Position Paper

Public Consultation on the review of the EU copyright rules
March 2014

The German Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 2,100 companies in Germany. Its 1,300 direct members generate an annual turnover of more than 140 billion Euros and employ 700,000 people. They include more than 900 small and medium-sized enterprises, over 100 start-ups as well as nearly all global players. BITKOM represents providers of software and IT, telecommunications and Internet services, manufacturers of hardware and consumer electronics, as well as digital media and Internet economy businesses.

BITKOM members play an essential role in the media business and in the discussion on copyright rules. BITKOM-members provide access to creative content or they distribute and convey creative content to a broad audience. At the same time BITKOM members as being manufacturers and importers of storage media and devices capable of making copies annually pay levies of more than hundred million Euros to Germany's collecting societies.

Therefore the European Commission's "public consultation on the review of the EU copyright rules" is of high importance for BITKOM and we welcome the opportunity to express our views on the questionnaire. The necessity of a copyright as the basis for adding value has - also in view of the internet and digitisation – not changed. The copyright in the information society will therefore continue to have great importance. Nevertheless, the EU copyright rules still do not meet the needs of the age of digitisation, but induce important questions which end in legal uncertainty and in thwarting innovations and new business models.

Before answering the questionnaire in detail we would like to highlight some key issues for the European Commission for the upcoming legislative period:

- We highly appreciate any initiative by the European Commission to simplify the licensing procedure. The CRM Directive is supportable but only a first step in the right direction.

- The "making available" right and the "reproduction" right have to be reconceived in terms of online distribution. And it has to be ruled, that linking and browsing are no relevant uses in terms of copyright.

- We appreciate any initiative by the European Commission to implement a registration system.

- Regarding the principle of exhaustion we urge the European Commission to devote attention to the impact on commerce, competition and consumer welfare caused by the current uncertainty and to be responsive to the need of easy and clear understandable rules.
- For "user generated content" a legislative solution is urgently needed.

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- We also think that it is important and urgent to discuss the functioning of private copying levy systems in Europe. This consultation can be the first necessary step to the final discovery that levy systems from the analogue world which are based on devices do not fit into the digital age and have to be phased out and replaced by alternative systems.

- Last but not least Copyright infringement has to be controlled. The Directive 2000/31/EC on E-commerce gives relevant and sufficient measures to act against copyright infringement and to take adequately account the risk and the damage caused by copyright infringement.

Content

subject	question	answer
I. Rights and the functioning of the Single Market		
A. Why is it not possible to access many online content services from anywhere in Europe?	1. [In particular if you are an end user/consumer:] Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?	
	2. [In particular if you are a service provider:] Have you faced problems when seeking to provide online services across borders in the EU?	**answer: YES** The clearing of rights becomes more and more difficult. Here we see an important need for action. If right holders of music continue to exercise their discretion in the matter of multi-territorial licensing, this will – as has previously been the case and contrary to what the Commission clearly hopes will happen – lead to a situation in which a few individual right holders will continue to cherry pick and remove “lucrative repertoire” from collecting societies and grant multi-territorial licences separately. The remaining repertoire will continue to be acquired by the national collecting societies. This does not involve a simplification of pan-European licensing but, entirely counter to the declared aim, reinforces the status quo which the Commission itself has found to be inadequate, and may even lead to increased fragmentation of the music repertoire. The newly introduced right holder’s ”right to choose” their collecting society in Art. 5 (2) of the last draft of the CRM directive is also expected to further complicate clearing processes. It is also our view that the current licensing practice puts national providers at a clear competitive disadvantage. If a provider wants to introduce a new service only to the German market, whether as a niche offering or as a start-up, initially in one country or for other strategic reasons, the provider previously needed to conclude just one copyright licensing agreement with GEMA. Today it has to conclude around seven to ten agreements in order to be able to provide the global repertoire in Germany, including several agreements in foreign languages and based on foreign legislation. A provider purely active in Germany does not have the resources required for this time-consuming and cost-intensive process. This is again aggravated by the fact that such provider has a smaller turnover and profit,

		because of its national focus. Therefore, provider and broadcasters should have the option to choose between a pan-European or multi-territorial license and national/bilateral licensing. Fragmentation of copyrights as an obstacle for smooth pan-European licensing is also increased by the practice of some important right holders to explicitly prohibit innovative accompanying services when licensing works for public communication, even if there is no sensible legal ground for a separate right of use and no separate commercial exploitation. This practise poses a serious threat to innovation.
	3. [In particular if you are a right holder or a collective management organisation:] How often are you asked to grant multi-territorial licenses? 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.	
	4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?	The acquisition of licenses should be simplified. Providers need legal certainty in order to satisfy consumer demand for innovative services. To achieve legal certainty, providers of online music services need to conclude one agreement for the entire global repertoire. This should be legislatively guaranteed on EU level. It is generally impracticable to exclude individual licensors from agreements because pieces of music are delivered by the owners of ancillary copyright and the lack of sufficient information and the complex situation with regard to rights means that copyright owners cannot be traced beyond reasonable doubt or definitively. Also once the CRM-directive will have been adopted the EU legislation does still not provide adequate safeguards to ensure that the repertoire of all societies have access to multi-territorial licensing. In terms of the current proposal of the CRM-directive there is no reference to any pressure to the collecting societies to outsource the rights management if they themselves do not wish to grant multi-territorial licences. We therefore propose to oblige collecting societies to contract with each other in order to ensure the necessary accessibility of rights and also to contract with right users who seek clearance. As

		collecting societies are key institutions in licensing processes, the legal rules for their activities should – beyond the intention in the CRM-Directive – be revised in order to establish an effective supervision and control. Additionally and to the fostering of local start-ups, creative niche providers and comparable companies, steps should be taken to ensure that a national blanket licence policy applies alongside the pan-European licensing structure where services are local and do not exceed a defined size. This should also be in the interest of publishers and collecting societies as they would not have the onerous tasks anymore associated with very small licensees from other countries in Europe and they would promote a broader service structure.
	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)?	
	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)?	**answer: NO**
	7. Do you think that further measures (legislative or	**answer: YES** see answer on question 2 and 4

	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?	
B. Is there a need for more clarity as regards the scope of what needs to be authorized (or not) in digital transmissions?		
1. The act of "making available"	8. Is the scope of the "making available" right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?	**answer: NO** Directive 2001/29/EC neither specifies what act is covered by the making available right (e.g. upload, accessibility of actual reception) nor does the directive define where the act of making available takes place in cross border situations. If market player do not know what is covered by the right of "making available", EU wide licensing is obstructed. Thus there is a need for clarification of the scope of the "making available" right, in particular in regard to cross boarder situations. Firstly, we held that the simple act of uploading to the internet is no act of exploitation and should not be covered by the "making available" right if no one ever accesses it. Moreover, the right of "making available" requires that the work is being made available to the "public". Making a work available only to a closed circle of persons should not be covered by the "making available" right. Secondly, we agree that the pure fact a work is accessible in a certain territory should lead to a license requirement in this country.
	9. [In particular if you are a right holder:] Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to	

	have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[1])?	
2. Two rights involved in a single act of exploitation	10. [In particular if you are 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?	**answer: YES** Yes, the application of two rights for one act of exploitation creates problems with regard to the distribution of content by providers. In the past both rights (right of reproduction and right of making available) necessary for the online and mobile exploitation of music were granted by the respective collecting societies in Europe. As a result of the EU-recommendation in 2005 Anglo-American music publishers withdraw their right of reproduction from the collective management by collecting societies. The right of making available for the respective musical works remained within collective management. Therefore the situation now is that both licensing systems – collective rights management and single licensing – apply for one musical work used in one economic process. The aim of facilitating the licensing process for the content provider through collective rights management is jeopardised. Although rights manager, such as CELAS for the EMI Publishing repertoire, are licensing the corresponding making available right for the Anglo-American EMI Publishing repertoire the situation for the content provider remains difficult. For the right of making available CELAS is acting not in its own name but in the name of PRS and GEMA as a representative. If there is a dispute regarding the ownership of the rights the content provider would have difficulties to ask for indemnification as it is unclear who should be addressed. The issue increases as most of the musical works have so called split copyrights, which means that part of the work are owned by various rights holder. In the online environment the making available right is useless without the reproduction right. Therefore in German adjudication the LG München I and OLG München (29 U 3698/09) confirmed, that the splitting of the two rights – as it has been practiced within CELAS – contradicts the German Copyright Law. In addition to this, a splitting of both rights would double the expenses on licensing and would inhibit new business models. To solve this problem it should be clarified that the right of making available and the corresponding repro-

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

		duction right necessary for one technical and economic process may not be split and represented by different right holders. Therefore the making available right should always include the right of reproduction as far as the right of making available cannot be used without the right of reproduction. To offer content to users via online and mobile platforms the reproduction on the server of the service provider is a necessary condition for the making available of such content.
3. Linking and browsing	11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the right holder?	**answer: NO** Linking is the core of the internet as it naturally depends on connections via hyperlink. Making linking subject to an exclusive copyright would shatter the success story of a free and emancipatory web. If linking would require the permission and/or a license from the right holder this would amount to a significant expansion of copyright, with severe and unforeseeable social and economic consequences, and serious undermining freedom of expression. Linking does not constitute a "use" of a work subject to copyright. A link primarily serves the purpose of a reference, index or footnote. A work subject to copyright that has been previously made available to the public is neither "transmitted" nor "retransmitted" by merely linking to it nor is it communicated to a "new public". A link only facilitates access to a work that is already publicly available. This is true regardless of the specific form of linking (e.g. surface linking, deep linking, inline linking/embedding). Thus linking should not – neither in general nor under specific circumstances – be subject to the authorisation of a right holder. Currently there are three cases pending at the European Court of Justice on linking (C466/12, C279/13 and C348/13). In 2003 the German Federal Court of Justice has ruled that (deep) linking does not constitute a "use" in the meaning of copyright (Bundesgerichtshof, I ZR 259/00 from 17.7.2003 "Paperboy", GRUR 2003, 958; also Bundesgerichtshof, I ZR 39/08 from 29.04.2010 "Session-ID" (except if a protection measure has been bypassed in order to provide the link)). In the view of the Court, a link only serves as a reference (or footnote) that facilitates access to a work already publicly available. The link provider has no control over the actual availability of the linked content. Links in the form of embedding content do not require any different analysis. Embedding content via an (inline) link does not constitute a transmission or retransmission and the work is not communicated to a

		"new public". Moreover, the link provider has no control over the (future) availability of the linked content. Thus, from a copyright perspective, inlinelinking/embedding does not interfere with any exclusive right. It has to be pointed out that an exclusive right in regard to inlinelinking/embedding would lead to severe negative consequences for internet and it's social benefits. Last but not least it has to be noted that it would be diametrical to the interest of the right holders to make inlinelinking/embedding subject to an exclusive copyright. Due to prohibitive transaction cost inlinelinking would simply vanish. The right holder would not be able to increase their revenues. From an economic perspective two technical aspects have to be taken into account: (i) the link provider has no control over the availability of the linked content (what price would he be willing to pay?) and (ii) the person who initially makes content publicly available on the internet has technical control in regard to whether or not the content may be embedded on third party sites. He should remain the sole licensor of the right holder.
	12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the right holder?	**answer: NO** This is about the right to read. Reading, viewing or simply listening to a work never has been subject to copyright. Reading, viewing or listening to content on web pages that are freely accessible on the internet (browsing) require multiple temporary digital reproductions of fragments of the content. For example in case of viewing of film shots - the streaming needs a temporary, ephemeral duplication by buffering in the cache, however this process is taking place automatically without being perceived by the user and the copy is also automatically deleted, without any human intervention, after a certain time. Without such temporary copies browsing or using the internet would not be possible. The Directive 2001/29/EC exempts such temporary copies from the exclusive copyright (Art. 5 I). A narrow interpretation of Art. 5 I as well as an abolishment of Art. 5 I would break the internet. The question to what extend temporary reproductions that occur during the process of browsing are subject to an exclusive copyright or exempted by Art. 5 I is currently pending at the European Court of Justice (C360/13). In its reference for a preliminary ruling the UK Supreme Court states: "Merely viewing or reading [at work] is not an infringement" and "it has never been an infringement, in either English or EU law, for a person merely to view or read and infringing article in physical form". To change this understanding would mean that those

		who merely browse the internet, without downloading anything, are unintentionally likely to incur civil liability. As the UK Supreme Court has already rightly noted it would be an unacceptable result to consider millions of ordinary Internet users to be copyright infringers by dint of merely accessing a web-page containing copyright material. This should also not be the intention of the European legislator. Even though one could argue that browsing legal websites could be licensed via an implied consent of the right holder, whereas browsing illegal websites would be not: Internet users cannot judge whether a website is legal or illegal before visiting the website. And in some cases the Internet user does not even have the control about the website opened by the browser. Browsing on illegal websites should be banished by focusing on the provider of these illegal websites (see on question 75ff) and not with criminalizing an action of which you cannot even justify a negligence.
4. Download to own digital content	13. [In particular if you are an end user/consumer:] Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?	
	14. [In particular if you are a right holder or a service provider:] What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.	As the Commission rightly points out, digital content is increasingly being distributed via digital transmission instead of physical media. This new distribution model raises a question: under what circumstances are consumers able to sell or give away the content they have obtained? In the physical world, distribution and free alienability of copyrighted works is ensured through the principle of exhaustion. Copyright exhaustion operates whenever a sale of physical goods that incorporates copyrightable expression occurs. It allows wholesalers to sell products covered by copyright, including products distributed in copyrighted packaging, to retailers without first securing distribution licenses from the copyright holder. It also permits retailers to sell products to consumers without obtaining distribution licenses. It enables the purchaser of a copyrighted product to transfer that product to other parties by selling, lending, leasing, or giving the product to the parties without obtaining permission from the copyright owner. This promotes free and open commerce, moves products from those who value it less to those who value it more, enables innovative rental based business models, as well as charitable giving.

		However the digital world is different as digital products do not lose quality or do not feel "used" after being used. Therefore, the question whether the principle of EU exhaustion of the distribution right should also apply in the digital world requires a legislative basis decision on how the interests of right holders and the interests of users can be brought into balance. In some cases consumers expect to be able to sell what they bought. While in some instances legal uncertainty prevents consumers from doing so, in others (e.g. paperless tickets to sports event or concerts) a consumer is so far technically restricted from transferring his/her ownership. The understanding between the consumer and the distributor or provider of a copyrighted work is therefore a key consideration. Digital content is sometimes distributed in a manner that is highly similar to a purchase of physical copies (such as books or CDs). Other distributions may be made according to a subscription model, a rental model, or another set of contractual license terms. Some providers will offer two prices – one for a temporary rental, and another for an outright purchase of the digital work (though with most content, the rights granted will still be limited to personal use by the consumer, and may include limitation to a certain number of devices). It is important that the EU system provide predictability and encourage transparency for both distributors/providers and consumers. EU copyright law should also ensure that right holders are able to exclude the possibility of distributing their content to third parties in the license-agreements whenever this is required in respect of product and/or consumer demands. In the software market, for instance, there are business models so called "educational licenses" and "volume licenses") which are exclusively offered to potential licensees under special conditions. If these exclusive licensees would be allowed to transfer their software license to a third party who would not meet these special conditions, this business model would no longer be viable. This will hurt software consumers, who will have fewer choices and pay higher prices. In contrast, giving software producers the flexibility to offer their products through a variety of distribution models and licensing options allows producers to meet varying consumer needs, preferences, and pricing expectations. Similar concerns also arise when TV, video or music is offered as an "on demand"-service. While keeping in mind these challenges, we urge the European Commission to devote attention to the impact on commerce, competition and consumer welfare

		caused by the current uncertainty and to be responsive to the need of easy and clear understandable rules – also and especially in the light of a private context.
C. Registration of works and other subject matter – is it a good idea?	15. Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?	**answer: YES** An EU wide Berne compliant registration system would dramatically improve licensing, even if it does not constitute a precondition for the protection of exercise of copyrights. Online services devote a great deal of resources and manpower to licensing. Often existing works are not used in a digital context due to the hurdles in identifying the respective rights holder. It is not only about transaction costs. You cannot license a copyrighted work unless you know who owns the relevant right. Very often this information is not available. New technologies as well as the vast expansion of copyright have led to a dramatic increase of information/content that is subject to exclusive copyrights. Billions of "works" are created every day by every day activities taking snapshots or short video clips with mobile phones, blogs as well as traditional works. GEMA by its own has already 60.000 members. These members are right holders of different content and different right splitting. In many cases more than one right holder is involved in a song. What GEMA is doing in-house with the rights of its members should be done EU wide. A registration requirement would even strengthen the position of the right holder as it improves transparency to the potential user as a prerequisite for licensing.
	16. What would be the possible advantages of such a system?	The advantages of registries extend well beyond licensing. Those advantages have been well documented by WIPO (http://www.wipo.int/copyright/en/activities/copyright_registration/): (i) right owners will have with a simple and effective means to clearly establish authorship and/or ownership that can be used in commercial and legal contexts; (ii) registration can also help to delimit the public domain, and consequently facilitate access to creative content for which no authorization from the right owner is needed; (iii) national registries serve the public interest by providing a source of national statistics on creativity and culture; (iv) finally, national registries may constitute a repository of cultural works through deposit. We note with interest the development of a digital copyright exchange in the UK, and at European level

		the International Standard Audis-visual Number a not-for-profit Swiss association based in Geneva established by major collecting societies CISAC, AGICOA and others, and mandated by ISO for implementing, running and managing the ISAN standard, the ISAN system and a central database. Whilst the concept of a European centralized database is one we support as it has the potential to help creators, content providers and rights holders to license rights more quickly which means with less administrative cost and with greater certainty, its governance model and operating procedures must be a constructed to ensure full independence. In this respect there may be a role the European Commission can play to ensure its management and administration are fully independent, that no stakeholders in the rights clearance value chain is able to unduly influence administrative activities, for example in a capacity as some form of guarantor. More practically, we would want to be part of an independent verification process prior to the rights being input into the database to diminish the likelihood of misleading or inaccurate information that could hinder the acquisition of rights. A robust procedure for dispute resolution, and in instances where this is invoked, a full indemnification against counter claims whilst the procedure is ongoing, are additional safeguards which would need to be built into operating procedures. There should also be no obligation to consult the database. Right holders should be responsible for registration of their work, like sellers are responsible for labelling their product/work). However, the registration should not be compulsory for the protection and the exercise of the right.
	17. What would be the possible disadvantages of such a system?	A registration system that is too complex or expensive will not attract sufficient right holders to be valuable. At the same time unless there is a mix of incentives, a registry is also unlikely to attract attention and buy-in. The Creative Commons experience has shown that it is possible to build a simple platform, without much fund, where millions of works are “signaled” on a voluntary basis.
	18. What incentives for registration by right holders could be envisaged?	
D. How to improve the use and interopera-	19. What should be the role of the EU in promoting the adoption of identifiers	Identification of works is the basic prerequisite of any market to function. In the area of music, recent discussions on collecting societies have highlighted the need

bility of identifiers	in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?	to have transparent ownership information available. Efforts in this area should focus on open, transparent identifiers and registries, as well as on effective incentives.
E. Term of protection – is it appropriate?	20. Are the current terms of copyright protection still appropriate in the digital environment?	**answer: NO** When it comes to the copyright of artists one could argue, that extensive terms of protection should not be in their interest. It is not the author itself who would profit from an extension. Instead the problem of piracy would be enlarged. (compare http://www.cippm.org.uk/downloads/Press%20Release%20Copyright%20Extension.pdf However, caution should be exercised when discussing the terms of protection. Two issues have still to be guaranteed: a payback of investment must remain possible and it has to be taken into account that in fact many authors in the past only found recognition and commercial success posthumously.
II. Limitations and exceptions in the Single Market		
	21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?	**answer: YES** The catalogue of limitations and exceptions in the EU copyright directives derives from the different legal traditions in the Member States. Although optional limitations allow keeping these traditions, it leads a lack of harmonization and market distortion within the Single Market. Especially concerning the exception for private copying, the different implementation causes considerable problems in the Single Market (see our answers in section IV). In general it can be said, that the different systems in the Member States create large obstacles in cross border trade (e.g. grey market, distortion of competition etc. – see answer to question 27). Many services, companies and innovators rely on the existence of specific exceptions and limitations of copyright. Such services cannot be offered EU wide and a single market is not available to them. Cross border cloud services for instance demand a harmonized pan European legal framework. This applies from a content licensing perspective as well as from a consumer perspective. It is important, that the same legal framework exist in order to ensure, that a service, which is legal in one member state can also be offered in another member state.

		Here is another example: Library may offer access to archives to citizens in one member state but are not be able to do so in other Member States due to the lack of a respective exception of copyright. A university may use copyright protected material for the purpose of teaching in one member state on the basis of a respective exception but might not be able to do so in another member state. A fragmentation of limitations and exception is also worrying because many of them are based on fundamental rights that are part of EU law and which do not stop at borders. Citizens and consumers should have the same fundamental rights in Europe.
	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?	**answer: YES** Generally we think that a higher level of harmonization is needed to reduce the problems mentioned above. In the introduction of this section it is stated, that only some of the exceptions are mandatory. The exception Article 5 (1) of the Directive 2001/29/EC for example determines that certain temporary acts of reproduction do not belong to the reproduction right of the author. This exception assures for instance the lawful use of a work in the digital world. In the same way it is possible to think about a mandatory private copying exception. Such mandatory private copying exception could only be introduced based on the model planned in the UK. The UK government proposes to introduce a narrow private copying exception which causes no significant harm to right holders. Consequently, no further compensation will be due to rights holders. As a mandatory exception it would harmonize the framework for private copying in the EU and enable a competitive digital Single Market. The need for mandatory exceptions should be assessed taking into account in particular whether (i) there is a detrimental impact on the internal market; (ii) whether fundamental rights and/or the public interest are a strong justification for the exception; and (iii) whether an underlying policy (i.e. economic or innovation policy) is better achieved at EU level.
	23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.	No existing exception should be removed from the existing catalogue. They are based on the existing catalogues in the Member States and serve important cultural and social purposes. Removing existing exceptions will not be socially accepted. The closed character of the existing catalogue of copyright exceptions has been proven to obstruct innovation. There is a need for more flexibility in order to enable more competition on downstream (secondary)

		markets, provide more leeway for value added information services and to not foster creativity and transformative uses. Text and Data Mining and UGC are only examples of unforeseen developments. In Germany the Federal Court of Justice had to decide twice on the legality of the display of thumbnails within image search services (Bundesgerichtshof, "Vorschaubilder I", GRUR 2010, 628; Bundesgerichtshof, „Vorschaubilder II", GRUR, 2012, 602). There is no doubt that those services are in the interest of the public as well as the right holders. Without such services images could not be found on the internet. Still the German Federal Supreme Court could not find any existing copyright exception even though the service is in accordance with the purpose of copyright to allow the creators to exploit their works, allow the users access to cultural content and to promote cultural and scientific progress. This case demonstrates clearly the need for a flexible exception clause that provides sufficient leeway to provide value added services that are socially beneficial and do not prejudice any legitimate interest of the rights holder. In regard to the two cases on thumbnails the German Federal Court of Justice found a solution outside of copyright by developing it is implied consent theory. However, a copyright internal solution is needed going forward. At the same time our concerns raised in question 27 have to be taken into account.
	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?	**answer: YES**
	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 indi-	For a flexible and appropriate reaction on new uses and for the development of innovative and useful services, the EU should consider whether the rigid catalogue of copyright exceptions in Article 5 of the Copyright Directive (2001/29/EC) should be flanked by a blanket clause. Such blanket clause could be in the style of the US-American "fair-use"-principle, even though the "fair-use"-principle should not been adopted. It has to be ensured that such blanket clause is not disproportionate regarding the interests of authors. At the same time a greater degree of flexibility should not end in a more heterogeneous landscape of limita-

	cating 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.	tions and exceptions in the EU as it is today (see more on question 21 and 22)
	26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?	**answer: YES** see our answer to question 27
	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?)	In our view especially the hardware based levy-system as a compensation constitutes problems regarding cross border trade (see in detail our answers in section IV). We would like to point out that: The definition of what is a "fair" compensation has to be based on an analysis of the actual harm caused to right holders (see our answers in section IV). Minimal harm should not give rise to a claim for further compensation. (i) The method for calculating harm should consider the value consumers attach to the subsequent copies they make, which refers to the economic utility of each copy. (ii) All decisions regarding the analysis of the actual harm require the representation of all stakeholders in the process. (iii) Copyright levies cause many problems regarding cross-border transactions and the movement of goods: First there is more distortion of competition within the EU and also in every Member State. For example in Germany high tariffs for USB-Sticks and memory cards resulting a large grey market. For collecting societies it is impossible to control all commodity flows especially in storage media (e.g. distribution via big trucks). This means a distortion of competition on the German market. Second the export of a product to another Member State leads to the problem of high administrative reimbursement schemes and often the levy is paid double at the end. (iv) Considering the many problems caused by the implementation of compensation schemes, the European Commission should present options to reform and simplify the system, which would pave the way for the abolition of copyright levies and eventually their replacement by alternative systems.

F. Access to content in libraries and archives		
1. Preservation and archiving	28a [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?	
	28b [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?	
	29. If there are problems, how would they best be solved?	
	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?	
	31. If your view is that a different solution is needed, what would it be?	
2. Off-premises access to library collections	[32-35]	
3. E-Lending	[36-39]	
4. Mass digitisation	40. [In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management	

	organisation:] Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?	
	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)?	
G. Teaching	[42-46]	
H. Research	[47-49]	
I. Disabilities	[50-52]	
J. Text and data mining	53a [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?	**answer: YES** Despite some suggestions to the contrary, text and data mining is not currently, and cannot be, subject to copyright protection. Moreover, text and data mining should not be subject to copyright protection in the future.
	53b [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?	
	53c [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?	

	54. If there are problems, how would they best be solved?	
	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?	
	56. If your view is that a different solution is needed, what would it be?	
	57. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?	
K. User-generated content	58a 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?	
	58b [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?	
	58c [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?	
	59a [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?	
	59b [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?	
	60a [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)?	
	60b [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?	
	61. If there are problems, how would they best be solved?	
	62. If your view is that a	Digital technologies have opened wonderful opportuni-

	legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?	ties for everybody to create and share content online. As a result, there is a constant shift from consumers of copyright protected works to so called “prosumers”, users who do not only passively consume copyright protected works, but instead create new content on the basis of pre-existing works and thereby actively participate in the creative process. To give an idea of the relevance: today 130 hours of video are uploaded to YouTube every minute and there are 41,000 posts a second on facebook. New digital technologies have stimulated creativity and participation online in an unprecedented manner. This process should not be hindered by an overly broad copyright. A future copyright should allow the creation and sharing of creative user generated content (that include copyright protected material). Many commentators have already claimed that the introduction of a new exception clause is needed. We agree. However, we would like to point out that this issue is broader than just an exception and will require a change in paradigm. Copyright rules that were designed with content created ‘professionally’ are at odds with today’s creativity. Already 2008 the Commission pointed out (Green Paper “Copyright in the Knowledge Economy”, COM (2008) 466 final, page 19): “Consumers are not only users but are increasingly becoming creators of content. Convergence is leading to the development of new applications building on the capacity of ICT to involve users in content creation and distribution. Web 2.0 applications such as blogs, podcasts, wiki, or video sharing, enable users easily to create and share text, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination. However, there is a significant difference between user-created content and existing content that is simply uploaded by users and is typically protected by copyright. In an OECD study, user-created content was defined as "content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices" (Participative Web and User-Created Content, OECD 2007, p. 9.). The Directive does not currently contain an exception which would allow the use of existing copyright protected content for creating new or derivative works. The obligation to clear rights before any transformative content can be made available can be perceived as a barrierto innovation in that it blocks new, potentially valuable works from being disseminated. However,

		before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rights holders of the original work. There have been calls for the acceptance of an exception for transformative, user-created content. In particular, the Gowers Review recommended that an exception be created for "creative, transformative or derivative works" (Recommendation 11), within the parameters of the Berne Convention three-step test. The Review acknowledges that this would be contrary to the Directive and accordingly calls for its amendment. The objective of allowing such an exception would be to favour innovative uses of works and to stimulate the production of added value (The Review clearly referred to "transformative use" under US law and to the example of sampling in the Hip Hop music industry. However, in US law transformative use alone is not a defence to copyright infringement. Instead, it is one of the conditions required for a use to qualify for the fair use defence under section 107 U.S. Copyright Act.)." Professional commercial usage (like TV spots including music etc.) are not part of these query and must be fully licensed including adaptation rights et al.
	63. If your view is that a different solution is needed, what would it be?	
III. Private copying and reprography		
	64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[2] in the digital environment?	**answer: YES** BITKOM thinks this question is good starting point for the discussion about private copying (levies) but has to go further to the question if the system is still justified in a digital era. To examine this we first have to take a look on the historical origin. The levy system has been invented in the 1960s where the DRM systems did not exist in a practical and affordable manner and also not in a secure environment. Distribution of copyright protected content was predominantly conducted through the sale of physical storage media (records, tapes etc.). The media and content sectors were traditionally characterized by high upfront investments, low marginal costs and high risks.

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

		The classical value chain in the music industry compulsory contained the production, manufacturing, sales/marketing, distribution and retail sales of music at a brick and mortar store. Customers had very limited technical equipment to conduct private copies of such physical storage media. In addition it was impossible to identify the user copying such content. Against this background it was seen as reasonable approach to collect compensation for the private copying exception from third parties, i.e. manufacturers and importers of the corresponding copying devices. There had been two major justifications for approaching named third parties: (i) there was no other possibility for owners of copyright protected works to receive compensation for a possible harm of the primary market and (ii) there were no technical possibilities to control copying of protected works Both key assumptions set out above are not valid anymore. With state-of-the-art DRM systems copyright owners have full control not only over the distribution, but also over the subsequent copying conducted by the user. The Internet and digitization have undoubtedly had a major impact e.g. on the music industry and the traditional value chains (see study "Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Music Industry", 2012, European Commission, Joint Research Centre, Institute for Prospective Technological Studies, Report EUR 25277 EN). Music sharing over the internet enables artists to get wider reputations and consequently more opportunities for record sales and merchandising and also more live performances with larger audiences. They can achieve this even without the help of music companies, which traditionally played an intermediary role. Social Media platforms partly replace expensive promotion campaigns. For example the song "Gangnam Style" by PSY became a world-wide hit after of over a billion views on YouTube. Digitization and the internet have thus disrupted the role of major music companies and their relationship with consumers. New bands share their music free over the internet to become prominent, gather fans and finally sell their works and reach positive spillover effects on the live music market. The same developments can be regarded in other content areas such as literature (new authors promote ebooks over platforms such as amazon without the need to find a publisher) and films. At the same time the Internet allows the right holder delivering content to consumers in the exact way they expect to receive it. It has to be unambiguously confirmed that compensation for private copying is exclu-

		sively based on harm and therefore should only exist if there is a proven substantial harm to right holders. In comparison to the world of the 1960s a "harm" by private copying to the primary market can no longer be noted. In spite of that, devices and storage media – which are often used for storing other than protected content – are no longer a suitable connecting factor for harm (what remains to be proved). We are living in a technical area where relevant copying devices can no longer be clearly defined. Mobile phones become small PCs, or tablets, TVs serve as video recorder, MP3 players do not store content anymore on a HDD but instead stream content etc. This leads to the consequence that the devices are just for play-back. Media convergence can also result in increased technical protection as in the case of multifunctional TV receivers. For example Pay TV providers in Germany offer in one product both linear and non-linear viewing with the added option of saving content. The device itself does not have the technical capacity to allow further copying or transfer, thus limiting any potential loss for right holders to an absolute minimum. Those are just some examples to illustrate that a clear definition of relevant hardware equipment is almost impossible, even if key criteria would be pre-defined on an EU level. Administrative efforts significantly increased over the years while at the same time the need for a hardware based system ceases to exist following technical improvements in the area of new business models and DRM. These facts show that the technology, the behaviour of the users, the marketing behaviour and the right holder's possibilities have changed drastically since the 1960s. Besides these developments there are several problems in the current copyright levy system which should lead to a change. There is no coherence in the way copyright levies are determined across the EU. The levies are set arbitrarily from Member State to Member State. Differences apply, inter alia, by hardware product category, by the amount of the levy, by the criteria defining the amount per category (i.e. by memory capacity or by some other applicable criteria) or even with respect to the overall mechanism of the system. Also, there is no clear guidance how to distinguish business and private customers. While it is clarified in theory that business customers should not be subject to the levy, industry and collection societies are left alone how to effectively implement necessary procedures. An effective and workable exception of B2B products does not exist across the EU and it is unclear if a practical system can be established.

		Especially the German copyright levy system contains grave deficiencies and doesn't work at all: Trade associations and collecting societies have to negotiate levies since the new Copyright Act in 2008. Nevertheless currently nearly every tariff published by collecting societies is disputed and unclear. In Germany there are court cases and negotiations for more than 20 devices or media types. Legal and economic uncertainty is the consequence for the importers and manufacturers who are involved only as a third party. Financial impact is even worse. Because of the different levies in all countries around Europe it is hardly possible to add the levy to the price of the device which was intended when the levy system was implemented decades ago. As good example for the malfunction of the copyright levy system in a Single Market may serve the rates for photocopiers: In France they are 0 €, in Germany 87,50 € (maximum levy) and in Belgium 1.838,98 € (maximum levy) per unit. Collecting societies determine tariffs arbitrarily and not on the basis of objective and reliable data. As a result importers and manufacturers as third parties have to deal with inappropriately high tariffs. Examples: German collecting societies published a levy of 36 € per unit for mobile phones. Another example is the incident that there existed a tariff for USB-Sticks and memory cards until the end of 2011 of 0,10 € per unit. In 2012 the collecting societies increased their own tariffs by 1950 % (tariffs up to 1,95 € per unit) without giving any reasons. Occasionally collecting societies publish tariffs for years retroactively. In the case of mobile phones they increased an already published tariff retroactively. In such cases the levies cannot be passed on to the end customer who has already purchased the product with the consequence that the purchaser has the economic damage. The different levy systems within the EU and the inability of the collecting societies to control the market lead to a menacing grey market and therefore distortion of competition. Regarding the missing implementation of the ECJ-Padawan-Decision and the problems with cross border trades we indicate to the following answers. Such diverse copyright levy systems with corresponding failures are clearly against the single market principle, affect cross border trade and contradict the underlying assumption and requirement that copyright levies should compensate harm caused to the authors of protected works. We believe that this fundamental issue cannot be fixed

		by some adaptations to the digital environment. A hardware based levy system would at all times remain highly affected by technical developments and new business models. Such developments are always faster than a regulatory framework could adapt to it. Consistency would never be achieved. The private copying exemption as a principle has been used as a balance of interests between stakeholders since decades as it is relevant for many business models and consumers. However, the current legal framework for private copying compensation considers the developments of the digital age completely insufficiently. The framework must be changed in a way that it is clarified that new business models and the vast possibilities in the digital world allow an appropriate compensation of right holder and that alternatives to the hardware based levy system have to be examined, in cases where a relevant harm can be observed (for further details see answer to question 71).
	65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by right holders, and where the harm to the right holder is minimal, be subject to private copying levies?[3]	**answer: NO** Licensed copies cannot be subject to private copying compensation. BITKOM agrees with the conclusion reached by the European Mediator, Mr. Antonio Vitorino, in his recommendations to the European Commission, according to which online content services should not be subject to levies. As the Mediator effectively summarized: "The opposite view would pave the way for double payments. Consumers cannot be expected to show understanding for such double payments." From a legal point of view, the private copying exception only applies in circumstances where right-holders cannot practically authorize the relevant acts in exercising their exclusive rights. In other words, whenever there is no market failure and the reproduction right can be exercised effectively, the private copying exception is no longer justified and does not end up limiting the scope of the exclusive right of reproduction. Wherever a right-holder authorizes an activity, in exercising her exclusive rights, no claim for fair compensation arises since the person performing that activity (i.e. the subscriber of an online content service) is a licensee, and not the beneficiary of an exception. Fair compensation cannot be claimed where all the relevant acts have been authorized by the relevant right-holders in exercise of their exclusive rights, for example in the case of an e-commerce transaction for a digital download service or in the case of a waiver-type license such as Creative Commons license,

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

		where the right-holder chooses to allow his works to be copied freely. The shift from ownership to access models for online content distribution is increasingly relevant, both technically and commercially. These models have developed well with regard to music and audiovisual works. An equally significant change can be observed in today's book publishing business, where there has been an increasingly important shift from book sales towards e-books made available under a license agreement. Licensing could become the prevailing business model in the near future for a large share of books for which private copying is compensated by levies nowadays. It is important to recall that the case law of the CJEU has already acknowledged that fair compensation is only applicable when copying itself has not been authorized by right- holders, but is made by the user under the relevant exception. In particular, the Padawan judgment explicitly provides that fair compensation occurs in case of making private copies without the authorization of the right-holders. Finally, recital 35 of the Directive 2001/29 describes the legal relationship between licensing schemes and the private copying exception which underlines the aforementioned: "In cases where right holders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due. (…) In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise."
	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 righ holders' revenue on the other?	First of all it seems incomprehensible to extend the levy system which is not functioning in the offline world to online services. Secondly there is no justification to extend the levy system on cloud services. The Vitorino report clearly indicates that the attempts to broaden the interpretation of the private copying exception not only are to the detriment of right holders and legal offers based on licence agreements, but are also legally questionable and should not be supported. Right holders already receive compensation for licensed content in the framework of licensing contracts between right holders and users (see answer to question 65). As already pointed out above, compensation for private copying is exclusively based on harm and therefore should only exist if there is a proven substantial harm to right holders. While there is no limitation or exception for the usage of new services such as cloud services, the assessment if harm exists, has to be

		made. Concerning cloud services such harm cannot be noted. Applying the unfair copyright levy system to cloud services would result in unjustified triple payment by consumers (for the licensed content, for the connected device, and for the cloud service). Further the user behaviour in the context of online services shows clearly that not copying is the relevant usage but streaming. If no copies are made there is no justification for levies. One of the main advantages of cloud services is their global nature, therefore imposing territorial/national levy systems on global services seems unfeasible and absurd, especially considering the principles of the Single Market. Further it will practicably impossible to levy cloud services acting outside of Europe. As consequence only European services would be obliged to pay with the consequence that they will be encouraged leaving Europe. Cloud computing allows easier access to digital content for consumers and provides artists with new distribution models. In the digital era, consumers need to be able to access digital content from several connected devices at all times and from anywhere. European consumers and internet users would be the first victims of the imposition of levies on cloud services since prices would most certainly raise because of levies. Companies of all sizes, which are increasingly using cloud services, would also face this consequence. Imposing levies on cloud services would also have negative impact on European cloud service providers, as the obligation to pay levies added to new administrative burden would significantly limit their competitiveness in the global market. The negative impact on new business models would be immediate, as levies would raise prices and thus limit the attractiveness, competitiveness and future development of business models based on new technologies. From a practical point of view it would be hardly possible to differentiate between cloud services offering only or partly copyright protected content and services offering no protected content. As consequence every cloud service would have to pay a levy independently of what they are offering. This would be like a tax on cloud services which is unacceptable. Competitive disadvantages and legal uncertainty would be the outcome.
	67. Would you see an added value in making levies visible on the invoices for products subject	**answer: YES** Copyright levies are comparable to a hidden charge for the consumers. End users have to pay for private copying but in most cases are not aware of the levy.

	to levies?[4]	Therefore it is inevitable to introduce a system which ensures highest possible transparency for the end users. It is incontestable that more transparency in copyright levy systems has to be achieved. However it seems to be challenging to find the right way. Making levies visible on the invoices for products is one possibility. Nevertheless there will be high practical difficulties in implementing this option.
	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? If 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.	**answer: YES** For many years cross-border transactions are increasing significantly. Regarding levies this means that for a device which is brought to the market in country A and then exported to country B the levy has first to be paid in country A and then in country B. In parallel the importer to country B can try to get back the levy he paid for the device in country A. This refund process doesn't work in practice. Partly it is in several cases hardly possible for the importer to country B to prove that the levy was already paid or if he is able to do so Collecting Societies need months or even more than a year to pay the levy back. The outcome of this is that in several cases double payment arise with the consequence that companies try to avoid distribution channels via countries with (high) levies and finally that the black market increases. We like to point on the Amazon-Decision of the ECJ where the Court stated (C‑521/11, 65): "However, a person who has previously paid that levy in a Member State which does not have territorial competence may request its repayment in accordance with its national law." This reimbursement obviously does not work.
	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.).	Sales to professional users must be excluded from private copying levy schemes. Users that do not benefit from the exception cannot be requested to advance a levy payment and then incur risks and costs to get a refund, especially inasmuch as disadvantages caused could exceed the advantages of the refund and could act as a disincentive to even file a claim for reimbursement. It can be presumed, that the most reimbursement systems for professional users are not compliant with the CJEU judgment in the case Padawan v. SGAE and the principle of proportionality. With a particular focus on the German market it is important to note that there is no efficient and workable solution to differentiate between private and business use of a hardware product which is subject to the levy.

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

		In the other countries the situation is the same. Many products qualify as adequate B2C and B2B product at the same time. A clear differentiation by product type would only be possible in exceptional cases for dedicated B2B products (e.g. A3 printing devices). For the vast majority of products it is rather a marketing decision of the manufacturer how to classify them and it depends on the type of end-user and the usage which device will be bought and finally used for private copying or not. For this reason a classification by product type is not an adequate criterion for the whole market. At the same time there are massive practical hurdles to differentiate for individual sales along the supply chain. Many manufacturer sell specifically B2B products through multilevel distribution. It is almost impossible to document on each level whether or not a levy has already been paid in order to allow for an effective claim for refund by the B2B customer. Also the importer of the product does not know who is the ultimate purchaser and the end-user of the product and is therefore required to report and pay full quantities sold to the overall market. The only one in the chain who knows to whom a product is sold and who could differentiate between B2B and B2C is the last purchaser who sells it to the final customer. Against this background it is currently common practice that B2B customers effectively bear the full burden of the levy without justification. The percentage differs by product category. By way of example it can easily reach up to 50 % which is the documented B2B share for PCs (EITO ICT Market Report 2013/14).
	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?	Please see response to question 69. In addition it has to be said that the existing systems in Austria, France and the Netherlands don't work because of multiple reasons. First off all many market participants are not aware of such a system. If they are aware of it the problem is that the systems are too complex. The example of France, where such a system is officially in place, is particularly telling. When replying to a written question of a member of the French Parliament on July 30 2013, French Minister for Culture Ms. Aurélie Filippetti acknowledged that by May 14 2013, Copie France had only received 294 requests for reimbursement for business use. Of these, 176 were accepted and 118 were rejected. (The full text of the question and answer can be found on the following link: http://questions.assemblee-nationale.fr/q14/14-23672QE.htm). Until June 4 2013, the total amount reimbursed to professional users was €167.971, namely €67.000 for

		2012 and €100.971 in 2013. It has to be noted that according to market research data each year a total reimbursement of €40.000.000 should take place; instead only €67.000 was reimbursed in 2012. This huge discrepancy illustrates the inefficiency of the French reimbursement system. Also in Austria the refund system doesn't work and is actually subject matter of the Amazon litigation case. Actually the case is back again at the Court of Instance in Austria. This result shows clearly that the reimbursement system doesn`t work with the consequence that commercial users are paying a levy although the ECJ clearly stated that in case of only commercial usage no levy is due. In Germany IT-industry actually tries via a general agreement to build up a more differentiated and practicable system to differentiate between consumer and commercial used devices. But the technical parameters laid down in the agreement bring so much administrative burden to industry and also to Collecting Societies that is almost impossible to implement it in the way theoretically foreseen. Three years of negotiations showed clearly that the levy system as it is now is not practicable and any try of implementation costs each party concerned lots of money. Besides the huge administrative and financial burden for the parties concerned another consequence is that the real beneficiary – the right holder – will get less compensation as he would get if an effective system would be in place.
	71. If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?	The statements above show clearly that the levy system does not work in the digital age, have to be phased out and replaced by an alternative system. This can only be done by looking on the user and his behavior. It needs to be clear that levies are due only on copies that fall within the private copying exception and not on licensed copies or illegal copies. Further the compensations must depend on the harm to the right holder. So an alternative would be to establish an exemption based on the "fair use-principle" meaning that private copying is allowed in a limited scope and the rights holder gets his compensation via the price of the purchase and no further compensation is due. If there would be the decision to compensate the right holder in an additional manner – a kind of additional "subvention" – then the question of the way of financing arises. One possibility could be a payment of fair compensation through a State fund. This alternative system, which is already in place in Norway and Spain, is more effectively with less administrative burden and without disadvantages for third

		parties like manufacturers and importers than the hardware based levy systems in place in other Member States. It must also be pointed out that the new Spanish system has had a significant impact for consumers in terms of the price evolution for devices. Indeed there has been a remarkable decline in the price for audio-visual, photographic and information processing equipment, between December 2011 and February 2013, according to official data published by INE and EUROSTAT (HICP (Harmonized Index of Consumer Prices), "Audio-visual, photographic and information processing equipment") and publicly available. In the period December 2011 - February 2013, prices for the above mentioned equipment decreased by 12,01% in Spain. Another possibility of financing a "subvention" could be a user related fee similar to a broadcasting fee per user or household. In this case the jurisdiction of the ECJ could best be implemented because then it would be the private user who would be obliged to compensate right holders for the harm caused by copying their works. In summary, it can be stated that current private copying levy systems are not fit for the digital age and require significant reform as transitional measures toward the development of alternative compensation mechanisms as mentioned above. Such alternatives have to be discussed in the ongoing Commissions discussion on copyright in the digital era.
IV. Fair remuneration of authors and performers	[72-74]	
V. Respect for rights		
	75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?	The Directive 2000/31/EC on E-commerce gives relevant and sufficient measures to act against copyright infringement and to take adequately account the risk and the damage caused by copyright infringement. However, instead of disproportionate actions against users (comparable with the recent "redtube"-case http://worldnews.nbcnews.com/_news/2013/12/13/21891592-20000-porn-watchers-addresses-mistakenly-released-in-german-court-lawyer?lite) the civil enforcement system in the EU should focus on measures against professional infringers (e.g. provider of copyright infringing downloads or streams) which services are a necessary condition for any copyright infringe-

		ment by users. In this context, the revision of the structure and the working methods of investigating authorities is a very useful measure. To make enforcement more effective, expertise and experience of member states should be professionally and locally pooled. Further, the EU should intensify international cooperation for the enforcement in the case of copyright infringement on the internet. The respective illegal provider and their server are often located in countries outside of Europe. They prevent an effective enforcement by the anonymous or pseudonymous use of hosting and payment services. That intensified international cooperation is the right way, however, is evident shown in the successful enforcement against “kino.to”. Furthermore, the successful shutdown of “kino.to” had an international signaling effect that led to “voluntary” shutdowns of comparable illegal services. Though, international cooperation in the prosecution of copyright infringement on the internet should not be confined to such individual cases, but should be of a broad approach against illegal content. Since most of the illegal services seek profit from the placement of advertisement, the EU should in the context of illegal cooperation discuss measures to prevent high advertising revenues for such obvious illegal services.
	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?	In assessing the role of online intermediaries in IP enforcement, we believe it is essential to strike the right balance between, on the one hand, protecting intellectual property, and, on the other, not placing unreasonable expectations on online intermediaries. The Commission points out in footnote 67 of the consultation, that any clarification should not affect the liability regime of intermediary service providers established by Directive 2000/31/EC on electronic commerce. This clarification is very important, as the liability regime continues to provide for a fair balance between all concerned fundamental rights and parties. When it comes to ISP’s the cooperation of internet service providers is possible on a sufficient scale already under the current Directives. The e-commerce Directive provides for a notice and take down regime for host providers. The IPR enforcement Directive provides for the right of information and ISP's face interlocutory and permanent injunctions. Both directives together achieve the necessary balance: the IPR Enforcement Directive (and corresponding provisions in the InfoSoc Directive) provides for injunctions against intermediaries whose services are used by a third party for any proven IPR infringement,

		and lays down the minimum legal conditions that must be adhered to by national courts when formulating injunctive measures; and the e-Commerce Directive ensures that such injunctions cannot result in general monitoring obligations. We do not feel that a legislative approach is warranted at this point, but would welcome clear guidance to EU Member States to ensure the correct implementation of the existing legal framework. It is in the application by national courts that we see a need for guidance on the circumstances in which injunctions against internet intermediaries are appropriate and how the scope of such injunctions must be cabined. In the past three years the European Court of Justice has explicitly dealt with the possible scope of injunctions against internet intermediaries (e.g. C-324/09 "L'oreal./.eBay"; C-70/10 "Scarlet Extended", C-360 "Sabam/Netlog") and made clear that such injunctions need to be very specific with regards to the measures to be taken by intermediaries and must not merely be success oriented. For example general filtering systems installed for the prevention of copyright infringements were held disproportionate. However, such decisions and clarifications have not been taken into account by some of the EU Member States' highest national courts. For example, the German Supreme Court has upheld and even tightened its case law against internet intermediaries based on the assumption that general and success oriented injunctions are legitimate as well as the setup of general filtering systems and a general duty to manually compare pictures by the intermediary for the prevention of copyright infringements (Bundesgerichtshof, I ZR 216/11 of 16.05.2013 "Kinderhochstühle im Internet II"; Bundesgerichtshof, I ZR 57/09 of 17.08.2011 "Stiftparfüm"). If the Commission does opt to reopen the IPR Enforcement Directive, we would urge it to introduce clarifications to ensure that the scope is adapted to the technical and commercial realities in which intermediaries operate, and to take into account the interests of businesses and consumers who rely on the services of intermediaries. In particular, it is important for national courts to understand that injunctions must be narrowly defined and should only play a very limited role in the fight against IP infringements online. Any approach to policymaking in this area must recognize that the most effective way to deal with IP infringements is through cooperation between all stake-holders. Having this in mind, BITKOM suggests to foster cooperation with advertising brokers and the like preventing that service provider with obviously illegal content

		profit from high advertising revenues. Finally in this context, we would like to highlight one cite of Neelie Kroes, that for an economic success of the right holders in exploiting copyright protected content is not only crucial the enforcement of rights against users and intermediaries but first and foremost the availability of the content to users from legal sources. Neelie Kroes rightly called upon the film industry: „The digital age isn't a threat to the film industry, neither to cinemas nor broadcasters. It's not something to be ignored; still less something to be fought, tackled, legislated against. But it's an opportunity: something to be welcomed, supported, embraced. […] I want a framework that limits piracy not simply through ever more aggressive enforcement, but by making it easier for people to get what they want, instantly, on-demand and legally; without facing frustrating, artificial barriers." (http://europa.eu/rapid/pressrelease_SPEECH12704_en.htm?locale=en) Right holders should focus on how to increase offers and consumption of legal content. Attractive offers are key to increase of legal consumption. As an example, films should be made available much sooner after the theatrical release date. This requires a rethinking of the release windows mechanisms. In a recent study published by Spotify one of the questions was examining the impact of holdout strategies on sales and illegal torrent volumes. The result was that “artists who delayed their release on Spotify suffered higher levels of piracy than those who did not”. (Spotify report: Adventures in the Netherlands: Spotify, Piracy and the new Dutch experience). The availability of the most recent content from legal sources online would therefore be a very effective tool to reduce copyright infringements
	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?	Copyright infringement damages the creative industry and affects cultural diversity. It is difficult to numeralise the extensive commercial damage caused by copyright infringement. Copyright infringement makes the refinance of services very difficult for right holders. The money which is lost by copyright infringement is missing for investment in new business models and for sponsorships of secondary growth and of talents. The state also loses tax revenue by copyright infringement. This having in mind the Directive 2000/31 strikes a reasonable balance between the different interests at stake (Recital 41). In regard to the safe harbor provisions (Art. 1215) the interests of the service providers, the interest of right holders as well as fundamental rights of users are at stake. Art. 12-15 provides a flexible regulatory framework that enables courts as prov-

		en in case law of the CJEU to find a reasonable balance of the involved interests. However, in a Working Paper (European Commission, Commission Staff Working Document, Online Services, including Ecommerce in the Single Market, SEC 2011, 1641 final, page 25 et seq.) the Commission has identified four areas in which more clarity in regard to the interpretation of those safe harbors is needed: (i) activities covered by Art. 12-15 ECD, (ii) the conditions under which a provider can rely on Art. 12-15 ECD, (iii) form of notice and action procedures, and (iv) significance and scope of prohibition in Art. 15 ECD. Indeed more clarity in those areas is needed. It is important to avoid wrong incentives and chilling effects by placing too far reaching obligations on intermediaries. Reasonable notice-and-take-down-procedures could provide efficient remedies for right holder as well as legal certainty for intermediaries. As mentioned the CJEU has provided relevant guidelines how to interpret the Directives in the light of the Funda-mental Rights enshrined in the Charta (e.g. Cases C 70/10 "Promusicae", C 275/06 "SABAM"). The CJEU has stipulated the necessity to strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals, who could be affected by enforcement measures. The latter are the freedom to conduct a business enjoyed by operators ISPs pursuant to Art. 16 of the Charter and the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Art. 8 and 11 of the Charter. In the context of the right balance we would like to high-light another crucial aspect concerning the application of the Right of information of the IPR enforcement Directive, which is particularly relevant with regard to the protection of personal data. Adequate and effective measures like the right to information in terms of the E-Commerce-Directive are more than necessary to decrease the damage of copyright infringement. However, Germany has implemented in § 101 II and IX of the German Copyright Act, that the Right to Information can only be claimed in the framework of a judicial proceeding (according to Art. 8 IPR Enforcement Directive). The practical knowledge shows the utmost importance of such regulation. The involvement of a judge ensures the right balance between data protection rights and the right to information of legitimate rights owners. This is very important as very often the personal infor-

		mation obtained by the Right to Information is used to address a written warning letter asking to cease the wrongdoing and to pay for the damage occurred. In case the addressed alleged infringer returns the signed declaration to cease and desist and does pay the demanded damage a further judicial proceeding is not taking place. It has severe consequences in case the access provider has to judge himself whether the rights owner has the right to sue or not and as a consequence is claiming legitimately the data requested. Very often the examination of the right to sue is very difficult, due to complex licensing systems.
VI. A single EU Copyright Title		
	78. Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?	**answer: YES** We can agree with such initiative as long as it is guaranteed that national providers are not impaired by a single EU Copyright Title.
	79. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?	
VII. Other Issues		
	80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.	**Cable retransmission in terms of the Satellite and Cable Directive 93/83/EEC:** The technical development has led to new transmission platforms with regard to the distribution audiovisual content. For example a retransmission of live TV channels over the Internet and mobile communication networks on stationary devices (e.g. Settop-Boxes, PCs) as well as on mobile devices (e.g. Tablets, Smartphones) is possible. The Satellite and Cable Directive 93/83/EEC and the national laws (e.g. Section 20b German Copyright Act / Section 144A of the Copyright, Design and Patent Act

		1988) which have been implemented by the member states in order to comply with the Directive have the intention to facilitate the acquisition of the cable transmission right by cable operators (e.g. acquisition of the rights from a single source (collecting societies), the licensing of the retransmission right cannot be prevented or blocked by an individual copyright holder, same terms and conditions for all market participants, obligation to contract). However, in Germany in terms of Section 20b of the German Copyright Act it is controversial, if the simultaneous, unaltered and unabridged retransmission of an initial broadcast via a transmission path which is not cable or microwave (e.g. via the Internet or mobile communication networks) is covered by Section 20b of the German Copyright Act. The crucial point of the dispute is the question, if Section 20b of the German Copyright Act has to be interpreted in a technological neutral way. In Germany, the District Court of Hamburg denied in the so called "Zattoo Case" in 2009 (Decision from April 8th, 2009 (AZ 308 O 660/08) the applicability of Section 20b of the German Copyright Act with regard to the transmission of live TV channels over the Internet, although the transmission was done over a cable system. In our view there is no obvious reason, why similar services (the transmission of live TV channels to end user for reception on end user devices) should be treated in different ways. The interest situation between a traditional cable operator and an Internet Service Provider is identical. The specific transmission path (e.g. Mobile Networks, Internet) should be irrelevant. All cases where a live TV Channel is transmitted simultaneous, unaltered and unabridged should be considered as a "cable" retransmission within the meaning of the Directive. The legal situation in Austria is clear since the Decision of the Austrian Oberstes Gerichtshof from August 28th, 2008. (Ob 89/08d). In this decision the court made clear, that the wireless retransmission of live TV Channels over mobile networks on mobile devices has to be considered as a "cable retransmission". Although Section 59a UrhG of the Austrian Copy Right Act is based on the same Directive, different legal opinions exist in Europe. Therefore there is an urgent need to clarify on a European level that the Directive has to be interpreted in a technological neutral way in order to ensure, that scenarios (e.g. retransmission via the Internet / Mobile Networks), which are comparable with the traditional

		cable retransmission, are treated in the same way with regard to the acquisition of the rights. Otherwise, it will be difficult to establish cross border TV services in Europe. **Orphan Works:** We welcome the Directive 2012/28. However, the directive will not achieve the goal of endorsing the digitisation of orphan works unless rules are introduced that support public private partnerships. Immense investments have to be made for the digitisation. Therefore, it is necessary that the beneficiaries may generate revenues. Recital 22 of the Directive shows that the European Union is aware that mass digitisation is impossible to achieve without private partners. They have the knowhow and resources to manage such projects. No private partners will join such projects if no incentives are offered to them. So far the Directive contains no incentives for private parties to engage in digitisation projects since the Directive currently does not provide for private third parties to get rights to use the resulting digital copies. Moreover, the range cultural heritage protected by copyright and/or neighbouring right cannot be limited to writing or audiovisual works. A large number of photographies are orphan (the British Museum outlined that a right holder could not be identified in 90% of the photographies stored in its archive). Valuable heritage is vanishing in archives.