope of abusive buy-out clauses by contract interpretation. Also, the author should have certain revocation rights if the conditions for the exploitation of his work change (in case of an overly broad transfer of rights e.g. if newly emerging technological possibilities are not appropriately applied by his contractual partner).

In addition, the EU should consider implementing legal remedies for authors allowing them to claim for an equitable and fair compensation from their counterparts in copyright contracts. However, one should not be over-optimistic about the effects of such legal remedies. If works are hardly profitable, there is no justification for additional revenues beyond the agreed reward. Moreover, copyright contract principles should seek for a balanced partition of the economic risk; certain profits of exploiters are required to counterbalance flops and successes. The possibility of judicial overriding of contracts should therefore be the exception only applicable in excessive cases.

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

The harmonisation of copyright contract law in the EU would resolve one of the most important impediments for the EU-wide marketing of copyright protected works. Under the current national regimes with highly divergent rules, parties cannot rely that a transfer or license of copyrights under the law of one Member State has the same effects in another Member State (e.g. in Germany or Austria contractual transfers are *ex lege* prohibited). The Commission has announced on several occasions that copyright contract law could be one of the next steps towards a truly harmonised copyright regime in Europe. Therefore, the copyright community expects the Commission to initiate a more concrete dialogue on copyright contracts. The “Licences for Europe” process is not yet sufficient to solve the problem.

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

It would hardly be feasible, as a short term solution, to establish a directly applicable EU contract law for copyright and neighbouring right contracts; the interfaces with general principles of law – governed by substantially different concepts of contract law in the Member States – are by far too numerous. Therefore, directly applicable EU contract law (related to whatever subject matter) for the time being only may provide a further (“29th”) legal regime which may be chosen as an alternative to the remaining national contract laws. Further reaching steps – in particular replacing national law – would require an antecedent,

largely exhaustive harmonisation of general issues of contract law in the Member States. An alternative legal regime, however, would not help, but complicate the situation because the transparency regarding the applicable law for third parties would decrease.

However, the heterogeneity of national contract laws in general does not exclude working towards greater harmonisation related to specific issues of copyright contract law; consumer protection provides for a good example of a successful interaction between EU law and national contract laws; numerous Directives led to a substantive increase of the level of consumer protection in the Internal Market. Related to copyright law, a number of issues could be addressed such as the transferability of the exclusive right (currently excluded in certain Member States), certain requirements to be observed in a transfer or licence contract (e.g. written form, specification of exclusive rights etc.), consequences of exclusivity or non-exclusivity of a licence, third-party effects of licences, permissibility of sub-licensing etc. Furthermore, guidelines for the interpretation of contracts, for the determination of fair and equitable remuneration or other uncertainties in legal practice might help.

With a view to such harmonisation, the EU should follow a holistic approach, encompassing all categories of works. Particularities, however, might also be addressed where necessary. In that respect, differentiations within copyright contract law according to certain criteria – e.g. mandatory rules with regard to publishing contracts for scientific works – could and should be aligned with the substantive copyright law. In fact, notably (mandatory) exceptions and limitations provide for an additional layer to balance the interests of different categories of right holders.

VI. 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?

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (“Enforcement Directive”) provides for a high level of law enforcement against commercial and private copyright infringers. Whereas it may be questionable whether the current regime is sufficiently deterrent regarding commercial infringers, enforcement tools against private infringers require more delicate consideration. In fact, a strengthened enforcement increasingly risks undermining the acceptance of copyright in society. Overly strict enforcement measures entail weakened compliance with copyright principles and, as such, may result in adverse effects for authors and right holders. The European legislator should therefore be aware that exceeding law enforcement measures against private parties – e.g. double and treble damages as implemented in some Member States or liability rules for the expenses caused by cease-and-desist-letters – are not free of social costs. All attempts to amplify law enforcement in the field of copyright will be followed by strong public outcry, especially from Internet users who are still alert after the ACTA debate.

Therefore changes of the law enforcement regime should only be taken carefully and with a balanced approach. Stricter law enforcement measures should specifically address large scale commercial infringers. But what is more, enforcement measures should be balanced with clearly defined defendant's rights. Particularly, stronger law enforcement measures against large scale infringers could be combined with efficient rules against the abuse of law enforcement measures. Beyond that, caps for damages and expenses for private infringers could be considered. In the special field of the Internet, a political trade-off with user groups should be sought. In this respect, it should be recalled that all law enforcement measures are subject to the proportionality principle as laid down in Art. 3 para. 2 of the Enforcement Directive.

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 Enforcement Directive has not harmonised the rules on third party liability in the European Union. Although it is true that the E-Commerce Directive exempts certain Internet service providers from liability and precludes national courts from issuing injunctions which require those providers to install systems for general filtering indiscriminately to all users (see CJEU, case C-70/2010, *Scarlett v SABAM*), the requirements for injunctions and damages in cases of specific monitored infringements have not been regulated at a Union level until today. This absence of European principles has led to significant differences in Member States' laws. Today, this fragmentation poses a serious impediment for intermediaries with pan-European services. It is burdensome and costly for intermediaries to verify all the

different liability regimes within the European Union. Therefore, the Commission should consider closing this gap on the next occasion.

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?

Art. 8 para. 3 lit. e) of the Enforcement Directive provides that the right of information shall be without prejudice to statutory provisions which govern the processing of personal data. Yet this provision has not resulted in a strong data protection regime, since Internet service providers can be forced to disclose the names and addresses of private users in case of alleged copyright infringement. Also, there is no guarantee that right holders may use only legally obtained information about the user's conduct when approaching the competent judicial authorities in proceedings under Art. 8. Giving the fundamental character of the right of privacy, the European legislator should establish more efficient safeguards for the protection of personal data in infringement proceedings. The jurisdiction of the CJEU in the case *Promusicae* (C-275/06) does not provide sufficient protection of the right of privacy since it leaves too much discretion to the Member States.

VII. 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?

The establishment of a single EU Copyright Title should be pursued as a mid-term objective by the European institutions. The current approach of harmonisation by specific Directives with many optional provisions (notably related to limitations), minimum protection requirements and open categorical terms has not proved to countervail a great number of differences in Member States' copyright laws. This results in numerous legal frictions for cross-border services, which could be cleared most efficiently by a unified EU copyright system. Art. 118 TFEU provides a sufficient legislative competence for the Union to act.

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

The drafting and adoption of a single EU Copyright Title is certainly not a short-term project but will need some years of preparation. In the meantime, the European institutions might have to react to urgent challenges by adapting the current legal regime. Notably an interim revision of the Information Society Directive and the Enforcement Directive might be unavoidable. Such amendments, however, should not predetermine the greater picture of a future EU Copyright Title.

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.



ELI

EUROPEAN
LAW
INSTITUTE