Public Consultation
on the review of the EU copyright rules

I. Introduction

A. Context of the consultation

PLEASE IDENTIFY YOURSELF:

Name:

Design and Artists Copyright Society

Register ID number:

TYPE OF RESPONDENT (Please underline the appropriate):

- **Representative of authors/performers**
- **Collective Management Organisation**
- **Other** (Please explain):

……

……

II. Rights and the functioning of the Single Market

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

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?***

□ NO

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

□ NO

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

Nearly all licences DACS issues are of a multi-territorial nature. DACS operates as part of a network of associated societies through reciprocal representation. The network currently subsists of 32 collecting societies in 28 countries worldwide, whereby most of the Member States of the European Union are covered. Members join the network granting the relevant society worldwide rights which enables the societies belonging to the network to grant multi-national licences. The network is therefore in a position to operate on a multi-territorial basis which benefits consumers as well as commercial users of copyright material who can choose which society of the network they would like to approach and to license the use of the members' works on a national, European or international basis. Most importantly this system also ensures that rights holders receive the remuneration they are entitled to.

It is important to note that the copyright holder as the owner of the exclusive rights is generally at liberty to limit the scope of the mandate granted to a collecting society, including limitations on the basis of territoriality. In this instance, the mandated collecting societies would respect such limitation. DACS currently issues around 2,000 individual licences per year most of which are of a multi-national nature and all of them allow for free circulation of the licensed products within the EU.

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

DACS has not identified any problems.

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)?***

□ NO, not from a copyright perspective.

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)?***

□ NO

When licensing rights to broadcasters or service providers DACS does not impose territorial restrictions and has not been made aware of any difficulties or complaints about licensed content restricted by broadcasters or service providers.

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

□ NO, not in the area of copyright law where market-led solutions are being developed and deployed by the industry on a continuous basis.

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

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

□ NO

The "making available" right is not sufficiently clear, especially in a global context. Nevertheless the EU should ensure the possibility of licensing and should not introduce any changes to interfere with this.

We do not believe that the "country of origin" or the concept of "targeting" are on their own effective ways of adding clarity to the "making available" right. Targeting is irrelevant to whether the site is prejudicing the rights of rights holders. Both the language and currency of the content or accompanying adverts on a site do not dictate the overall audience. This means that even if the website is targeting a certain territory, access is generally not restricted on this basis. Additionally, the country of origin principle on its own would enable users to evade licensing models by moving servers into countries with no or reduced copyright protection and where the EU does not have jurisdiction over the relevant 'country' or infringers.

We therefore believe it is necessary to clarify that "making available" takes places in the country of upload and the countries where the content can be accessed, to avoid creating loop holes to the detriment of rights holders.

The fact that the Internet is global and the "making available" of copyright protected content therefore usually occurs on a worldwide basis means that any solution must take into account the global phenomenon of online access. This cannot be achieved by assessing the situation with a focus on Europe alone, as this would risk European rights holders losing out in a global context.

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])?***

☐ YES

As outlined above the clarification of the territorial scope of the "making available" right will have an impact on the recognition and enforceability of rights. The outcome of this clarification could have a detrimental effect on the position of rights holders, especially if users of copyright protected content are free to choose the jurisdiction as the place in which the works are made available and whose laws apply. In order to guarantee rights holders a meaningful scope of protection in the online environment it is important that the "making available" right will be determined by both the laws of the country of upload and the laws of the countries in which the content can be accessed.

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

☐ NO

The licensing of multiple rights together is standard practice and accommodated by the majority of DACS' licences.

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

☐ YES

There should be a clear distinction between hyperlinking to work that amounts to infringement and hyperlinking to work that does not: in the first instance, the exception under Article 5(1) of the Copyright Directive is sufficiently clear.

Hyperlinks should be subject to prior authorisation where the hyperlink takes users to illegal content, or where it directly or indirectly enables the provider of the link to gain commercial advantage which the rightsholder would not have been aware of when granting original permission.

Whilst the recent decision in *Svensson*[2] goes some way to address this issue by carving out that a user will not infringe copyright where the content is "freely available", it remains to be seen what "freely available" means and whether this could be interpreted to bypass, e.g. contractual restrictions.

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

☐ YES, in particular where the temporary reproduction on the screen and in the cache substitutes a more permanent download. Technological development is leaning towards a

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

[2] Case C-466/12, *Nils Svensson & ors v Retriever Sverige AB* [2014]

model where works are accessed temporarily without making permanent copies on the user's hard drive but access is still possible at any time chosen by the user. In these cases temporary copies are substituting the permanent download and should be subject to the authorisation of the rights holder, whose legitimate commercial interests would be jeopardised if cache memory starts to substitute permanent downloads and reproductions of works.

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)?***

☐ NO

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.***

Any use of digital content does not generally deteriorate or negatively affect the quality of that content unlike in the offline world. On the contrary, any digital copy can in theory be as "original" as the very first one. To enable the onward sale of digital content and to apply the doctrine of exhaustion would significantly interfere with the market of the original rights holder. This is because the officially retailed digital copies would in no way be different to the secondary market of "used" digital content. Though having used the item for what it was intended, it would be cheaper as it will have lost value to the original purchaser i.e. read the book, watched the movie, printed a poster or made private copies of it. The marketability of the content would have significant implications for the rights holder whose remuneration often depends on the numbers sold and who has no visibility on any copies having been made before resale. Also, in an online environment it would not be possible to restrict the doctrine of exhaustion to the internal market driving sales to external large scale suppliers. Additionally, in the visual arts there are new emerging markets that are largely based on selling digital editions and a legal framework that allows for the unrestricted reselling of such items would significantly interfere with these new and emerging business models: see for example Sedition, *www.**sedition**art.com*.

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?

☐ NO

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

We understand that an EU wide system of registration may have possible advantages, such as making it easier to identify rights holders and facilitate licensing, however we do not believe that this should in any way introduce a system of mandatory registration in order to gain copyright protection, which would be against obligations under international treaties.

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

We believe that the service we provide to our members as a collecting society encompasses the remit and the advantages of registration, as members are effectively registered in terms of licensing and being identified as rights holders. An additional layer of registration on an EU level will not only undermine the work we do for our members, but also cause confusion to members and non-members alike.

Technology also assists in identifying works as increasingly online content contains a digital fingerprint. Furthermore, any 'orphan works' will be dealt with by the Orphan Works Directive, and therefore EU level registration would once again cause undue confusion to both our members and the artist community.

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

None.

D. How to improve the use and interoperability of identifiers

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

Identifiers are essential to a Collective Management Organisation (CMO)'s ability to operate efficiently and transparently. We believe the European Commission should dedicate more time and money into projects with agreed international standards that facilitate populating databases; and, through DG Comp and DG Markt, engage with web publishers in respect of preventing stripping metadata and encouraging the voluntary adoption of the UK Copyright Hub. CMOs need to be able to use such standards to optimise their distribution activities in line with the Collective Rights Management Directive. We support the notion of a feasibility study on the interface of international standards (International Standard Name Identifier and International Standard Text Code) with private databases of CMOs.

E. Term of protection – is it appropriate?

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

 YES, DACS believes that the current terms of copyright protection, in particular the term life of the author plus 70 years, are appropriate and provide for a valuable incentive to create and disseminate work. In cases where shorter terms currently apply a harmonisation upwards should be pursued. The current term enables creators to provide for their families and beneficiaries in ways that are comparable to other industry sectors. In the area of visual arts in particular, artists are often supported substantially by their families to enable them to create their works and this investment is rewarded through the potential of earning royalties from the use of the works for a limited time. According to a study conducted by DACS in 2010 the median wage of visual artists in the UK is £10,000, which is substantially less than the median wage in the UK of £21,320 (www.dacs.org.uk/latest-news/artist-salary-research).

III. 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?

 NO. Although Member States have the flexibility of implementing the principles enshrined in the optional list of exceptions in the Directive, national legislation continues to be bound by the Berne Convention three-step test[3] regardless, which levels out the legal landscape in the

[3] Article 5(5) InfoSoc Directive 2001

Member States. Therefore, we do not believe that optional limitations and exceptions are problematic on an EU level.

We believe that the list of limitations and exceptions are respectful of the cultural differences and diversity between each Member State and this should be maintained to support cultural diversity.

Furthermore, exceptions should not be used as a way to circumvent licensing solutions, which if rolled out as mandatory across Member States would disparage licensing as a correct and effective way to conduct business across borders.

We also believe the EU must maintain the principle of subsidiarity as laid out in Article 5(3) TEU insofar as it shall respect the competence of each Member State to efficiently achieve its objectives under national law.

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?

□ NO, see above. The current level of harmonisation is sufficient.

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

□ NO

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?

□ NO

We believe that there is already sufficient flexibility in the EU regulatory framework for limitations and exceptions. Fair dealing exceptions are well established and have been adopted and further defined by national legislation as well as on a European level through case law. To introduce wider concepts, like a fair use doctrine as found in US law would unjustifiably widen the scope of fair dealing in a way which would require case law to establish the meaning. The fair use doctrine in the US is likewise bound by certain factors established through a substantial body of case law, which do not exist in Europe. This would unjustifiably prejudice the situation of rights holders who would need to establish the exact extent of such a doctrine. It would also lead to uncertainty amongst users who would not know if uses would be covered by such a doctrine. Ultimately this could risk having a dampening effect on the economic development of this sector of the creative industries.

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

As outlined above we do not believe that the current system requires increased flexibility as it already provides for flexibility and the potential to adjust the application of certain exceptions through national legislation and case law which takes into account recent developments.

The Directives are subject to sufficient reviews and any re-opening of such legislation and the underlying concepts would only lead to increased uncertainty that would have a negative economic effect.

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

☐ NO

As mentioned in our response to question 21, subsidiarity is an important aspect of EU law and therefore the territoriality of limitations and exceptions are intrinsic to EU law.

While we do believe that more can be done to educate users on whether limitations and exceptions apply for them, we do not believe this education will come from legislative changes but instead from non-legislative initiatives.

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?)

The compensation and the collection of fair remuneration should happen in the territory in which the licence or permission is granted and the collecting society responsible in that territory should take this cross-border effect into account when distributing through their networks. For example, Germany realises fair remuneration for private copies through a blank media levy. Although the UK copyright system does not yet recognise a private copying exception, UK citizens when travelling to Germany may purchase blank media (memory card, paper, CD ROM, etc.) and therefore pay the levy and also make private copies of German works but potentially also works by British artists. DACS receives remuneration from its German counterpart VG BildKunst from these levy collections therefore addressing the cross-border effect of these exceptions and limitations.

A. Access to content in libraries and archives

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

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

☐ NO

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

Not applicable

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?

Not applicable

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

Not applicable

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

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

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

DACS has an agency agreement with the Copyright Licensing Agency (CLA). The CLA negotiates agreements with libraries so that they can provide remote access for internal, personal and non-commercial uses. For example, the CLA signed a licensing agreement with the British Library on International Document Delivery. This addresses these types of uses and provides solutions to specific use requests, through industry-led solutions, which makes legislation at EU level unnecessary.

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

Stakeholder dialogues and industry-led development of solutions that balance the need of users and the rights of rights holders. A successful example of this is the recent Artist's Resale Right Stakeholder Dialogue which resulted in universally agreed standards to which all parties could commit.

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

We do not believe that legislative solution should be imposed at a European level and believe that industry-led solutions should be endorsed.

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

There is no need for a different solution, as outlined above any such solutions should be industry-led.

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

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

(c) *[In particular if you are a right holder:]* ***Have you negotiated agreements with libraries to enable them to lend books or other materials electronically, including across borders?***
 NO. This is still in development and requires a collaboration between rights holders, named institutions and users; as any such business model will have implications on established markets and therefore have a detrimental effect on the economic development in this area. However, we do not believe that legislation at European level is needed to address this situation.

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

We have not encountered any problems yet that cannot be addressed through appropriate licensing solutions.

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

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

Not applicable

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

The traditional library model and the traditional publisher/rights holder model do not overlap with one another. However, when it comes to e-lending, this is no longer the case as selling access to copyright works, rather than physical copies, is an essential part of the business model in the digital environment for publishers and rights holders. Therefore library e-lending conflicts with this normal exploitation of the work and will prejudice the rights holders' ability to monetise the sale or use of their work. We believe that standards should be set for e-lending remuneration and that a tariff system should be tied to the quantity of copies available for lending. This will help overcome the issue that arises from the fact that digital copies can be made in abundance and that they suffer no deterioration through copying.

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?***

□ NO, firstly the EC has not made its proposed solution for cross-border accessibility known.

Secondly, the MoU only concerns out-of-commerce works and does not address cross-border accessibility as this would require extended collective licensing solutions rather than an understanding to make out-of-commerce works available. This should be addressed on a national level and not be regulated at European level.

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)?

□ NO

B. Teaching

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

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

□ NO

We believe that the phrase 'for the sole purpose of illustration for teaching' provided in Article 5(3) (a) InfoSoc Directive sufficiently and accurately represents the limited scope for the exception. Any dilution of this wording to produce teaching materials or to circumvent available licensing solutions for more commercial uses of copyright protected content should be expressly forbidden.

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

We would prefer clarification that the wording does not allow for the reproduction, making available and distribution of teaching material, which is licensed by rights holders.

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

DACS provides licences for print or digital use, which facilitates the use of content for teaching. Furthermore, the CLA also provide a range of licences for education which we believe to be comprehensive and successful. DACS is also a member of the Educational Recording Agency (ERA) which provides licences for educational establishments for the recording of broadcasts, both analogue and digital. The ERA licensing scheme operates on the back of an exception that allows for the recording of broadcasts for teaching purposes where no licensing scheme for such uses exists and therefore provides a comprehensive solution for users of such materials.

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

□ NO, we do not believe that a legislative solution at European level is needed.

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

□ NO

C. Research

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

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

□ NO

We believe the solutions in national laws that DACS is aware of are sufficient. However, we do believe that the exceptions would benefit from a universally applicable definition of non-commercial, as this is a constant topic of debate and creates uncertainty.

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

Where such problems exist, these would in our opinion be best addressed through licensing solutions that can be sufficiently flexible to take into account the nature of the specific uses.

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

As outlined above, where specific uses are not already covered by existing exceptions, DACS provides specific licences for research purposes, as does the CLA, which we believe to be very successful. Through the combination of exceptions and licensing solutions the scope of activities covered is very comprehensive and therefore provides certainty for users.

D. Disabilities

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

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

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

□ NO.

There is already a great deal of licensing innovation and flexibility from rights holders, especially in providing appropriate arrangements for people with visual impairments. There is evidence of existing positive partnership models between rights holders and user groups, and we believe that stakeholders are cooperating already to develop more market-led solutions, which should not be pre-empted by imposing legislation. For example, in the UK DACS has successfully participated in projects with the Royal National Institute of Blind People to make visual works on book covers accessible for visually impaired people.

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

We have not experienced any problems in this respect.

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

As far as DACS is aware industry-led solutions exist that operate very successfully under participation of rights holders.

E. Text and data mining

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

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

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

 NO, we have not experienced specific problems with the use of text and data mining, but DACS would like to ensure that any exception in this respect cannot easily be abused for commercial purposes and interfere with the legitimate interests of rights holders. In particular, DACS believes that search engines monetising the results from text and data mining activities should not be able to rely on such exceptions aimed to enable genuine research activities.

An example of how this would affect DACS members is the exploitation of images by an online service that operates by trawling through other sites for images. For example iPhone application Art Authority uses images posted on websites to organise them by period and artists and charges users access fees without any remuneration going back to the featured artists.

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

Not applicable

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?

Not applicable

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

Not applicable

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

Not applicable

F. User-generated content

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

N/A

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

N/A

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

 NO, in general DACS does not experience problems resulting from the way users disseminate genuine new content on the Internet.

However, we believe that there should be two key changes:

1. A clear definition of UGC is needed. For example some social media sites describe UGC as all content that users of the service upload onto their profile or the site in general, even where the content itself is simply copied, with or without licence. This type of content should not be classified as UGC. Pre-existing works are often simply reproduced without permission without social media sites accepting responsibility for the further dissemination and exploitation of these works without licences.

2. The EU should support collective digital licensing solutions for the creation of UGC and ongoing use of pre-existing works as part of UGC that rewards creators.

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

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

 YES, we believe that more work could be done to ensure that works are properly identified for online use and in an online environment to ensure that rights holders are known and to avoid the creation of orphan works.

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

 NO, it is important for DACS to continue to educate rights holders on the rights in their works in order to ensure they receive the correct remuneration. This is entrenched in what we do and will continue to do. DACS is a collecting society and as such runs remuneration schemes not only for primary uses of members' works but also for secondary uses of published works. This means that users who have created works that have been published can claim royalties for the secondary use of their works.

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

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

As outlined above, we would encourage further awareness/educational initiatives.

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

No legislative solution necessary

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

Not applicable

IV. Private copying and reprography

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[4] in the digital environment?

☐ YES

In particular further clarification is needed about what 'fair compensation' means in the digital environment, which has so far been interpreted by the CJEU in case law (*Thuiskopie v Opus Supplies 2011 and Padawan v SGAE 2010*). In the latter, it was found that fair compensation cannot be zero as copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned (paragraph 40 Padawan) However this is not universally accepted and applied.

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[5]

☐ YES, we believe that levies can be a reasonable solution to guarantee royalties flowing back to rights holders for the use of their work. Though in our opinion the way the question is phrased does not accurately reflect reality. It is often the case that a service that is licensed by relevant rights holders is also accessed by non-authorised users. This means that the original assessment of the initial licensing fee does not take into account all the private copying of the content that actually takes place. It is also not entirely clear what the concept of minimal harm to rights holders entails. Harm cannot simply be understood in a commercial way but should take into account that works are often used in ways that are not in line with what the exclusive rights holder would be in agreement with.

We therefore believe that implementing private copying levies is a suitable way to ensure remuneration to creators, especially artists whose incomes may be very small and who would suffer harm from being denied even the small amounts of remuneration from private copying.

As mentioned above, we refer to the case of Padawan, in particular paragraph 46 of the judgment which stated:

"…given the practical difficulties in identifying private users and obliging them to compensate rights holders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment (…) the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and

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

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

who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them."

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

Referring to the case of Padawan, as above, paragraph 50 of the judgment states that it is consistent to provide that "persons who have digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it."

Therefore the judgment considers that the payment obligation should be imposed upon those providing the reproduction service. We believe that this has not and will not affect the development of these types of businesses but instead guarantee a legal certainty for using these services and avoid the complexity of identifying private users so that they can pay compensation.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[6]

□ YES

We believe this would create greater transparency and could potentially result in a greater acceptance of these types of royalties which in general are only a very small percentage of the actual price charged.

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?

NO – as the UK is at present not operating any levy schemes DACS does not have any experience in this respect.

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.).

As the UK currently does not operate any levy systems DACS cannot provide any figures in this respect.

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?

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

As above, not applicable

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

Where there are problems with levy systems we believe that these issues can be addressed or are generally minimal and so can be accepted as a way of ensuring fair remuneration to rightsholders who do not have an alternative means to benefit from the use of their works in these circumstances.

V. Fair remuneration of authors and performers

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

Our members rely on the fair licensing contracts that we provide for them to ensure adequate remuneration. Contract terms should remain flexible for the best result for all our members and should also allow for payments for the secondary exploitation of works.

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

□ NO

We do not agree that prohibiting clauses on EU level in a contract is necessary or practical. We believe that it would create confusion about the enforceability of a contract as a whole if certain clauses were to become unenforceable. This should be left for Member States to regulate through unfair contracts terms legislation, if at all.

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

Not applicable

VI. Respect for rights

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

□ YES, as wider access to works also requires effective enforcement mechanisms and efficient combating of piracy and other forms of unauthorised reproduction. DACS, like other CMOs, sees it as an essential task of a collecting society to ensure that this is happening and further support through the EU and on European level would be welcome.

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?

 NO, the existing framework is not sufficiently clear. The Commission should get ISPs to be more proactive and collaborate with them on awareness raising initiatives or devising ways of increasing enforcement from infringers.

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

 YES, as established in EC case law, i.e see *Productores de Música de España (Promusicae) v Telefónica de España SAU*, we believe that the right balance needs to be found on the basis of proportionality.

VII. A single EU Copyright Title

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

 NO

DACS does not believe that a unified European Copyright Law, irrespective of its taking precedent over national laws or merely providing an additional parallel title to national copyright titles, should be a preferred option. On the contrary we believe that Europe's cultural diversity is partly a result of the national differences in copyright law and is at the very least preserved by these differences in national laws.

Differences in law create diversity. For example we understand that the current list of voluntary exceptions and limitations in Directive 2001/29/EC was the result of lengthy negotiations with all different Member States to incorporate country specific exceptions that mirrored certain standards and uses prevalent under national copyright law. Whole industry sectors and businesses depend on the existence of these exceptions, participating in shaping the creative landscape of the different Member States.

Similarly, the different interpretation of originality and infringement in different countries can provide incentives for different ways of creating copyright protected works and can influence the emergence of different ways of expressing creative thought. We believe that these differences, help to support and preserve the cultural diversity that makes Europe unique and provides for a valuable counterbalance to the American creative industry for example.

Potentially detrimental effect of unified European law

A unified European copyright law would risk eliminating these differences and introducing concepts into national legislation that are completely foreign to this system. They would distort and complicate the application of the law to existing creative processes, and disincentive longstanding creative practices and wipe out existing business sectors.

As outlined above, DACS believes that the current system of non-mandatory exceptions accurately reflects the fact that copyright, though partially harmonised, remains an intellectual property right which is strongly influenced by the culture and tradition of the respective Member State and constitutes the correct instrument to provide for sufficient flexibility while guaranteeing a certain degree of harmonisation and certainty for users of copyright protected works on a European level.

Licensing schemes

The current copyright system in the UK further facilitates the implementation of licensing schemes within the scope of certain exceptions in which DACS participates for visual artists. These licensing schemes provide flexibility and clarity for users of copyright protected works

The existing schemes DACS participates in are functioning well under the current national legislation and DACS therefore sees no need for any further measures by the Commission in this respect.

Potentially adverse effects of dual protection

It is difficult to see how the introduction of an optional level of protection of copyright on the European level would work without creating confusion, additional costs and uncertainty. It is also important to bear in mind that any increase in administration costs for rights holders and decrease in the revenue rights holders are relying on, will result in an increase in costs for consumers accessing and using their works. We also do not believe that this would result in a more coherent application of the law especially for consumers who apparently already complain about the complexity of national laws, and who have to navigate through two levels of protection.

We would also like to draw the Commission's attention to the fact that one of the greatest advantages of the Internet is worldwide accessibility and availability of information. To create a Europe-specific solution to the problems arising from this platform is very limited and it is questionable as to how far the introduction of a unified European copyright law can address these issues, which need to be seen in a global context. We therefore believe that apart from further reflection on the future of European rights management in an international context, the effects of a unified European copyright law on matters of cultural diversity and preservation of the cultural individuality of each Member State would need to be explored in more detail.

Education without legislation

The UK government is taking an active approach in tackling the problems of copyright infringement. They will be implementing educational initiatives which are outside the scope of legislative changes. Industry bodies will also be playing their part in ensuring end users are fully aware of the law and positively engaged. The EU must now play a part in accelerating non-legislative initiatives throughout Europe and engage with WIPO to address, for example, the global problem of the "making available" right. This should also extend to the harmonisation of an enforcement framework without creating a single title governing enforcement as a whole.

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?

No, as outlined above DACS does not believe that the development of unified European copyright title would be beneficial. On the contrary, the current framework supports and endorses cultural diversity which creates a valuable counter balance to for example the creative industry landscape in the US.

VIII. 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.

No