

PLEASE IDENTIFY YOURSELF:

Name:

SOCIETY OF AUDIOVISUAL AUTHORS (SAA)

The SAA is the grouping of European collective management organisations representing audiovisual authors. Its members (25 societies in 18 countries) manage the authors' rights of over 120,000 film, television and multimedia screenwriters and directors. More information: www.saa-authors.eu. Follow us on Twitter @saabrussels.

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In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

- If you are a Registered organisation, please indicate your Register ID number below. Your contribution will then be considered as representing the views of your organisation.

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

- End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) **OR Representative of end users/consumers**
→ for the purposes of this questionnaire normally referred to in questions as "**end users/consumers**"

- Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**
→ for the purposes of this questionnaire normally referred to in questions as "**institutional users**"

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

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

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

- Intermediary/Distributor/Other service provider** (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) **OR Representative of intermediaries/distributors/other service providers**
→ for the purposes of this questionnaire normally referred to in questions as "**service providers**"

- Collective Management Organisation**

- Public authority**

- Member State**

- Other** (Please explain):

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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?

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

Holders of copyright and related rights – e.g. writers, singers, musicians - do not enjoy a single protection in the EU. Instead, they are protected on the basis of a bundle of national rights in each Member State. Those rights have been largely harmonised by the existing EU Directives. However, differences remain and the geographical scope of the rights is limited to the territory of the Member State granting them. Copyright is thus territorial in the sense that rights are acquired and enforced on a country-by-country basis under national law¹.

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Rightholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management² should significantly facilitate the delivery of multi-territorial licences in musical works for online services³; the structured stakeholder dialogue “Licences for Europe”⁴ and market-led developments such as the on-going work in the Linked Content Coalition⁵.

“Licences for Europe” addressed in particular the specific issue of cross-border portability, i.e. the ability of consumers having subscribed to online services in their Member State to keep accessing them when travelling temporarily to other Member States. As a result, representatives of the audio-visual sector issued a joint statement affirming their commitment to continue working towards the further development of cross-border portability⁶.

Despite progress, there are continued problems with the cross-border provision of, and access to, services. These problems are most obvious to consumers wanting to access services that are made available in Member States other than the one in which they live. Not all online services are available in all Member States and consumers face problems when trying to access such services across borders. In some instances, even if the “same” service is available in all Member States, consumers cannot access the service across borders (they can only access their “national” service, and if they try to access the “same” service in another Member State they are redirected to the one designated for their country of residence).

¹ This principle has been confirmed by the Court of justice on several occasions.

² Proposal for a Directive of the European Parliament and of the Council of 11 July 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final.

³ Collective Management Organisations play a significant role in the management of online rights for musical works in contrast to the situation where online rights are licensed directly by right holders such as film or record producers or by newspaper or book publishers.

⁴ You can find more information on the following website: <http://ec.europa.eu/licences-for-europe-dialogue/>.

⁵ You can find more information on the following website: <http://www.linkedcontentcoalition.org/>.

⁶ See the document “Licences for Europe – ten pledges to bring more content online”:
http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

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

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term⁷ to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

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

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

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- 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).

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- 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]

[When an author creates a work, he has exclusive rights over it, without borders. He can](#)

⁷ For possible long term measures such as the establishment of a European Copyright Code (establishing a single title) see section VII of this consultation document.

then, in principle, license the exploitation of the work without borders too. However, in the EU's audiovisual sector, it is usual practice for authors in many countries to assign their rights for the whole world to the producer who finances the film. They expect their works to be exploited globally via the producer who can license the exploitation rights for various modes of exploitation and territories. The trouble is that audiovisual authors are neither able to control the distribution of their works nor their capacity to be remunerated for the exploitation of their works.

The reality of the European film and audiovisual sector is therefore that it is fragmented into several markets based on languages and types of exploitation of the works. Indeed, most audiovisual media services, including online, target specific markets. These services therefore do not request multi-territorial licences.

As far as multi-territorial online services are concerned, one can distinguish two categories:

- Online services that are operated by traditional players as a complement to their offline activities (broadcasters, telecom operators, cable operators). Licences for these online services are usually dealt with as an extension of their licences for offline activities. The multi-territorial dimension is usually limited to some public service broadcasters willing to be available for their nationals living abroad.
- Online services operated by pure internet players such as iTunes, Netflix, LoveFilm (Amazon), MUBI, YouTube, Dailymotion, etc. (OTT services). These services are available in several European countries but most of them reached their actual scope through country by country development and continue to operate on this basis. They tend to provide localised versions of their services in each market which are not available cross-border. In theory, they could be interested in multi-territorial licences, but in practice, our experience is that this is not the case.

Because there is no harmonisation of the intervention of collective rights management organisations in the audiovisual sector, in particular for authors' rights, only a few audiovisual authors' CMOs (in Belgium, France, Italy, Spain, Switzerland and the Netherlands) are able to clear online rights for their repertoire. In other countries, online rights are individually managed.

SAA's audiovisual authors' CMOs want the works of their members (screenwriters and directors) to be widely accessible on online services. For this purpose, they established a working group called FRAME at the end of 2011 to develop a multi-territorial online offer for digital service providers (DSPs) active in more than one European country. Their objective was to offer a multi-territorial agreement for the use of their aggregated repertoires and to license every European platform operator under the same conditions and under strict application of the principle of equal treatment. All platforms would get access to the FRAME repertoire, whether they exploit it in all of the countries or only in some. The remuneration would be calculated according to the principle of the country of destination.

15 audiovisual authors' CMOs cooperated in the FRAME project to develop such a model that would ensure the collection and distribution of audiovisual authors' remuneration for the online exploitation of their works. In doing so, they were faced with three main obstacles:

1/ Only a few audiovisual authors' CMOs are entitled to clear the online rights for their repertoire today. This considerably reduces the interest for DSPs of such a multi-territorial licence. This lack of harmonisation of the intervention of audiovisual authors' CMOs is an obstacle to pan-European online rights clearance for European audiovisual works.

2/ Competition issues: the Commission is unclear about the cooperation possibilities between CMOs and usually prefers to encourage competition. Via the FRAME working group, audiovisual authors' CMOs worked together to try to create a very simple, easy-to-use portal, which would have been helpful to both authors, DSPs

and ultimately consumers. However, EU competition rules jeopardize the achievement of this project by requiring that CMOs compete rather than cooperate.

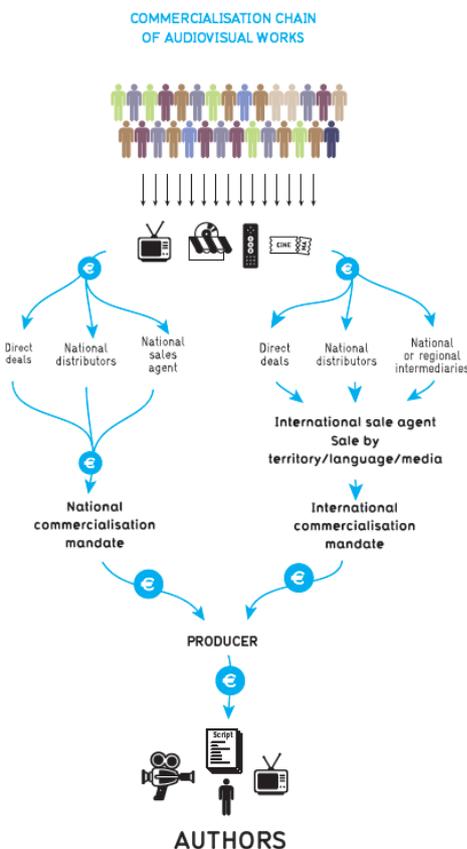
3/ Double taxation of royalties: there is no harmonisation of the tax treatment of cross-border royalty payments between Member States. If CMOs from different Member States develop a common licensing platform, they expose their members to an additional layer of withholding tax that can reach an overall taxation of 60%.

These problems have to be addressed urgently if the Commission does not want audiovisual authors to be left behind the Internal Market with only some of them being remunerated for the online exploitation of their works.

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]

1/ The lack of a harmonised framework for audiovisual authors' remuneration makes it impossible for their CMOs to offer DSPs pan-European licences. There is therefore an urgent need to provide audiovisual authors with a harmonised guarantee of remuneration for the online exploitation of their works that can be exercised by their CMOs. This should take the form of an unwaivable and inalienable right to remuneration, enforced through a scheme where CMOs are entrusted to collect the remuneration at the level of the final distributors (see answers to questions about fair remuneration of authors).



In the audiovisual sector, after the initial transfer of the authors' making available right to the producer, this right is very often split territorially and transferred again and again to many different operators such as sale agents, distributors, broadcasters, etc. The contractual chain back to authors is then so long, complex and easily broken if one element of the chain experience difficulties (e.g. an intermediary going out of business) that the authors rarely see a cent of any remuneration linked to the exploitation of the work.

Collective management of the right to remuneration should therefore be encouraged so as to guarantee that the online exploitation of audiovisual works will benefit their authors and be helpful to users who will know who to get the licences from.

2/ Cooperation between audiovisual authors' CMOs should be encouraged to develop pan-European licences.

In this context, the SAA welcomes the 12 April 2013 CJEU judgments ([here](#)) against the Commission's decision in the CISAC case in which the Court concluded that the Commission had not adduced sufficient evidence of a concerted practice between CISAC societies. The Court suggested,

among others, that cooperation between societies as regards effective monitoring and enforcement against unauthorised exploitation cannot work if these societies also compete in licensing.

3/ Another major problem in facilitating cross-border licensing of works is the way in which

the system of tax treaties operates in Europe. The tax system on royalties makes it extremely complex to develop initiatives such as FRAME as it remains within the scope of the network of different double tax treaties. This raises three specific issues:

- Different rates, required documentation and conditions are attached to each treaty;
- Complex to operate and resolve problems: issues have to be addressed directly to the tax authorities in other countries rather than centrally. Response times can be very slow;
- The administration of tax returns for individuals who receive royalties from foreign societies can be very complex.

There is an urgent need for the Commission to come up with a fair answer on this issue of double-tax treaties in order to facilitate cross border availability of works.

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

YES – Please explain by giving examples

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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

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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

Legislative solutions:

European legislation is needed to ensure that audiovisual authors are remunerated for the online distribution of their works, independently of the country of production and exploitation. With such a level playing field, authors' CMOs, entrusted to manage the making available remuneration of audiovisual authors could develop one-stop-shops to offer a single licence or entry point to online operators. This will, in turn, make it easier for them to pay the remuneration due to the European audiovisual authors of the works in their catalogue. This must be a priority for the Commission to ensure that audiovisual authors are remunerated for the on-demand exploitation of their works whatever the country of exploitation (please see details in our responses to Q.72-74 below).

In the digital age, there are so many opportunities to make works available to audiences that there is no excuse for a lack of effort by producers and their distributors in exploiting works within their control. An obligation of exploitation of the rights held (use it or lose it principle) should be introduced to generate a strong incentive for these operators to make the works available. If there has been no exploitation of a work for a period of time, then the authors' rights revert back to them and they can exploit their rights themselves. This would also help unlock cultural heritage works.

Finally, a reduced VAT rate for on-demand audiovisual works is a necessity for the development and take-up of online services: only cinema tickets and broadcasting currently benefit from a reduced VAT rate so far. When delivering the same audiovisual works on VOD and catch-up TV (and on DVD), audiovisual media services cannot apply a consistent reduced VAT rate. It is essential to allow Member States to apply a reduced VAT rate for all audiovisual works independently of their delivery method and in particular in the online environment. Such a reduced rate would boost the online market twofold: by competing on price with physical products and by drawing consumers away from illegal services.

Non-legislative solutions/market-led solutions:

Market-led solutions already exist and will continue to develop. As underlined at the plenary of the Licences for Europe stakeholders' dialogue on 13 November 2013, in the Joint Statement on "Cross-border Portability of lawfully-acquired content" of the audiovisual subgroup of Working Group 1, "market-led initiatives are already a reality in addressing demand for away-from-home consumption of different types of content, including a growing number of innovative consumer options" (see for example EuroVoD's statement on the cross-border access of subscription VoD offers, as well as the availability of several language versions, in accordance with granted rights).

In addition, as mentioned in the SAA's response to the 2011 Commission Green Paper on the online distribution of audiovisual works, here are some additional leads to help market operators address the digital single market for audiovisual works:

- Investment in production: one simple and very effective way to stimulate the borderless online distribution of audiovisual works is for the companies operating these services to invest in the production of the works and pre-buy worldwide online distribution rights to secure their supply in films (see Netflix's investment in original programming such as "House of cards").
- Rights' aggregation and information on the holder of the exploitation rights: for existing films financed through traditional mechanisms, the acquisition of rights for online cross-border distribution could be facilitated by rights' aggregators of European films specialised in online cross-border distribution and a professional 'information platform' gathering European producers and distributors to facilitate the identification and access to the licensors.
- Fight against piracy: legal platforms can only develop if illegal consumption of audiovisual works is countered. Some Member States (France, the UK and Spain for example) have taken action to address this problem, but they will necessarily have to be comforted and complemented by European initiatives in the context of a

revision of the 2004 IPR enforcement Directive (see SAA's [contribution](#) to the 2004/48 Directive consultation).

- Distributors of audiovisual works could experiment with new distribution schemes based on language versions instead of territories, as is the case in the book sector. This could help the multi-territorial online distribution of audiovisual works.

Finally, the freedom to provide cross-border services set out in Article 56 TFEU is a fundamental freedom which is central to the effective functioning of the EU internal market. However, a freedom is not an obligation. For commercial operators, it has to correspond to a market demand.

To assess this market demand, the European Commission commissioned [a report by Plum Consulting](#) in March 2012 on the economic potential of cross-border pay-to-view and listen audiovisual media services. This report identified 3 types of population group that may be interested in cross-border audiovisual media services: migrant populations, people with proficiency in or learning non-national languages and people travelling within the EU. The report estimated the potential consumer demand for pay-to-view cross border audiovisual services of between €760 million and €1,610 million annually in the EU. This compares to a total EU pay-TV market size of €28.6 billion in 2009.

NO – Please explain

NO OPINION

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC⁸ on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software⁹ and databases¹⁰.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders¹¹ which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies¹², (notably relevant at the start of the transmission –

⁸ 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.

⁹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

¹⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

¹¹ Film and record producers, performers and broadcasters are holders of so-called “neighbouring rights” in, respectively, their films, records, performances and broadcast. Authors’ content protected by copyright is referred to as a “work” or “works”, while content protected by neighbouring rights is referred to as “other subject matter”.

¹² The right to “authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part” (see Art. 2 of Directive 2001/29/EC) although temporary acts of reproduction of a transient or incidental nature are, under certain conditions, excluded (see art. 5(1) of Directive 2001/29/EC).

e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users’ end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks¹³. These rights are intrinsically linked in digital transmissions and both need to be cleared.

1. The act of “making available”

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of “making available” takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the “targeting” of a certain Member State’s public¹⁴. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are “targeted” by the online service provider. A service provider “targets” a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

YES

The scope of the making available right is clear enough from a practical point of view.

However, the making available right itself should be clarified by introducing an unwaivable right of authors to remuneration for their making available right, even when exclusive rights have been transferred, so that authors are guaranteed a financial reward proportional to the real exploitation of their works (please see details in our response to Qs. 72-74 below). Otherwise this right is bought out by producers and no value is received by the authors.

In addition, on whether to apply the country of origin principle as applied to satellite broadcasting to online audiovisual media services, the SAA notes that the 2001 Copyright Directive did not transpose the exhaustion principle applicable to satellite broadcasting to the making available right. On the contrary, Article 3 of the Directive expressly provides authors with “*the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*”

We are therefore not in favour of the exhaustion of the making available right. It would run against international treaties as it would deprive authors from an essential element of their exclusive making available right. What was acceptable for satellite broadcasting, due to its limited impact, in 1993 and still today, would override basic principles of copyright protection when it comes to online transmissions as they already are, and will continue to be, an

¹³ The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public “on demand” (see Art. 3 of Directive 2001/29/EC).

¹⁴ See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L’Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof) and pending Case C-441/13 (Pez Hejduk); see however, adopting a different approach, Case C-170/12 (Pinckney vs KDG Mediatech).

increasingly important mode of transmission of works.

It therefore appears that the “country of origin approach” is not a good proposal for the future. The recent [study by De Wolf & Partners on the application of the Copyright Directive](#) (p179-180 and 182-184) confirmed that the country of origin approach is not appropriate as it does not resolve any of the problems identified and would lead to “forum shopping” to find the most favourable national regimes.

It is better to recommend that online audiovisual media services work more with rightholders at the origin of the production and distribution of works in order to secure online exploitation rights for cross-border services.

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" approach¹⁵)

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 relief¹⁶)?

YES – Please explain how such potential effects could be addressed

NO

The SAA does not think that a clarification of the territorial scope of the making available right would have any impact on the recognition of the authors' rights, the possible transfer of rights and their remuneration. These issues are mainly dealt with in legislation and authors' contracts. The only way to address the current problems related to these issues is to tackle them directly through harmonisation and not through the territorial scope of the making available right.

The recent [study by De Wolf & Partners on the application of the Copyright Directive](#) underlined that “the territoriality principle (that the national legislator is competent to regulate events occurring on the national territory in copyright terms) was examined but has not been challenged, even after several international and European initiatives to harmonise copyright protection.” What is important is the act/criteria that “triggers the territoriality” as shown throughout the CJEU’s decisions (conclusions on the territoriality of the making available right on p.176).

NO OPINION

¹⁵ The objective of implementing a “country of origin” approach is to localise the copyright relevant act that must be licenced in a single Member State (the "country of origin", which could be for example the Member State in which the content is uploaded or where the service provider is established), regardless of in how many Member States the work can be accessed or received. Such an approach has already been introduced at EU level with regard to broadcasting by satellite (see Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission).

¹⁶ Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.

2. Two rights involved in a single act of exploitation

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

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

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

NO

In the audiovisual sector, there is no dichotomy since both sets of rights (reproduction right and making available right) are usually managed by the same entities.

NO OPINION

3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU¹⁷ in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU¹⁸ as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

The provision of a hyperlink can encompass many indexing methods such as access, framing or embedding. A hyperlink is not however a mere digital reference which only gives information on a content like a footnote; it gives access to the content, it makes it available to the public.

In principle, the provision of a hyperlink should therefore require an authorisation of the rightholder if it communicates a protected work to the public. This is particularly true for

¹⁷ Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

¹⁸ Case C-360/13 (Public Relations Consultants Association Ltd). See also

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

'embedded' or 'framed' links within websites, especially if there is commercial gain. In the case of embedded and framed links, the digital service operator is considered as an organisation which "intervenes, in full knowledge of the consequences of its actions, to give access to the protected work to its customers" (CJEU, 7 December 2006, C-306/05 *Rafael Hoteles* para. 42). Providing a hyperlink to a protected work whose communication to the public has not been authorised is clearly a copyright infringement.

The CJEU provided some guidance on hyperlinks in the *Svensson v Retriever Sverige AB* case (C-466/12). The CJEU held that the provision of clickable links to protected works (press articles by several Swedish journalists) published on a freely accessible basis on a website (the *Göteborgs-Posten*) does not constitute a communication to the public under the Copyright Directive, so the authorisation of the rightholders was not required. Indeed, the CJEU explained that the communication must be directed to a 'new public' and there is no new public in the case of the *Retriever Sverige* site according to the CJEU, since the works offered on the *Göteborgs-Posten* were freely accessible. Accordingly, the users of the *Retriever Sverige* website were deemed to be part of the public already taken into account by the journalists at the time the publication on the *Göteborgs-Posten* was authorised.

Replying to the other questions asked by the Swedish court, the CJEU also noted that this is so even if the internet users who click on the link have the impression that the work is appearing on the *Retriever Sverige* website, whereas in fact it comes from the *Göteborgs-Posten*. Finally, the CJEU clarified that Member States do not have the right to give wider protection to copyright holders by broadening the concept of 'communication to the public' since it would create legislative differences and legal uncertainty.

Even though the CJEU noted that had the works not been freely accessible in the first place, the authorisation of the rightholders would have been required, the CJEU left many important related questions unanswered. These include the question of the purpose of links, if not to increase the public which can access the works (i.e. why not 'new public' in this case), the situation of ad-sponsored sites was not considered and the potential implications for links to freely accessible infringing content neither. Indeed, the decision has been widely criticised¹⁹ for its limited scope and doubtful reasoning and is thought to be the first of a string of European references on hyperlinking.

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

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

¹⁹ <http://juriscom.net/wp-content/uploads/2014/02/hyp20140217.pdf>

<http://www.pcinpact.com/news/85862-inquietudes-autour-l-arret-cjue-sur-liens-hypertextes.htm>

<http://www.euractiv.com/infosociety/european-court-justice-allows-fr-news-533542>

<http://www.twobirds.com/en/news/articles/2014/global/cjue-decision-in-svensson-hyperlinks-to-freely-available-content>

exception)

From the consumer's perspective, pure viewing of a web-page does not need the authorisation of the rightholder since temporary reproductions are covered under a mandatory copyright exception. However, it does not mean that streaming services do not need an authorisation to make protected works available to the public. As with any other on-demand service, streaming services of audiovisual protected works need an authorisation for the making available of works to the public. In addition, when the reproduction comes from an obviously illegal platform, the temporary reproduction exception is not applicable and the viewing of an audiovisual work is therefore a copyright infringement. It is noteworthy that several references for preliminary rulings on issues to do with browsing are pending before the CJEU and should provide some guidance in the near future.

NO OPINION

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)²⁰. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)²¹. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have “re-sold” it – this is often referred to as the “forward and delete” question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

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

²⁰ See also recital 28 of Directive 2001/29/EC.

²¹ In Case C-128/11 (Oracle vs. UsedSoft) the CJEU ruled that an author cannot oppose the resale of a second-hand licence that allows downloading his computer program from his website and using it for an unlimited period of time. The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale. While it is thus admitted that the distribution right may be subject to exhaustion in case of computer programs offered for download with the right holder's consent, the Court was careful to emphasise that it reached this decision based on the Computer Programs Directive. It was stressed that this exhaustion rule constituted a *lex specialis* in relation to the Information Society Directive (UsedSoft, par. 51, 56).

digital content? Please specify per market (type of content) concerned.

[Open question]

Providing a legal framework enabling the resale of previously purchased digital content would raise more problems than it solves. One of the most important problems would be to ensure that no copy of the work purchased is kept by the first owner. The new 'forward and delete' technology (which erases the first copy from the seller's hard drive) could be seen as a solution to push for the establishment of such a legal framework. However, a number of other issues would have to be carefully considered. For example, whether rightholders would be ensured a fair proportion from the proceeds from re-sales, whether it would be feasible to obtain rightholders' authorisation for each act of resale, whether the first sale doctrine should apply in the digital context to content other than software, the meaning of a "copy" for copyright purposes (i.e. if the new copy made on the reseller platform amounts to an infringement of the reproduction right), etc.

In addition, exhaustion is not the way to deal with the possible resale of digital files. The current Copyright Directive does not allow the application of the exhaustion principle to intangible goods (Recital 29 and Art 4(2)). Accordingly, sellers must obtain copyright holders' approval before any act of resale and the resale market is prevented from having a detrimental impact on the primary market of the goods in question. That was the conclusion of the judge in a [German ruling](#) on downloads of ebooks and audiobooks and in a US case ('[ReDigi](#)') on digital music resales. The German court reiterated that the CJEU in the 'UsedSoft' case ([C-128/11](#)) considered that the reasoning applicable to software (to which digital exhaustion applied) in that case was a special case which applies when the Software Directive applies but is not applicable to other digital content.

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute²². Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered²³.

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

²² For example, it does not affect "domestic" works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country.

²³ On the basis of Article 3.6 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, a publicly accessible online database is currently being set up by the Office for Harmonisation of the Internal Market (OHIM) for the registration of orphan works.

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]

It is unclear from the questionnaire whether such a registration system would be voluntary or obligatory, public (like the RPCA in France, 'le registre public du cinéma et de l'audiovisuel') or private and what rights it would grant, i.e. whether it is a register which simply keeps a record of works, of their original rightholders, of the licensees according to concluded contracts or grants copyright protection (and perhaps even different levels of protection).

The SAA would only be interested in a model which would keep a record of the contractual chain (which does not exist today), not in a system that would run against the Berne convention formality prohibition.

However, setting up such a registration system would be extremely costly (a massive drain on the resources of all involved), time consuming and would likely never be reliable since it would constantly have to be kept up-to-date. The SAA thinks it would be a much more effective idea to link all the existing databases that are currently being developed by creating a type of ARROW project for the audiovisual sector. Such a tool would be articulated around ISAN, the international audiovisual works' identifier which is already used by audiovisual authors' CMOs (see answer to Q.19).

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

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed²⁴, and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database²⁵ should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The

²⁴ E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

²⁵ You will find more information about this initiative on the following website: <http://www.globalrepertoiredatabase.com/>.

Linked Content Coalition²⁶ was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub²⁷ is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

During the Licences for Europe stakeholders' dialogue, the SAA was heavily involved in the work of the Working Group on Audiovisual heritage and was one of the initiators of the [Declaration on audiovisual work identifiers](#) which was presented at the plenary meeting on 13 November 2013. The Declaration recognised that 1) "common use of standard and interoperable audiovisual work identifiers would facilitate the process of rights clearance, distribution for online availability, and discoverability of European works" and 2) "such identifiers should notably be implemented for all new European works that are produced to facilitate rights management, digital distribution, and discoverability".

In a world of multiple exploitations of audiovisual works on different media in different countries, work identification systems are an absolute necessity. This is why audiovisual authors' CMOs collaborated on the development of [ISAN](#), the International Standard Audiovisual Number. It is a voluntary numbering system and metadata scheme enabling the identification of any audiovisual work, including films, shorts, documentaries, television programs and their related versions. ISAN provides a unique, internationally recognised and permanent reference number for each piece of audiovisual content registered. ISAN is being used in production and distribution systems and to drive broadcast transmission systems (e.g. ITV in the UK), facilitating interoperability and information exchange that contributes to improving rights management. ISAN is key to content tracking and monitoring, and has been integrated in several watermarking and fingerprinting technologies.

Collective management of rights relies on identification systems and databases. ISAN is being integrated into the databases of audiovisual authors' CMOs containing information on the works, their authors and other rights holders. Audiovisual authors' CMOs have also developed [IDA](#) (International Documentation on Audiovisual Works), a worldwide centralised database for audiovisual works that contains accurate information on audiovisual works and their rights owners. This global database manages original productions, versions and adaptations in other languages and formats. Each work registration contains a minimum set of information: original titles, foreign titles, subtitles, production companies, year and country of production, shooting languages, [ISAN](#) number, a unique IDA code, as well as detailed information on rights owners such as their name, their international identifier ([IPI](#) - Interested Party Information) and their respective share in the work.

The audiovisual authors' CMOs use IDA to identify foreign audiovisual production and rights-owners before distributing the royalties to the relevant identified sister organisations. The sister organisation itself will transfer these royalties to their authors. The unique IDA code is used between CMOs when exchanging information on an audiovisual work. Before IDA, authors' CMOs sent requests by e-mail or mail to sister societies, meaning paperwork and rather long identification processes. IDA facilitates their identification and the exchange

²⁶ You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.

²⁷ You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

of documentation between CMOs and accelerates the transfer of payments between CMOs.

Such a centralised system is built for the specific needs of audiovisual authors' CMOs. IDA references are non-public identifiers but the database is interoperable with existing tools such as ISAN. IDA is a [CISAC](#) tool (the International Confederation of Societies of Authors and Composers) and is a part of the CISAC Professional Rules and the Binding Resolutions for audiovisual authors' CMOs, rules that aim to improve transparency and quality of service for all CISAC members.

ISAN being the bridge between IDA and third parties such as broadcasters, VOD platforms and any other possible users of audiovisual works, a wider use of ISAN by these users in the usage data reports they send to CMOs, combined with the use of the centralised IDA database, is the key to faster identification of foreign works and payment to authors by their CMOs. Any action from the Commission to generalise and accelerate the use of this standard by all users of audiovisual works would be welcome.

What might also be lacking today is a portal giving some public information and visibility to these tools and how they work together. The European Union could help in building such a portal.

Finally, and as mentioned in our answer to Q.17, we are ready to examine how our databases and others could be linked to ensure that more works are made publicly accessible and to help the discoverability of European works.

E. Term of protection – is it appropriate?

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention²⁸ requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

□ YES – Please explain

The 1993 Directive harmonising the term of protection of copyright and certain related rights recalled that the Berne Convention lays down only minimum terms of protection, leaving Contracting States free to grant longer terms (recital 1). As certain Member States had exercised this entitlement, the resulting differences between national laws were considered as distorting competition in the internal market which justified harmonisation so as to make terms of protection identical throughout the Community (recital 2).

The Directive recalls that the minimum term of protection laid down by the Berne Convention

²⁸ Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.

(life of the author and 50 years after his death) was intended to provide protection for the author and the first two generations of his descendants and considered that the average lifespan in the Community had increased, to the point where this term was no longer sufficient to cover two generations (recital 5). Therefore, in order to establish a high level of protection, which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community (recital 11), the Directive harmonised the term of protection for copyright at 70 years after the death of the author.

Therefore, apart from harmonisation, the main reason for the extension of the term of protection from 50 to 70 years was the extension of the average lifespan in Europe. The SAA does not see any reason linked to the digital environment that would question this extension.

NO – Please explain if they should be longer or shorter

NO OPINION

II. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC²⁹.

Exceptions and limitations in the national and EU copyright laws have to respect international law³⁰. In accordance with international obligations, the EU *acquis* requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)³¹, these limitations and exceptions are often optional³², in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

²⁹ Plus Directive 96/9/EC on the legal protection of databases; Directive 2009/24/EC on the legal protection of computer programs, and Directive 92/100/EC on rental right and lending right.

³⁰ Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971); Article 13 of the TRIPS Agreement (Trade Related Intellectual Property Rights) 1994; Article 16(2) of the WIPO Performers and Phonograms Treaty (1996); Article 9(2) of the WIPO Copyright Treaty (1996).

³¹ Other than the grandfathering of the exceptions of minor importance for analogue uses existing in Member States at the time of adoption of Directive 2001/29/EC (see, Art. 5(3)(o)).

³² With the exception of certain limitations: (i) in the Computer Programs Directive, (ii) in the Database Directive, (iii) Article 5(1) in the Directive 2001/29/EC and (iv) the Orphan Works Directive.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")³³.

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

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

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

YES – Please explain by referring to specific cases

NO – Please explain

There is no problem with the fact that most exceptions provided in EU copyright directives are optional for the Member States. The list of exceptions of the 2001/29/EC Directive is very long and encompasses all possible exceptions in the EU, but not for direct implementation by all Member States. Making this list mandatory would severely undermine the protection of authors' rights.

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

There is no general need for a higher level of harmonisation of the closed-list of exceptions and limitations of the Copyright Directive. As stated in recital 31, the degree of harmonisation of exceptions and limitations should be based on their impact on the smooth functioning of the internal market (last sentence). Neither the Commission nor the De Wolf study on the application of the Copyright Directive demonstrate such an impact in respect of

³³ Only the exception established in the recent Orphan Works Directive (a mandatory exception to copyright and related rights in the case where the rightholders are not known or cannot be located) has been given a cross-border effect, which means that, for instance, once a literary work – for instance a novel – is considered an orphan work in a Member State, that same novel shall be considered an orphan work in all Member States and can be used and accessed in all Member States.

any of the exceptions studied.

The only exception with a potential impact on the smooth functioning of the internal market is, according to us, the private copying exception which is accompanied by fair compensation systems. We therefore propose that the private copying exception and its fair compensation system be further harmonised (see answer to Q. 64 and subsequent on private copying).

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]

The SAA is not in favour of any additional exceptions to the long list of exceptions in the 2001 Copyright Directive. This view is supported by the [study by De Wolf & Partners on the application of the Copyright Directive](#).

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 optionality of exceptions and limitations in the closed-list of the Copyright Directive provides for a sufficient degree of flexibility. Further flexibility in this area would lead to more ambiguity and less certainty with respect to the scope of permitted acts.

The SAA particularly opposes the introduction of a “fair use” provision in the EU since it is not adapted to EU law and provides no legal certainty as issues can only be resolved in front of the courts. What is more, the [study by De Wolf & Partners on the application of the Copyright Directive](#) (p. 403) does not support introducing a general provision of fair use in EU copyright law.

The May 2011 [Hargreaves report](#) in the UK also supports our view. In spite of their shared common law tradition with the US, the British report stated on page 5 that “*The Review considered whether the more comprehensive American approach to copyright exceptions, based upon the so called Fair Use defence, would be beneficial in the UK. We concluded that importing Fair Use wholesale was unlikely to be legally feasible in Europe and that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law (...)*”. The Review also pointed out on page 44 that “*Most responses to the Review from established UK businesses were implacably hostile to adoption of a US Fair Use defence in the UK on the grounds that it would bring: massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods.*” – the SAA agrees with these arguments as applicable to the EU.

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

The territoriality of exceptions and limitations matches the territoriality principle of copyright and allows for respect of Member States' legal and cultural specificities.

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]

It seems reasonable that fair compensation be due in the place where the end user benefits from the exception, as is the case, for example, with the private copying exception (levies are due in the country in which the 'harm' to the rightholder arises, i.e. in the country in which the end user who bought the product resides according to the Opus ruling of the CJUE, C-462/09). In addition, it is crucial that remuneration be provided to the rightholders in the country where they reside, which is possible thanks to reciprocal agreements between CMOs.

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A. Access to content in libraries and archives

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving³⁴ and enable on-site consultation of the works and other subject matter in the collections of such institutions³⁵. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive³⁶.

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

³⁴ Article 5(2)c of Directive 2001/29.

³⁵ Article 5(3)n of Directive 2001/29.

³⁶ Article 5 of Directive 2006/115/EC.

1. Preservation and archiving

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

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

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

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

.....
.....

NO

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]

.....
.....

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

[Open question]

As far as film heritage institutions are concerned, the 2001 Copyright Directive provides for carefully crafted exceptions addressing the needs of publicly accessible libraries, educational establishments, museums and archives:

- In respect of specific acts of reproduction of works in their collections which are not for direct or indirect economic or commercial advantage (Art 5.2(c)), not limited to

preservation purposes as such;

- For communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of their establishments of works not subject to purchase or licensing terms which are contained in their collections (Art 5.3(n)).

These exceptions allow film archive institutions to fulfil their public interest missions.

Beyond these exceptions, SAA members have offered their help to film and audiovisual archives institutions on many occasions to address their needs in relation to the use of the cinematographic and audiovisual works contained in their collections and their related authors' rights. This has resulted in specific arrangements in a number of countries: collective agreements with INA in France, mandatory collective administration of broadcasters' archives in Switzerland, extended collective agreements in the Netherlands and in the Nordic countries, etc.

In addition, the SAA was a signatory of the Statement of Principles and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works which was developed in the framework of working group 3 of the Licences for Europe stakeholder dialogue. The Statement aims to facilitate discussions among the parties concerned on the relevant terms for digitisation and access to European cinematographic heritage works conserved in European film heritage institutions.

The signatories "share the view that European cinematographic heritage works constitute unique cultural elements as well as valuable assets in the European digital economy, and therefore, 1) they pledge to strengthen their mutual collaboration and that with the European Commission and Member States relating to European cinematographic heritage works ; and 2) at the same time, conscious of the investments necessary to fully seize the opportunities offered by digital technologies, they call on the Member States and the EU institutions to introduce financial mechanisms to support projects launched under this Statement to digitise European cinematographic heritage works and to promote their accessibility and increased discoverability by European citizens."

The Commission should work as a facilitator to encourage film archive institutions, broadcasters and their European representatives to explore the possibility of further agreements with audiovisual authors' organisations whether at national or EU level.

2. Off-premises access to library collections

Directive 2001/29/EC provides an exception for the consultation of works and other subject-matter (consulting an e-book, watching a documentary) via dedicated terminals on the premises of such establishments for the purpose of research and private study. The online consultation of works and other subject-matter remotely (i.e. when the library user is not on the premises of the library) requires authorisation and is generally addressed in agreements between universities/libraries and publishers. Some argue that the law rather than agreements should provide for the possibility to, and the conditions for, granting online access to collections.

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

(b) [In particular if you are an end user/consumer:] Have you experienced specific

problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?

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

[Open question]

In our view, online remote access is to be dealt with by way of licensing via collective management organisations. In fact, this is already the case in several Member States to promote education for example.

As an example, the [ERA educational licensing scheme](#) in the UK enables broadcasts to be used for educational purposes. Serving the UK education sector, ERA (Educational Recording Agency) is one of a range of CMOs which help copyright owners and performers derive an income from the licensed use of their works. In practice, it means that “recordings made or sourced under the terms of an ERA Licence can be built into a resource bank for an educational establishment covering topics such as drama, wildlife, the arts and current affairs. Copies of licensed recordings can be made for educational use within licensed premises. Clips from programmes can also be selected and used to encourage reference to the resource library, or for cross reference within class presentations or lectures. Increasingly, online relay within licensed premises linked to a white board and other in-class presentations is widening the number of ways that licensed recordings can be used.”

In addition, educational establishments, or bodies acting on behalf of educational establishments which hold ERA Licences, are eligible to take out “ERA Plus Licences”, an additional licence which allows “access to the recordings by students and teachers online, whether they are on the premises of their school, college or university, or at home or working elsewhere within the UK”.

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]

.....
.....

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

[Open question]

.....

.....

3. E – lending

Traditionally, public libraries have loaned physical copies of works (i.e. books, sometimes also CDs and DVDs) to their users. Recent technological developments have made it technically possible for libraries to provide users with temporary access to digital content, such as e-books, music or films via networks. Under the current legal framework, libraries need to obtain the authorisation of the rights holders to organise such e-lending activities. In various Member States, publishers and libraries are currently experimenting with different business models for the making available of works online, including direct supply of e-books to libraries by publishers or bundling by aggregators.

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

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

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

YES – Please explain with specific examples

.....
.....

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]

The difference between libraries' traditional public lending activities and online consultation and e-lending is huge. The conditions for these new activities have to be discussed with authors' representative organisations like CMOs through licencing processes which will allow libraries to develop these new activities and for authors to be remunerated.

4. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other³⁷. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)³⁸.

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

This question addresses out-of-commerce books and journals.

³⁷ You will find more information about his MoU on the following website: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm.

³⁸ France and Germany have already adopted legislation to back the effects of the MoU. The French act (LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du xxe siècle) foresees collective management, unless the author or publisher in question opposes such management. The German act (Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes vom 1. Oktober 2013) contains a legal presumption of representation by a collecting society in relation to works whose rightholders are not members of the collecting society.

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

The SAA is fully committed to pursuing the project that was started in WG3 (Audiovisual and Film Heritage Institutions) of Licences for Europe and find a way to undertake mass digitisation and clearance for online uses of the high volume of older works in the archives of film heritage institutions and public services broadcasters. Audiovisual authors' CMOs have a central role to play in helping these institutions preserve and offer to the public the cultural heritage of great works.

Thanks to the [Statement of Principles and Procedures for heritage films online concluded](#) between ACE, FERA, FIAPF and the SAA during Licences for Europe, film heritage institutions and rightholders' representatives now have a clear roadmap to discuss and agree terms for digitising, restoring and making available European film heritage. It will enable film heritage institutions to free up European films stored in their archives while guaranteeing rightholders an appropriate share of the rewards.

As far as broadcasters' archives are concerned, no broad agreement including all stakeholders could be reached during the Licences for Europe timeframe. EBU and the SAA together developed some recommendations highlighting that collective licensing solutions are particularly suitable for the large scale clearance of rights. There is a clear need for proportionate and cost effective rights clearance mechanisms for such large archives. This would help make a very significant amount of works available, particularly for research and educational purposes.

Further discussions are needed to develop a MoU or any other type of general agreement that would propose a suitable solution for mass digitization and rights clearance of broadcasters' archives based on collective management solutions.

.....
 NO – Please explain

NO OPINION

B. Teaching

Directive 2001/29/EC³⁹ enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

³⁹ Article 5(3)a of Directive 2001/29.

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]

.....
.....

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

[Open question]

.....
.....

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

[Open question]

.....
.....

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

[Open question]

.....
.....

C. Research

Directive 2001/29/EC⁴⁰ enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

YES – Please explain

.....
.....

NO

NO OPINION

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

[Open question]

.....
.....

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

[Open question]

.....
.....

D. Disabilities

Directive 2001/29/EC⁴¹ provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)⁴².

⁴⁰ Article 5(3)a of Directive 2001/29.

⁴¹ Article 5 (3)b of Directive 2001/29.

⁴² The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons

The Marrakesh Treaty⁴³ has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

YES – Please explain by giving examples

.....
.....

NO

NO OPINION

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

[Open question]

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

[Open question]

.....
.....

(http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (<http://www.visionip.org/portal/en/>).

⁴³ Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

E. Text and data mining

Text and data mining/content mining/data analytics⁴⁴ are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of “Licences for Europe”⁴⁵. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

YES – Please explain

⁴⁴ For the purpose of the present document, the term “text and data mining” will be used.

⁴⁵ See the document “Licences for Europe – ten pledges to bring more content online”:
http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

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

NO OPINION

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

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called “user-generated content”. While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs⁴⁶. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort

⁴⁶ A typical example could be the “kitchen” or “wedding” video (adding one's own video to a pre-existing sound recording), or adding one's own text to a pre-existing photograph. Other examples are “mash-ups” (blending two sound recordings), and reproducing parts of journalistic work (report, review etc.) in a blog.

and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions⁴⁷.

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](#)

As a preliminary remark, it has to be noticed that there is no universally-acknowledged definition of what constitutes user-generated content (UGC). The questionnaire refers to UGC as a new type of online activity, taking one or several pre-existing works, changing something in the works and uploading the result onto the internet e.g. to platforms and blogs.

The [De Wolf and CRIDS study on the application of the 2001/29/EC Directive](#) acknowledges that a major part of UGC which may be found on the internet requires in principle a prior licence from the rightholders whose works are used.

Whether amateur or professional, creative works are subject to the same copyright rules. This means that the use of existing protected works needs to be authorised by the rightholder, unless an exception can be invoked.

The Commission document for this consultation highlights that social media platforms have vastly changed the scale of such activities and increased the potential economic impact for rightholders in the pre-existing works. If this is the case, why is there so little case-law on

⁴⁷ See the document “Licences for Europe – ten pledges to bring more content online”:
http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

this issue as discovered by De Wolf and CRIDS in their study?

Authors do not oppose UGC in principle. They are very familiar with creative processes which use pre-existing works, in particular in the audiovisual sector where films very often use recorded music and documentaries are sometimes made of extracts of older works. The process is therefore not new, particularly for professional authors, and authorisation guarantees respect for moral rights.

What is striking with UGC is the claim of some users to create UGC content without seeking the permission of the authors of the pre-existing works, but to ask for recognition of their rights on the new works. This is unacceptable, as is the way in which Q.60 below is phrased – it recognises the rights of the creator of the new work but fails to acknowledge the rights of the original rightholder, i.e. the owner of the pre-existing work(s) on the basis of which the new work was created!

The essence of this activity of generating and uploading UGC renders any court proceedings ineffective: rightholders would probably win the case from a legal perspective but the costs of the proceedings largely outweigh the possible financial benefit.

It is a pity that WG2 of Licences for Europe was unable to deliver on this issue, due to the opposition of users' groups to any licensing solutions as they favour the introduction of a new exception to authors' rights.

In our view, the solution to user-generated content lies in licensing schemes concluded between rightholders' representatives such as audiovisual authors' CMOs and the social media platforms as well as micro-licences for small users. In fact, many examples of licensing schemes are already being developed (e.g. in the music sector according to [GESAC's statement](#) and [IFPI's announcement](#)) and should be encouraged and promoted.

- 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]

As previously said in our answer to Q.58, the use of pre-existing protected works to create user-generated content needs the authorisation of the authors or their representatives (in particular, to guarantee respect for moral rights), unless an exception can be invoked.

The [De Wolf and CRIDS study on the application of the 2001/29/EC Directive pointed out that](#) “a UGC exception remains a premature option” and there does not seem to be a need to act for the moment. We support this view and consider that there is no need for a new exception being introduced for UGC. However, the study notes that a Commission Communication on UGC to clarify what uses are allowed and give an opinion on what exceptions are relevant may be useful. We are ready to consider such a Communication.

Anything falling outside existing exceptions should be dealt with via simple licensing solutions. These licensing mechanisms should be devised to ensure that very personal uses would cost virtually nothing in terms of licensing fees and the cost of licenses generally would be proportionate to the use made of the works. It is noteworthy that internet platforms should not be the main beneficiaries of the success of UGC, so licenses with the platforms rather than only with the individuals themselves should also be sought.

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]

As previously mentioned in our answer to Q.61, anything falling outside the existing exceptions should be dealt with via simple licensing solutions.

III. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying⁴⁸. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees⁴⁹⁵⁰.

There is also an on-going discussion as to the application or not of levies to certain types of cloud-based services such as personal lockers or personal video recorders.

64. *In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions⁵¹ in the digital environment?*

□ YES – Please explain

The CJEU has already clarified a great number of issues related to the private copying exception since the Padawan v. SGAE ruling in 2010 (C-467/08, C-462/09, C-277/10, C-457/11, C-460/11, C-521/11) and will continue to do so taking into account the pending cases (C-435/12, C-463/12, C-572/13).

The SAA has repeatedly insisted, during Mr Vitorino's consultations in 2012 and discussions in the European Parliament on Ms Castex's initiative report on private copying levies, that some important principles have to be recognised and enforced at EU level:

- Private copying is justly accompanied by compensation for the rightholders.
- Having levies on devices and media making private copies is an efficient and cost-effective way to organise the compensation.
- An important element of the system's cost-effectiveness is to collect the levies at the earliest stages of the sales chain, i.e. from the manufacturer or the importer.
- The amount of private copying compensation should be linked to the value of the

⁴⁸ Article 5. 2)(a) and (b) of Directive 2001/29.

⁴⁹ Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

⁵⁰ These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

⁵¹ Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

creative works being copied, not to the price of the devices which can depend on commercial strategies.

- The private copying system should be brought into the digital age taking into account that consumers make private copies more than ever before on ever more connected devices and services.
- There is a need for common principles for defining applicable levy rates and devices/services that should be subject to levies.

We are particularly happy that these important principles have been recognised by the European Parliament [resolution](#) on private copying levies adopted on 27 February 2014.

The SAA produced a comprehensive infographic (in [English](#), [French](#) and [German](#)) explaining why the system of private copying levies is so important for rightholders and should be upheld, whilst also proposing ways in which the system could be improved.

It is of particular concern for the SAA that the UK government has proposed a private copying exception without any accompanying fair compensation mechanism – in clear breach of Art 5 of the Copyright Directive. This situation combined with the one in Spain, where the government has eliminated levies and transferred the fair compensation obligation to the state budget but only at a significantly reduced amount, are direct attacks against the fair compensation that need to be addressed by the European Commission.

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?*⁵²

YES – Please explain

In its [contribution](#) to the European Parliament ‘Castex report’, the SAA explained that Mr. Vitorino’s recommendation (licensed copies do not cause harm) suggests that all subsequent copies made of a work following purchase from digital services can be covered by licenses granted by rightholders to these services. Mr Vitorino therefore proposed to eliminate levies for “new business models in the digital environment”.

This is based on a gross misconception of both the private copying system and the multitude of new digital services which provide access to protected works. Private copies cannot be licensed since they are covered by a statutory exception to copyright under the 2001/29 Copyright Directive. Therefore licensing and fair compensation for private copying can only be separate issues. This was clearly confirmed by the CJEU in its Judgment in the case VG Wort/ Kyocera (ECJ 27 June 2013 case C-457/11 t/m C-460/11), where the Court considered that: “where a Member State has decided, pursuant to a provision in Article 5(2) and (3) of Directive 2001/29, to exclude, from the material scope of that provision, any right for the rightholders to authorise reproduction of their protected works or other subject-matter, any authorising act the rightholders may adopt is devoid of legal effects under the law of that State. Consequently, such an act has no effect on the harm caused to the rightholders due to the introduction of the relevant measure depriving them of that right, and cannot therefore have any bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis, under the relevant provision of that directive”.

In that respect, it is also highly relevant that the CJEU considered in yet another case,

⁵² This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

Luksan/Petrus van der Let (ECJ, [9 February 2012, Case C-277/10](#)), that “in the Member States which have decided to establish the private copying exception, the rightholders concerned must, in return, receive payment of fair compensation and that it is clear from such wording that the European Union legislature did not wish to allow the persons concerned to be able to waive payment of that compensation to them”. In general, authors, and particularly audiovisual authors, do not receive any payment linked to supposedly “licensed” subsequent copies of works being made available through digital services, other than private copying remunerations they receive through their CMOs.

Moreover, if the private copying exception was questioned and such private copies were regarded as falling under the exclusive rights that were to be licensed to (users of) digital services, the ones that would suffer most from such a change would be consumers and authors, the consumers losing their statutory freedom to copy and the authors their fair compensation.

- In practice, the authorisation, licence fee and commercial terms with regard to the reproduction right and making available right are negotiated by the holders of exclusive rights (mostly producers or subsequent distributors) with each digital service during the licensing process, whereas fair compensation with regard to acts of reproduction for private purposes is collected through the levy system and distributed to rightholders by CMOs.
- Mr. Vitorino’s proposal derives from the flawed idea that digital services would allow rightholders to be compensated directly. As stated above, the CJEU held that licensing of reproduction for private purposes by rightholders, such as producers or other intermediaries, has no legal effect, as these acts are already covered by the private copying exception. Other rightholders, such as audiovisual authors who transferred their exclusive rights to the producer sometimes for a lump-sum payment, do not have any direct relation with digital services and would therefore, not even have a possibility of being paid directly.
- In this field, a huge advantage of the private copying system is that it corrects inequalities between rightholders and guarantees that each category of rightholders benefits from a fair share of the value, whilst consumers enjoy the freedom of copying for strictly private purposes.

NO – Please explain

NO OPINION

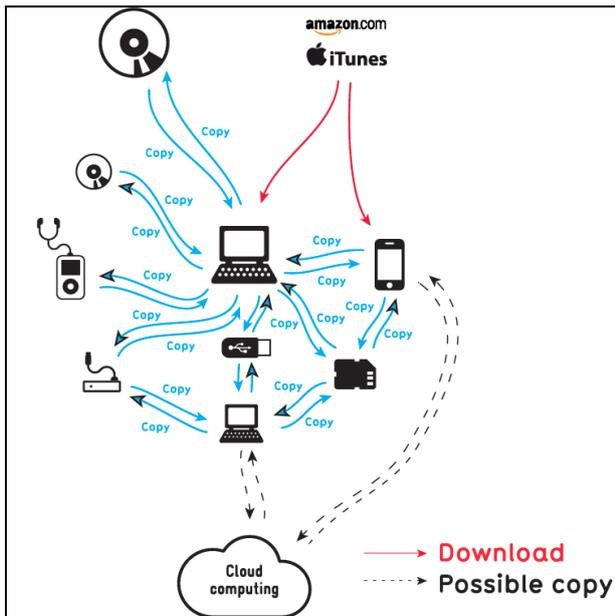
66. *How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders’ revenue on the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

[Open question]

The SAA believes that the application of levies to certain online services is justified and does not think that it would hinder the development and functioning of new business models. One of the reasons being that, just like the prices of products across Europe do not vary in proportion to the levy rates, the prices of online services/new business models are most probably also unaffected by the levy rates.

More copying for private use takes place now than ever before. The devices and media which enable or host private copies of protected works have increased, with storage capacities which have grown exponentially (128 GB iPad, 5TB external hard disks, etc.).

Consumers transfer songs and videos from computers to hard drives to phones to tablets to online lockers and back again in order to save and access their personal libraries whenever



and wherever they want. All of these processes are undeniably acts of private copying.

In addition, in line with the principle of technical neutrality, copies made via cloud services (and other future digital services which do not yet exist) many have the same purpose (private use) as the copies made by private individuals on their phones, tablets, etc. so should be included in the private copying system.

Applying private copying to certain cloud-based services means that copies made on those specific cloud-based services would be taken into account by usage studies which assess the harm caused.

This is the recommendation of the European

Parliament [resolution](#) on private copying levies adopted on 27 February 2014 which stated: “private copying arrangements should apply to certain online services, including certain cloud computing services” (para 29). The report also “calls on the Commission to assess the impact on the private copying system of the use of cloud computing technology for the private recording and storage of protected works, so as to determine whether these private copies of protected works should be taken into account by the private copying compensation mechanisms and, if so, how this should be done” (para 30).

67. Would you see an added value in making levies visible on the invoices for products subject to levies?⁵³

YES – Please explain

Past and recent consultation processes on private copying levies have shown that most stakeholders agree that levies should be clearly visible on all bills and contracts in the products’ sales chain (this is for example already the case in Belgium thanks to a [new Belgian law](#) applicable since 1 December 2013) and in retail shops and professionals’ invoices in France from 1st April 2014 ([Decree](#) of 10 December 2013).

In addition, consumers should be informed of the amount and destination of the levies and more generally the reason for this mechanism which compensates the freedom to copy provided to them by the private copying exception. This would help consumers understand how important the levy system is for the EU’s culture and rightholders and that they are part of and benefit from this virtuous system. Indeed, the European Parliament resolution on private copying levies “stresses the need to make clear to consumers the role of the private copying system with regard to remuneration of artists and cultural dissemination” and “urges Member States and rightholders to launch ‘positive’ campaigns highlighting the benefits of private copying levies” (para 16).

NO – Please explain

NO OPINION

⁵³ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments⁵⁴.

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

If the system of private copying levies is harmonised as we have proposed, there would be no issue of undue levy payments. The rule would be that the levy is due in the Member State in which the final user who purchased the product resides since that is where the ‘harm’ to the rightholder would arise (CJEU Opus ruling). In any case, even if undue levy payments occasionally did occur, exemptions and reimbursement systems should be in place to ensure that such equipment does not bear levies.

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]

As stated in our [contribution](#) to the European Parliament discussion on private copying levies, devices and blank media can serve other purposes than for the private copying of protected works. This should be taken into account when determining tariffs applicable to devices used to make private copies.

In addition, there are cases where certain devices and media will clearly not be used for the purpose of private copying. We talk of ‘professional uses’. In this context, exemptions and reimbursement systems should be in place to ensure that the equipment concerned does not bear levies. However, exempting any business from private copying levies would be excessive since equipment bought by companies can also generate private copies. The determining factor is the nature of the use, not the quality of the purchaser.

- As recommended by the CJEU in the “Padawan” ruling (C-467/08), professional uses should be excluded from payment of the levy, but not necessarily all purchases of professional users. Devices such as tablets or smartphones, despite being the property of a company, may well in fact be used by employees to copy protected works for private use. Recommending that private copying levies should apply exclusively to purchases by natural persons as private users would artificially reduce

⁵⁴ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

the scope of the private copying system.

- Exemption and refund systems for professional uses should be designed at national level in consideration of the specificities of the Member States concerned.
- The “Austro-Mechana” CJEU ruling (C-521/11) confirmed that reimbursement schemes for the levies paid on devices that are not ultimately used for private purposes comply with EU law, as long as they are effectively applied and do not constitute an excessive burden for those who are entitled to reimbursement.

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]

Please see our response to Q.68 above.

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

[Open question]

Firstly, as stated in all of SAA’s contributions on this topic, the rightholders’ proposal to introduce a single declaration point would facilitate declaration and payment procedures by manufacturers/importers. Indeed, the proposal to create a single European declaration was put forward by European rightholders during the 2008-2009 dialogue, and agreed with the ICT industry. It aims to facilitate the implementation of the “Opus” ruling of the CJEU (C-462/09). Via the “European Central Point” mechanism, distance sellers could submit declarations of sales of goods eligible to private copying levies at a single EU entry point, while the compensation would be invoiced and paid in the country of destination.

Secondly, the most efficient and cost-effective way to collect levies is to do so at the earliest stage of the sales chain, i.e. the manufacture or import stage. Shifting the liability to pay levies onto retailers, as proposed by Mr. Vitorino, would render the system extremely complex and costly since this would considerably increase the number of those responsible for paying the levies (from 500 currently in France, with a small number responsible for the bulk of the sales, to approximately 20,000 according to Copie France) and the means needed to ensure billing and control systems (Copie France believes that it would have to deal with 40 times more information). This is confirmed by the European Parliament resolution on private copying levies which states in paragraph 11 that “private copying levies should be payable by manufacturers or importers”; “if the levy were transferred to retailers, this would result in an excessive administrative burden for small and medium-sized distribution companies and collective rights management organisations”.

The prime responsibility of manufacturers and importers for payment of the levies must go hand in hand with joint liability of all entities throughout the chain of sales down to the final consumer in order to avoid potential fraud and unfair competition. This principle was also agreed between representatives of rightholders and the ICT industry during the 2008-2009 dialogue.

Thirdly, the fact that leviable devices and blank media differ across Member States means that the same product can be subject to private copying levies in a Member State and not in another. Compensation systems should be in place for all devices and media whose value is increased by multimedia storage and playback features. Therefore, a consistent definition of devices and media subject to private copying levies in the respective Member States should be sought. Rightholders’ organisations proposed during the 2008-2009 dialogue that all products (devices and media) able to be used to make private copies of protected works

should be eligible for the private copying compensation scheme, with a list of products established and regularly updated at EU level. This is also the opinion of the European Parliament who stated in its resolution adopted on 27 February 2014: “private copying levy should apply to all material and media used for private recording and storage capacity where private copying acts cause harm to creators” (paragraph 9).

Fourthly, European rightholders organisations agree that a quick and harmonised levy setting procedure should be developed across Europe. This would mean putting in place a European framework of definitions, principles and procedures to be respected by all Member States in the establishment of their levy setting process.

IV. Fair remuneration of authors and performers

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers⁵⁵ or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract⁵⁶. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

[Open question]

Fair remuneration of authors in the audiovisual sector is a big concern and a very important issue for the SAA since its creation, as explained in SAA's White Paper on Audiovisual Authors' Rights and Remuneration published in February 2011.

For audiovisual authors, such a ‘best mechanism’ to ensure that they all receive adequate remuneration for the exploitation of their works does not yet exist. This was confirmed by the conclusions of the recent ‘study on contractual arrangements applicable to creators: law and practice in selected Member States’ by CRIDS and KEA (see pp.13-14 in particular).

In our view, ‘adequate remuneration’ should relate to the use made of the authors’ works and should in particular reward the success of works by reflecting the revenues generated by the diverse parties in the exploitation chain, such as film and TV producers, broadcasters, cable and satellite operators and Video-on-Demand services. This is why buy-out contracts or a remuneration right that can only be exercised on an individual basis vis-à-

⁵⁵ See e.g. Directive 92/100/EEC, Art.2(4)-(7).

⁵⁶ See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

vis the producer, which prevent this from happening, would never amount to mechanisms guaranteeing adequate remuneration.

Contractual practices in the vast majority of European countries deprive audiovisual authors of the effective exercise of their rights and prevent them from receiving fair remuneration for the exploitation of their works (please see our answer to Q.73 on unfair contracts below). Audiovisual authors in many countries are forced, because of their structurally weaker bargaining position and the absence of legislation to protect them, to assign all their rights and receive a one-off fee at the production stage with no further payments linked to the exploitation of the work.

The possibility to effectively share in future revenues deriving from the exploitation of the work (which can continue for years) are however essential for authors to make a living in-between projects. As it can take years to prepare a film and enter into production, authors must be able to make a living by receiving a fair share from the revenues of their earlier successful productions in order to continue their creative labour.

The SAA therefore proposes to by-pass existing unfair contractual practices and to develop a sustainable remuneration system which would secure audiovisual authors' remuneration for their making available right in the digital market, taking advantage of the new technologies.

Such a proposal for European legislation builds on the harmonisation experience in the EU:

- the 1992 Rental Right Directive which provides for an unwaivable remuneration right for the rental.
- the 1993 Cable and Satellite Directive which provides for mandatory collective administration of the cable retransmission right.

SAA's proposal takes the best from both of these: it provides that when an audiovisual author has transferred his making available right to a producer, he retains the right to obtain equitable remuneration for the making available which cannot be waived, as is the case for the rental right. It also addresses the implementation aspects in order to ensure that the proposal will result in concrete payments to authors.

Two implementation aspects are in practice extremely important and were lacking in the 1992 Rental Right Directive: who should pay for the equitable remuneration and how should it be administered. Having learned from this experience, SAA's proposal addresses these two aspects:

- The equitable remuneration should be paid by audiovisual media services that make audiovisual works available to the public on-demand and exploit them;
- Its administration should be entrusted to collective management organisations representing audiovisual authors, unless other audiovisual authors' organisations, such as unions or guilds, are in a better position to guarantee such remuneration in a specific country.

Such a provision would not undermine the audiovisual authors who, in a very few countries such as the UK and Sweden (screenwriters only), exercise their exclusive rights through agents, guilds or their collective management organisations. In such cases, the right to equitable remuneration would not apply to the extent that separate mechanisms deal with remuneration payments for the making available right. These audiovisual authors would therefore be able to maintain or develop such arrangements for the remuneration of their making available right if they consider them to be more effective.

In addition, the recent 'study on contractual arrangements applicable to creators: law and practice in selected Member States' by CRIDS and KEA described collective agreements as a "tool to protect creators" and "to help all authors to get a balanced bargain when transferring their rights" (p. 10).

SAA's proposal aims at offering audiovisual authors who are not in a position to be able to refuse the transfer of a right to a producer a fair share of the proceeds of the exploitation of their works without hindering or complicating the actual exploitation of audiovisual works. This would thus achieve a level playing field in terms of remuneration for all audiovisual authors in Europe, whilst safeguarding optimal exploitation by producers and operators of audiovisual services.

This European legislation is a necessity as existing contractual practices in most Member States have proven to be inadequate to guarantee such remuneration to audiovisual authors for the making available of their works. European producers, which are mainly small companies, are very much focused on the production stage and little involved in the subsequent exploitation. They have therefore not developed industrial processes and mechanisms to trace actual uses of the works, let alone administering payments due to authors for the distribution of their works on multiple platforms. Most of them would prefer not to do this at all since it would be costly. The only entities to do this are authors' collective management organisations. They are best suited to address the remuneration due to audiovisual authors for the online distribution of their works.

SAA's proposal does not interfere with the producer's role. It aims at organising the remuneration due to authors, once the producer has decided to make the work available to the public in such a manner and at the time he chooses. It therefore means that any on-demand exploitation of an audiovisual work will continue to have to be cleared with the producer or with the making available right holder appointed by the producer or subsequent contractor.

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

YES – Please explain

The SAA supports an intervention by the Commission into contractual practices. Indeed, we support fairer contractual terms and practices, whilst acknowledging that this will not solve all the problems, in particular the remuneration issue of audiovisual authors for the exploitation of their works. Any initiative in this field should therefore complement the introduction into EU legislation of an unwaivable right to remuneration of audiovisual authors for their making available right, based on the revenues generated from the online distribution of their works and collected by collective management organisations from final distributors (as explained in our answer to Q.72 above).

Today, in countries where the legislation provides for a presumption of transfer of authors' rights to the producer, it is not unusual that producers, broadcasters or commercial users such as cable operators dispute the validity of the transfer of authors' rights to their CMO in order to avoid a direct payment from users to authors' CMOs and to promote an "all-rights-included" model of rights' acquisition. Such an 'all-rights-included" model is of the same vein as buy-out contracts. It negates the authors' right to proportional remuneration linked to the revenues generated by the exploitation of the works. This problem was confirmed and explained on p. 90 of the recent 'study on contractual arrangements applicable to creators: law and practice in selected Member States' by CRIDS and KEA.

Audiovisual authors' call for a right to remuneration for the exploitation of their works to be enshrined in European legislation is clearly supported by the European Parliament who stated its view twice in recent years:

- In the excellent report on the challenges facing the distribution of European cinema in the digital era prepared by Mr Borys, a Polish MEP (resolution), the European Parliament stated in November 2011: "Underlines the need to accompany the development of new online exploitation methods with the implementation, at European level, of fair remuneration for audiovisual authors that is proportional to the

revenues generated by these new formats and services”.

- In a report on the online distribution of audiovisual works in the EU prepared by Mr Cavada, a French MEP ([resolution](#)), the European Parliament stated again in September 2012:
 - o “Maintains that it is essential to guarantee authors and performers remuneration that is fair and proportional to all forms of exploitation of their works, especially online exploitation, and therefore calls upon the Member States to ban buy-out contracts, which contradict this principle;”
 - o “Calls for the bargaining position of authors and performers vis-à-vis producers to be rebalanced by providing authors and performers with an unwaivable right to remuneration for all forms of exploitation of their works, including ongoing remuneration where they have transferred their exclusive ‘making available’ right to a producer;”

NO – Please explain why

NO OPINION

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

[Open question]

In most European countries, audiovisual authors suffer from unfair contractual terms (excessive transfer of rights in terms of scope and duration without remuneration other than the initial production fee, waiver of rights to remuneration, clauses forcing the author to indemnify the producer against any and all claims from CMOs regarding remunerations for the exploitation of the work, etc.) imposed by producers or broadcasters in the individual negotiation of their contract. These negotiations too often result in buy-out contracts, authors receiving a lump sum payment for the writing and/or directing of the film, with no further payment no matter how commercially successful the film goes on to be. Even when authors sign contracts which respect their economic interests and provide for additional remuneration, they rarely receive any payment automatically, except when collective management is in place and enforced by collective rights management organisations.

The recent [‘study on contractual arrangements applicable to creators: law and practice in selected Member States’ by CRIDS and KEA](#) confirmed the inefficiency of current rules. Indeed, as stated in the study’s conclusion “the existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or to address some unfair contractual provisions”. The study sets out a number of examples of “the difficulty to secure fair remuneration in digital exploitations, of the practice of buy-out contracts, of the invocation of the presumption of transfer, of the refusal to pay CMOs remuneration of authors of audiovisual works”, which “are illustrative of the shifting of power among stakeholders to the detriment of creators” and increase the situation of unbalance and lack of protection (p. 13).

Accordingly, in parallel to European initiatives to ensure proper remuneration of authors, consideration should be given to developing key standards for fair and enforceable contractual terms in individual contracts, including the prohibition of certain clauses in contracts.

Here are a number of concrete examples of unfair contract terms and practices from the UK:

- Especially in film contracts, deferral of fees. Fees are usually deferred to a point where a film earns back sufficient revenue or profits. It is quite common that films fail to earn back enough to trigger the reimbursement of the deferral so these clauses

are effectively agreements to waive pay. Our UK member, Directors UK, notes that research carried out shows the extent of this practice in the UK. The key conclusions were that:

- i. 70% of directors experience some form of fee deferral
 - ii. 20% experienced fee reductions after the closure of the original deal
 - iii. 13.3% experienced changes in potential bonuses after closure
 - iv. Of those experiencing deferral, 50% deferred 50% or more of fees, with 40% deferring 80-100% of fees
- Where contracts do contain an entitlement to bonuses or rewards for success, these are most often expressed as percentages of net profits or of producer profits. In practice, because of the fact that producers themselves can be in a poor position, dubious accounting practices and breaks in the distribution chain (see below) it is very rare that any returns from such clauses ever materialise.
 - It is common for film rights (and sometimes TV rights) to be traded and re-traded from one intermediary/agggregator/distributor to another, either on a territory or media basis. Contracts may still hold the original producer liable to pay further rewards to a director, but this can be frustrated if there is a break in the chain of intermediaries for whatever reason (e.g. bankruptcy, failure to report a transfer of rights) and if the original production company itself goes into liquidation – this is common when a special purpose vehicle company is set up to make a film and then dissolved once it is completed.

In addition, one way of ensuring the enforceability of fair contractual terms would be that producers applying for public funds for the production of films and audiovisual works should be obliged to provide a copy of authors' contracts among the documentation. The body providing for the financial support would have the obligation to check it. This would be a strong incentive for producers to better respect authors' rights as it would become a pre-condition for obtaining public financial support.

In the [SAA White Paper on Audiovisual Authors' Rights and Remuneration in Europe](#), we carried out a survey of the situation of audiovisual authors in the different EU countries and realised the important differences in legal traditions, audiovisual market sizes, etc. We did not judge the harmonisation of contractual practices to be an adequate option to ensure equal remuneration conditions to authors throughout Europe. We therefore developed a specific proposal to achieve this objective: the unwaivable right to remuneration of audiovisual authors for their making available right with compulsory collective management.

The SAA proposal was described in the recent ['study on contractual arrangements applicable to creators: law and practice in selected Member States'](#) by CRIDS and KEA as offering "promising solutions" to problems encountered in relation to digital exploitation (e.g. creators cannot claim remuneration on new modes of exploitation from the exploiter if the rights have not or not adequately been transferred, remuneration foreseen in post-internet contracts is rarely specific to digital uses, modes of calculation of remuneration are difficult to determine exactly and fairly in rapidly evolving business models (pp.66-67), "specific contractual terms for digital rights are not in themselves a guarantee that genuine bilateral negotiation takes place" (p.71)).

The study also stated that "introducing some unwaivable right of remuneration for some exploitations, to be paid by the user undertaking that exploitation, could better protect the authors" (p.94) and put forward the following recommendations: "The rights to equitable remuneration or fair compensation should be conceived as unwaivable rights, in line with the recent case law of the Court of Justice of the European Union (as regards the private copy remuneration in the *Luksan* decision)." "Some other unwaivable rights to remuneration could be proposed for some forms of exploitation, notably for some kinds of digital exploitations,

possibly subject to collective management.” (p.104).

This would ensure that, whatever the contract signed with the producer, online services would have to negotiate with authors’ organisations and would guarantee remuneration for each exploitation of a work, without relying on the long contractual chain that today deprives most authors of their remuneration for the exploitation of their works, in particular when it takes place outside of the country of production.

V. Respect for rights

Directive 2004/48/EE⁵⁷ provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text⁵⁸. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose⁵⁹. One means to do this could be to clarify the role of intermediaries in the IP infrastructure⁶⁰. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

NO – Please explain

The scope of the question and clarifications of the civil enforcement system in the EU should not be limited to infringements committed ‘with a commercial purpose’. All infringements should be punished. The only difference being that sanctions will be larger for commercial purpose infringements.

As stated in the SAA’s contribution to the Commission’s public consultation on the Enforcement Directive in March 2011, clarifications of the 2004/48/EC IPRs Enforcement Directive are necessary to avoid ambiguities and adapt the Directive to the challenges posed in particular by today’s digital environment. There are indeed a number of useful improvements and gaps in protection which should be considered.

In this context, we do not support any form of legislation that would decriminalise so-called non-commercial infringements. Given the nature of enforcement online, such decriminalisation would provide a readymade defence for structurally-infringing websites.

⁵⁷ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

⁵⁸ You will find more information on the following website:

http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm

⁵⁹ For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

⁶⁰ This clarification should not affect the liability regime of intermediary service providers established by Directive 2000/31/EC on electronic commerce, which will remain unchanged.

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]

Although Art 8(3) of the Copyright Directive is an effective tool in achieving cooperation from intermediaries against copyright infringement, some Member States still have not correctly implemented this provision and the corresponding provisions of the Enforcement Directive. As a result, their Courts still require a finding of some form of liability on the part of the intermediary: they hold that injunctions against intermediaries can only be granted if the intermediary can be imputed with liability (in Germany, Sweden). This is not what Art 8(3) states: injunctions are on the basis that the intermediary is best placed to bring an infringement to an end (confirmed by the CJEU). There is therefore a need for correct implementation of Art 8(3) by all Member States to foster cooperation of intermediaries.

The SAA welcomes recent national court decisions, for example in France, which are clarifying the role of intermediaries in the IP enforcement infrastructure. They are increasingly required to carry out an active role and take on responsibilities.

Indeed, a recent decision of the Paris High Court ('Tribunal de Grande Instance') ordered the defendants, internet service providers (Orange, Bouygues Telecom, Numéricable, Free, SFR and Darty Télécom) and search engines (Google, Microsoft, Yahoo! and Orange), to take all measures to block access to streaming sites Allostreaming, and other sites belonging to the same network, for a year. The court found that the claimant (cinema professionals) had demonstrated that the sites were entirely or almost entirely dedicated to reproducing audiovisual works without the rightholders' authorisation. This judgement is an important step in the fight against online piracy which will force rightholders and intermediaries to cooperate. It is also the first time that search engines have been ordered to delist pirate sites. Such court decisions, as well as national legislative initiatives on 'notice and takedown' seem to be proof that the notification procedure is evolving in the right direction: intermediaries' actual knowledge of the illegal content no longer seems to be a precondition to engage their liability.

SAA strongly encourages the Commission to examine the possibility of integrating a 'notice and takedown' type mechanism in the future revised Enforcement Directive. In addition, the notification procedure (and the information to be provided) as well as the impact of this procedure, i.e. the action to be taken by the hosting provider (immediate take down (as quickly as possible within 24 hours) and stay down of illegal content, not just the links to it) should be harmonised.

Cooperation between rightholders and intermediaries could also lead to the development of useful filtering technologies which could be developed by platforms and implemented at the stage when users upload content onto their servers. This filtering technology would be based on databases of works which have been registered, with a view to identifying and blocking illegal content. In this context, cooperation between rights holders and providers is key to developing such databases of protected content and should therefore be encouraged.

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

According to the Court of Justice of the European Union⁶¹ a fair balance must be struck between the various rights at stake (such as the right to data protection and the right to property, which includes IPR) given that both are recognised as fundamental rights by the Charter of Fundamental Rights of the European Union. National courts have then to apply a proportionality test and weigh all fundamental rights in order to come to a balanced result. It therefore looks like there are sufficient safeguards in place to ensure fair outcomes.

NO – Please explain

NO OPINION

VI. A single EU Copyright Title

The idea of establishing a unified EU Copyright Title has been present in the copyright debate for quite some time now, although views as to the merits and the feasibility of such an objective are divided. A unified EU Copyright Title would totally harmonise the area of copyright law in the EU and replace national laws. There would then be a single EU title instead of a bundle of national rights. Some see this as the only manner in which a truly Single Market for content protected by copyright can be ensured, while others believe that the same objective can better be achieved by establishing a higher level of harmonisation while allowing for a certain degree of flexibility and specificity in Member States' legal systems.

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

YES

NO

NO OPINION

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

[Open question]

SAA does not see the need for “an optional unitary EU Copyright Title”. This proposal to use Article 118 TFEU⁶² in the field of copyright was first made by the Commission in 2009 and then repeated in several documents but the Commission never explained the need for and

⁶¹ Judgment of 29 January 2008 in the case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*.

⁶² “*In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.*”

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.”

the use of such a title. The only information delivered in the Green Paper on the online distribution of audiovisual works was that “authors or producers of audiovisual works would have the option to register their works and then obtain a single title that would be valid throughout the EU”. This (overly) brief presentation raises two questions: the registration condition and the nature of the title.

In terms of copyright protection, the Berne Convention prohibits any formality such as registration as a condition for the enjoyment and exercise of rights. Authors are very much attached to this prohibition which guarantees their rights in all circumstances as far as their creation is original and therefore deserves protection. Consequently, authors are very reluctant to see any system based on registration as it endangers their authorship of works.

From a practical point of view, to pursue such a proposal, the Commission should then either undertake to revise the Berne convention or to define the nature of the title out of the copyright sphere.

Because of the formality prohibition, such titles do not exist in the copyright sphere. The only existing registries in the audiovisual sector have limited scope and impact which do not affect rights’ protection and exercise (for example the necessary work declaration to an authors’ society for an author to receive related payments, or the French cinema public registry which offers the statutory publication of certain contracts).

Article 118 TFUE has obviously been introduced for industrial property purposes and refers to the setting-up of centralised EU-wide authorisation, coordination and supervision arrangements, which do not seem relevant to authors’ rights.

VII. Other issues

The above questionnaire aims to provide a comprehensive consultation on the most important matters relating to the current EU legal framework for copyright. Should any important matters have been omitted, we would appreciate if you could bring them to our attention, so they can be properly addressed in the future.

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

[Open question]

Creators at the centre of EU copyright policy

It is crucial that creators be placed at the centre of EU copyright policy. After years of distrust and attacks against copyright by users’ and consumers’ groups who want to undermine a system that they do not consider fit for the digital age, there is an essential need to give back legitimacy to a system that promotes creativity, freedom of expression and dissemination of culture.

The best way to provide legitimacy to the copyright system is to reconnect it to creators and ensure that creators are the first and main beneficiaries of the licence fees and remuneration paid by users.

The current European copyright law does not provide for such a guarantee, except in limited cases (unwaivable right to equitable remuneration for the rental right) and gives rise to criticisms that it only works to the benefit of major entertainment companies.

There is therefore a need to rebalance European copyright policy in favour of authors as original rightholders. This needs to be the focus and priority of any forthcoming copyright reform.

This is a win-win solution for users, consumers and for all rightholders as it would clarify that creators are the main beneficiaries of the copyright system and therefore strengthen its legitimacy and its enforcement, in particular online.

In the audiovisual sector, to ensure such rebalancing, SAA has proposed in its [White Paper on the Audiovisual Authors' Rights and Remuneration in Europe](#) the introduction into European legislation of an unwaivable right to remuneration of audiovisual authors for their making available right, based on the revenues generated from the online distribution of their works and collected by collective management organisations from final distributors (see answers to Q. 72, 73 and 74).

CMOs fit for the digital age

The digital age has presented CMOs with major challenges regarding many aspects of their operations. The analogue world has been replaced by one characterised by mass uses and transactions of copyright works, lower values of licences for transactions and much greater flexibility in the type of uses being made and the devices on which uses take place. CMOs have adapted to this – and continue to do so – by doing the following:

- Investing in new technology, software and systems to keep their licensing operations fit for purpose;
- Improving their governance, transparency and accountability to members and users;
- Simplifying their licensing procedures to reduce transaction costs;
- Innovating in the kind of licences being offered;
- Making it a central objective to see the works of members receive the greatest possible legitimate distribution;
- Promoting the use of copyright works for education and cultural purposes;
- Making it a priority to engage young people directly whether they are users or creators of copyright works – and sometimes both at the same time – so that they learn respect for the value of creativity and are encouraged to express themselves creatively.

During the discussions on the Collective Rights Management Directive, audiovisual authors' CMOs explained the specificities of their societies compared to those in the music sector in order for the Directive to take them into account and be fit for all CMOs, whatever their sector of operation. The recently adopted Directive establishes a European legal framework for CMOs which secures collective rights management as a future-proof tool. It is now time to build on it to improve audiovisual authors' remuneration in the digital age.

Call for clarifications of the cable retransmission right

We call on the Commission to take action to recognise, that in the digital age, new media operators which carry out retransmissions should be subject to the same rules as cable operators and that leading cable operators should not be able to escape responsibility under the SatCab Directive simply because they argue that transmissions via new media platforms do not amount to retransmissions under the SatCab Directive.

Indeed, as proven by the contradictory national rulings and implementation of the 93/83/EEC Satellite and Cable Directive ("SatCab Directive") as well as the cable section of the [De Wolf study on the application of the Copyright Directive](#), clarifications of various aspects of the cable retransmission right are needed in order to provide legal certainty to all stakeholders involved. The ongoing litigation in several Member States shows that the existing grey areas are being exploited by commercial operators (especially leading cable operators) to try and escape their obligations under the SatCab Directive.

Firstly, clarification is needed regarding the initial transmission where uncertainty relates to

the “direct injection”⁶³ of TV and radio programmes in the cable network. The issues are whether the initial transmission is an independent act of communication to the public for which a distinct remuneration for rightholders can be claimed and whether both the initial and secondary transmissions could be qualified as a retransmission by cable. If so, mandatory collective management would apply to both.

Secondly, the question of responsibility of the different stakeholders involved, especially broadcasters, cable and alternative operators, must be clarified to ensure rightholders a high level of protection. Indeed, the consequence of qualifying the direct injection and the subsequent cable retransmission as one act of communication to the public by cable is that mandatory collective management does not apply (this only applies in cases of cable re-transmissions), so right holders’ consent and remuneration is required only once. As stated in the De Wolf study on the application of the Copyright Directive (pp.227-228), the author E. Traple correctly explained⁶⁴ and concluded against a restrictive interpretation of the term “retransmission” which “leads to a significant limitation of the level of protection of rightholders” contrary to the objective of the Directive which he recalled is “to create legal certainty for the cable operators as to the acquisition of rights and to ensure a high level of protection for the authors and rightholders”. Consequently, the more the system of mandatory collective management applies, the better protected rightholders will be.

In practice, audiovisual authors in certain Member States are not protected at all and have little or no means to acquire effective remuneration for the economically important and highly profitable exploitation of cable retransmissions. E.g. in the Netherlands, the largest cable operators, that paid remuneration to a collective of CMOs for over 25 years, simply ceased to pay remunerations to the CMOs of screenwriters and directors in October 2012. They argue that (i) the system of mandatory collective licensing of cable retransmission rights does not apply to the technique of “direct injection” of radio and television signals; (ii) as a consequence of the statutory presumption of transfer of all exploitation rights to the producer, which according to the cable operators prevails over a transfer of rights to a CMO, these rights are vested in the production companies and/or broadcasters involved; (iii) authors have already received the remuneration for this exploitation as a (not specified) part of their initial production fee from the producer.

In practice however, the production fees paid to audiovisual authors have as a general rule diminished in recent years and the remuneration for this important type of exploitation (which authors were used to receiving via their CMOs and which forms a vital part of their income) is not included in their initial production fees.

Thirdly, a decision on whether the SatCab Directive is technology-specific or technology-neutral is needed. Despite the need for a study highlighted in the De Wolf study (pp.228-233), most Member States, except the UK and Austria (as per the study) have so far interpreted the SatCab Directive in a technology-specific way. This means that new media operators are generally prevented from being able to simply turn to CMOs to negotiate contracts for the retransmission of the broadcast content.

Time has passed since the 2002 Commission report when it was thought too early to consider such an extension, and the time when the possibility of retransmitting works via the internet and other networks was not well known has long gone. In addition, the simultaneous

⁶³ Defined as “the distribution by cable of programmes, which are transmitted by the broadcaster to the cable operator by means of a dedicated line, in order to be then transmitted to the public by means of a cable” by the Brussels Court of Appeal in 1998 in a case brought by Uradex (CMO for performers). In this case, the court considered that both the direct injection and the cable distribution following a direct injection were retransmission by cables, but the Court of First Instance deviated from this position.

⁶⁴ E. Traple correctly explained that “this complex act of cable transmission is monetised at different stages, by the broadcaster and the cable operator. The fact that a public is reached makes it possible for the broadcaster to close advertisement deals, while the cable operator receives the cable subscription fees. The rightholders may consent to the cable transmission of the programme with one party only and calculate the fees without a precise idea of the total financial return for all economic operators involved.”

character of these new types of transmissions makes it practically impossible to clear the rights in time. Moreover, regarding the new media platforms, a 2007 study by EBU⁶⁵ explained that “with a view to safeguarding a level-playing field, the system of simplified clearance of cable distribution rights should be extended to comparable cases of retransmission of broadcasts by commercial third-party operators (...)”.

⁶⁵ ‘Cable retransmission of broadcasts : a study on the effectiveness of the management and clearance of cable retransmission rights’, 2007, EBU
http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/Position%20Papers/EBU-Position-EN_Cable%20retransmission%20study%2014.11.2007.pdf