

**Public Consultation
on the review of the EU copyright rules**

Response submitted by

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II. Rights and the functioning of the Single Market

4. Download to own digital content

14. *What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.*

The question has been addressed by the European Court of Justice in the matter of software commercialised on-line (C-128/11 *Usedsoft*). By analogy, it has the potential to be applied to other copyright digital goods. The Court ruled for the possibility to rely on the exhaustion principle for the second (or following) purchaser of an “used” software.

This is to say that following purchasers of a piece of software do not have to pay compensation to rightholders or require their authorization in order to use the work.

If this principle has to apply to all digital goods, the legal framework regarding the resale of digital copyright works in Europe would be clear, and rather satisfactory. Of course in the interest of the certainty of right, it would be useful to codify this principle by European law.

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?*

The optional nature of the list led member states to adopt very different solutions. Member states (old members especially) seem to show a conservative attitude in implementing Directive 2001/29/EC (*hereinafter*: the Information Society Directive). Thanks to the almost entirely optional list of copyright exceptions, they appear to have implemented many exceptions that were already present in their national copyright law before the implementation of the Information Society Directive. This is suggested by the remarkable differences in terms of the structure and the wording of the different national legislations, which are more similar to the pre-existing legislation than to the structure and the wording of the Directive.

The optional list of exceptions of the Information Society Directive therefore was probably not the most suitable instrument to reach copyright harmonization. Moreover, the list of the exceptions and limitations did not achieve the purpose of being exhaustive either. Some member states introduced in their legislation exceptions not present in the Article 5 of the Directive. Slovenia, for example, inserted among its exceptions one for transformative works, which is not mentioned by the Directive. However, a more consistent implementation of some fundamental copyright exceptions suggests that they could be accepted as compulsory by all EU member states.¹ This list should apply to both copyright exclusive rights and technological measures, unless technological reasons make this impossible.

In principle, the presence in the EU of different national cultures requires flexible solutions rather than rigid ones.² These solutions would best suit the goal of harmonising the national legislations respecting local diversities. However, from a technological point of view the solution cannot be flexible, as for example the American “fair use” provision. In this respect, professor Felten acutely stated that making TPMs [Technological Protection Measures] compliant with fair use is like

¹ For a perspective compulsory nature of copyright exception see Heide 2000, at 229-230.

² See Hugenholtz 2000b, at 501-502.

putting a judge in a microchip.³ Technological solutions need a precise set of instructions, which cannot consider the nuances of a flexible legislation. Of course, the compulsory list of copyright exceptions would need to be adapted to the material possibilities of the technology in order to be made compulsory also for TPMs.

An essential list of exceptions with a flexible closing clause appears to be the most suitable solution. It would suit to both the harmonisation of copyright exceptions and their compliance by TPMs. Obviously the closing clause⁴ would not be compulsory for TPMs. Beneficiaries claiming exceptions falling within the scope of the clause would have to refer to copyright tribunals, mediators or courts, when they are not satisfied with the usage rules implemented on a copyright work.

[From: M. Favale, 'Fine-Tuning European Copyright Law to Strike A Balance Between the Rights of Owners and Users', 33(5) *European Law Review* (2008) 687-708]

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 question of fair compensation in cross-border transactions has been addressed by the European Court of Justice (C-462/09 *Stichting de Thuiskopie*; C-521/11 *Amazon.com*). The Court stated, in essence, that it is for the Member State on the territory of which the harm to the owner takes place (intending the unauthorised reproduction of the work) and therefore the Country of the purchaser of the reproducing device to make sure fair compensation is paid to the owner, also in the case of a cross-border transaction. To this end, a levy corresponding to fair compensation can be charged not only to the seller but also to the importer of the reproduction equipment (if the seller cannot be reached because it is based in another member state).

At this point an obvious issue to consider is how to avoid a double imposition of the levy, in the case that the original seller had been charged a levy in its own country. This is not a problem that can be solved at judiciary level, but it needs to be addressed at the EU level with appropriate legislation. To this end, a codification of the solution hinted by the European Court could provide a way forward. Although it is true that the compensation is due by the person producing the harm (if harm is indeed ascertained and evaluated), it is also true that the most effective way to recover this amount is to charge it at the source of the reproducing device, hence to the manufacturer. Nothing stops (by express acknowledgement of the European Court: C-467/08 *Padawan*) the manufacturer to pass on the levy on the purchaser or on the intermediary, which will pass it on to the purchaser.

Now, the real issue to be considered is how to identify the owner of the work in order to correspond him or her fair compensation and how to make sure the amount is effectively delivered to the right recipient in the case of a cross-border transaction. Moreover, in an increasingly multicultural Europe, even the assumption that rightholders of a country are the ones suffering the greatest harm by reproduction carried out by a person residing in that country can be easily rebutted. Thus, the really challenging issue is not "who has to pay?" but "who has to be paid, and how?." In this sense a European levy to be distributed among European collecting societies (or to a central European collecting society, if ever we will have one) has the potential to get the solution closer to the target.

Moreover, the European Court is in the process of envisaging increasingly complicated solutions in order to guarantee the fair balance of interests (between copyright holders and users), as for example a refund of the levy "in cases where the final use of those media clearly does not fall

³ See Felten 2003, at 58; see also Garnett 2006, at viii.

⁴ For example, the three-step test of the Berne convention could serve as a model for the "wild card" exception.

within the case referred to in that provision [Article 5(2)(b) of Directive 2001/29]” (C-521/11 *Amazon.com* at 67).

Before the solutions gets even more complicated than the problems, a simpler system to calculate fair compensation is needed at European level. Now, we know that the starting point to calculate fair compensation is the harm caused to rightholders by private reproduction of copyright works (“fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception » C-467/08 *Padawan* at 64.2). Therefore, sound empirical research is urgently needed to identify, assess and effectively quantify this harm in order to envisage a system for determining fair compensation which strikes a « ‘fair balance’ between the persons concerned » C-467/08 *Padawan* at 64.2.

A. Access to content in libraries and archives

1. Preservation and archiving

<i>29. If there are problems, how would they best be solved?</i>

The Current status of preservation activities involves careful consideration of several legal and economic issues, including database rights and intellectual property rights. Among the latter, recent consideration has been given to the problem of so-called orphan works (works for which the author is unknown or unlocatable) by a study carried out by CIPPM and CREATE on Orphan Works. See 'Copyright and the Regulation of Orphan Works', available at <http://www.ipo.gov.uk/ipresearch-orphan-201307.pdf>)

The study concluded , among other points:

Ultimately a legislator must make a decision on what is deemed to be the desired behaviour. Thus, it seems feasible to consider both the limited liability and the up-front rights clearing as viable options but for different purposes. The limited liability system seems to have advantages for archives and other non-profit institutions exposed to orphan works enabling those organisations to actually share their stock of orphaned artefacts with the public. In contrast, up-front rights clearing seems to provide more appropriate incentives for commercial uses of orphaned artefacts guaranteeing that a re-appearing rightholder will be compensated for the exploitation of her work.

[From : M. Favale, F. Homberg, M. Kretschmer, D. Mendis and D. Secchi, ' Copyright and the Regulation of Orphan Works', available at <http://www.ipo.gov.uk/ipresearch-orphan-201307.pdf>]

4. Mass digitisation

[We address issues of mass digitization under “Text and data mining” (*infra*)].

B. Teaching

<i>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?</i>

The copyright exception for teaching purposes, although optional in the Information Society Directive, has been implemented by all EU Member States (See M. Favale, ‘Fine-Tuning European

Copyright Law to Strike A Balance Between the Rights of Owners and Users’, 33(5) *European Law Review* (2008) 687-708, at 700). However, the provisions of each national copyright legislation are worded rather differently.

Some Member States assimilate the exception for teaching to the exception for citation or quotation and they exempt the unauthorised reproduction or communication of protected works for teaching purposes from copyright infringement. Other Member states assimilate the exception for teaching (and research, normally) to the exception for private copy, by providing some form of fair compensation for the owner.

Other differences among the national wordings of this exception refer to more specific uses of the work (for example, the collection of works used to form anthologies) or to the size of the sample (for example, only short excerpts, or short works are exempted from copyright protection).

Current developments in teaching methods increasingly involve online technologies for lectures, videos and a great deal of resources. And on-line courses are attended by people from all over the world. This on the one hand calls for specific licensing frameworks and on the other hand needs solutions able to face cross-border dynamics.

It is in this context that more uniform legislation, at European level but also at international level, is urgently needed. Compulsory and clearly worded exceptions in an updated Information Society Directive and International treaties as the one recently implemented for the Blind (the Marrakesh treaty) will be the most effective instrument to achieve this end.

C. Research

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

All EU Member States have implemented Article 5.3(a) of the Information Society Directive, although this was optional. The wording of the Directive refers to an exception to the Reproduction right (Article 2) and Communication right (Article 3) in the case of “use for the sole purpose of illustration for teaching or scientific research”. Teaching and research are therefore referred to in the same exception. Member States implemented this particular exception often by keeping in place this assimilation, and therefore subjecting both teaching and research to the same provisions.

While clearly some connections and overlapping exist between teaching and research (however normally confined to the sector of higher education), a European and possibly international legal framework should keep into account the difference between users of copyright material for teaching purposes and for research purposes.

Given the importance of both these activities for the circulation of culture, which it is the ultimate purpose of copyright protection (notion too often understated), compulsory and clearly worded exceptions should be created both at European and international level.

D. Disability

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

While the signature of the Marrakesh Treaty is commendable (especially in providing for cross-border availability of accessible formats), the freedom left by the treaty to signatory members in

terms of fair compensation to be paid to rightholders and in terms of subjection of the exception to the condition of unavailability of accessible format copies, can still create problematic disparities among countries.

However, the most negative point of this laudable work of the WIPO Standing Committee on Copyright and Related Right is related to the fact that on the exception for educational and research institutions progress is still lagging behind. While a draft treaty is already in place for broadcasting organizations, nothing is available in an encouraging form for teaching and research.

E. Text and data mining

The response to this set of questions draws from the analysis developed in M. Borghi and S. Karapapa *Copyright and Mass Digitization* (Oxford University Press, 2013) (*hereinafter*: Borghi & Karapapa).

53. (a) Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?

Reproduction of copyright works for non-commercial research based on text and data mining (TDM) can find, in principle, refuge in the existing *corpus* of exceptions and limitations available under the laws of Member States. However, as it will be explain in the following, the applicability of the current exceptions is neither legally certain nor uniform across Member States. As a result, the use of the same TDM method may result permissible in one country and infringing in another.

TDM methods can possibly fall within one of the following existing exceptions of the Information Society Directive:

Art. 5(2)(c) [*Specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives*]. Although Rec. 30 specifies that the exception ‘should be limited to certain special cases’ and should not apply to uses related to on-line delivery of protected works, nothing prevents Member States from interpreting the exception as allowing libraries and archives to engage in reproduction of their own material for non-commercial TDM research, or to authorize third parties to do the same. This is for instance the case of Norway, where the exception is being used to permit research institution to carry out TDM research on libraries’ digital copies (Borghi & Karapapa, 57, fn 62). However, this is not the case in most Member States, where the exception has been given a narrow scope. For instance, Member States is uneven, with some countries giving a narrow interpretation and some countries limiting the application to some categories of works (e.g. in the UK the exception does not apply to sound recordings, broadcasts or films). Moreover, even in a broader interpretation, the exception applies squarely only to certain categories of public institutions, and it excludes private companies (and possibly charities). It is not clear whether the exception would allow, for instance, a library to give permission to a private company to carry out TDM research with their digital copies.

Art. 5(1) [*Temporary acts of reproduction*]. This limitation represents a valid defence for some—but not all—activities that are normally carried out when doing TDM research. As it has been variously pointed out: “While acts enabling browsing and caching are likely to be covered by the limitation, it is not completely clear whether, and to what extent, other acts occurring during the digital processing of copyright works [...] are exempted” (M Borghi “Chasing copyright infringement in the streaming landscape”, *IIC*, 2011, 42(3), 316, 333). This is mainly due to the narrow interpretation given by the CJEU in *C-5/08 (Infopaq I)*, whereby the condition that the reproduction must be “transient and incidental” has been translated into the requirement that the storage and deletion of the reproduction do not depend on discretionary human intervention. This means in practice that “all reproduction processes which depend on human intervention in at least one phase

are excluded from the exemption” (*Id.*, 341). This requirement is an impediment to TDM methods, which are normally dependent on human intervention in one or more phases.

Art. 5(3)(e) [*Illustration for teaching or scientific research*]. Reproduction for scientific research is variously recognised in the laws of Member States as an activity that deserves some degree of freedom. In the UK, it falls under the umbrella of fair dealing for non-commercial research (CDPA 1988, sec. 29.1). In principle, the exception can be invoked to cover TDM, as a particular instance of scientific research that requires wholesale reproduction of protected works. However, the use of the term “illustration” is indicative of the fact that the provision targets essentially “occasional acts of reproduction that are necessary for *human* researchers to carry out research—more than systematic reproduction of large amounts of texts or other subject matter by computers” (Borghi & Karapapa, 61).

In conclusion: although TDM can in principle be covered by existing exceptions and limitations provided for under the Information Society Directive, it is recommended that a new exception be introduced to clarify the scope of permissible activities and harmonize the conditions across Member States.

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?*

A statutory exception for TDM should be based on the following principles:

- i. Technological neutrality: the exception should not refer to particular technologies or methodologies (e.g. text mining) but should address a specific way of making use of copyright works. In this respect, the concept of ‘automated processing’, as first introduced in the context of data protection law (see Directive 95/46/EC, Art. 2(b)), can find analogical application in copyright law (for a thorough discussion see Borghi & Karapapa, pp. 140-147). The exception can be phrased as covering “*automated processing of works to carry out analysis of their content*”.
- ii. The exception should apply only to automated processing for the purpose of research or study, and for purposes that are not directly commercial.
- iii. The exception should apply to the reproduction right only. The activities falling into the definition of “automated processing” should not involve public communication, either directly or indirectly.
- iv. The exception should not prevent the applicability of other exceptions or limitations, such as quotations for purposes such as criticism or review (5(3)(d)). This means that, for instance, automated processing of works for purposes of indexing and search does not preclude displaying of short extracts of those works in response to search queries—on condition that the extracts are compatible with the relevant exception. The effect of each exception—in particular with respect to the conditions set forth in Art. 5(5) of the Information Society Directive (‘three-step test’)—should be assessed independently, and not cumulatively.
- v. The exception should be mandatory and not subject to technological and/or contractual restrictions.

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

While non-commercial research can be covered by a copyright exception, TDM research for commercial purposes should be subject to normal licensing agreements. However, it has to be borne

in mind that repositories of digital content may not always be substitutable good for companies engaged in TDM. As explained in Borghi & Karapapa “For researchers willing to use text mining to discover a connection between a gene and a disease, for instance, the content provided by that publisher may not be substituted by reverting to content provided from another publisher” (p. 112). This means that owners of digital repositories may in most cases be providers of essential facilities. While it is not advisable to adopt a system of compulsory licences (as this would unduly interfere with the principles of free market), the law should incorporate provisions against refusal to licence (for a discussion of refusal to licence as applied to TDM see Borghi & Karapapa, 110-115).

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

There are two main issues that constitute barriers to TDM: the ‘preferential uses’ granted to private companies in mass-digitization agreements, and the subsistence of the *sui generis* database right on collections of digitized works. We address these two issues separately.

a) Preferential uses

When public institutions like libraries and archives enter a digitization agreement with private companies, the latter are commonly granted ‘preferential uses’, namely exclusive privileges over certain uses of the digital copies created by effect of digitization. As discussed in details in Borghi & Karapapa (pp. 104-110), under these agreements the public institution

“can only make use of the copy ‘as part of services offered’ on its website, but cannot carry out, or allow others to engage in, commercial uses, redistribution, or ‘automated systematic download’ of the copies. Most importantly, the library is under an obligation to implement technological measures to restrict ‘automated access to any portion’ of the digital copies or to the website on which these copies are available.” (Ibid., p. 104)

These provisions have the effect of reserving to the private company who performs the digitization the exclusivity in the use of the digitized works for TDM research. The digitization contracts between European libraries and Google, for instance, reserve to Google the exclusivity of TDM research over millions of European books for a given period of time. Although the Commission, following the recommendations of the Comité des Sages,⁵ has recommended that these privileges ‘necessary to recoup the investment’ should not exceed seven years time,⁶ most of the contracts signed between the European libraries and Google give the latter exclusive uses for fifteen years (see Borghi & Karapapa, 105-107). These privileges are a serious impediment for companies and research institutions other than Google to develop TDM research on the European cultural heritage.

b) The database right

Any copyright provisions aimed at enabling TDM would be ineffective if it does not address explicitly the rights in databases provided for by Directive 96/9/EC (the Database Directive). As a matter of fact, TDM has its actual scope of application on *collections* of works (instead of on *individual* works), and such collections are normally protected either by copyright (if eligible under Art 3), or by the *sui generis* database right (Art 7). So, even if works that constitute content of a databases are subject to a TDM exception, the availability of the exception would be undermined by copyright and/or database right on the database as such. Any reproduction of works listed in an electronic database for purposes of TDM may result in “extraction and/or reutilization of the whole

⁵ Comité des Sages ‘The New Renaissance’, January 2011, 39–40, available at <http://ec.europa.eu/information_society/activities/digital_libraries/comite_des_sages/index_En.htm>.

⁶ Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU), Rec. 7.

or substantial part”, and is hence an infringement, regardless of whether the activity is permitted under copyright law (see Case C 202/12, *Innoweb BV v Wegener ICT Media BV, Wegener Mediaventions BV*).

To be effective, the exception to the reproduction right should be accompanied by a parallel exception to the database right.

It is submitted that such an exception would not be in conflict with the Database Directive. Art 9 of the said Directive allows Member States to

stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

[...]

(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; [...]

“Extraction for the purpose of scientific research” should explicitly cover automated processing for carrying out content analysis.

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?

YES.

Depending on the type of work/subject matter, it can be difficult to *access* and *use* pre-existing work to create new content to be disseminated on the Internet. For example, to access and use academic articles generated by Universities to create new content can be difficult unless a valid licence is in place and the person has access to the licence. In such cases, and where the traditional publishing model dominates the dissemination, *access and use* proves to be more of an issue as opposed to dissemination on the Internet which crosses borders. The latter (i.e. dissemination) can be achieved fairly easily through various platforms ranging from websites (personal; organisational) through to social media sites.

NO.

On the other hand, it can be fairly easy to access and use pre-existing works or other existing subject matter to create new content for dissemination on the Internet. This is particularly true in the case of user-generated content (UGC). Platforms such as *YouTube* make available a large amount of copyright content which can be freely accessed.

To put it into context, a Commissioned Study (by the UK Intellectual Property Office) carried out by the Centre for Intellectual Property Policy and Management (CIPPM) at Bournemouth University in 2013 can be cited.

[See, Erickson K., Kretschmer M., & Mendis D., *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options* [London: Intellectual Property Office; 2013], pp. 1-38].

The Study reviewed a sample of 8,299 user-generated music video parodies relating to the top-100 charting music singles in the UK for the year. Through this Study, it revealed that on average “there are 24 user-generated parodies available for each original video of a charting single” showing UGC to be a significant consumer activity. It also revealed the ease of access to pre-existing works to disseminate new content on the Internet, including across borders.

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?

YES.

In the field of academia (and being a right holder in this field), work that is created on the basis of pre-existing works is generally identified and referenced in the online world. At the same time, it must be pointed out that the type of work that is accessed and used in this field is relevant to a particular group of people as opposed to the wider and larger masses. The problems occur in the use of popular media and in the use of online platforms such as YouTube, Vimeo for example, to create new content. In such cases, there is lack of acknowledgement of the original creator which can lead to infringement of copyright and piracy.

The existing proprietary systems do not address issues thrown up by UGC. For example, whilst some Member States of the EU have adopted exceptions to deal with parody – which relies on pre-existing work, there are a number of other Member States which do not have such a provision. UK is currently moving forward in introducing a parody exception.

However, a UGC-focused provision (similar to Canada) will be more useful as more people engage in such activities. Also the existing laws are silent on whether the use of pre-existing work to create new content is for commercial or non-commercial use. This is something which needs clarification along with the clarification that user-generated content should not have an adverse effect on the market of existing work / original which again is not addressed clearly in the current laws of the Member States.

Clearly the UGC must acknowledge the original work and must not harm the personality rights of the creator of the original work.

[See, Mendis D., & Kretschmer M., *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* [London: Intellectual Property Office; 2013], pp. 1-92].

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)?

In the UK, collecting societies such as the Authors Licensing and Collecting Society (ALCS); Design and Artists Copyright Society (DACS); Performing Rights Society (PRS) for Music; and the Copyright Licensing Agency (CLA), amongst others, exist to remunerate various types of works. Whilst, in general, these collecting societies do remunerate rightholders, there are issues relating to remuneration particularly when it relates to artistic works, online works and in the use of photocopied works.

For example, a Study carried out in 2011 illustrated that “visual artists have precarious careers, with typical earnings well below the UK national median wage of £21,320. In 2009/10, the typical photographer earned £15,000 (median), the typical illustrator earned £15,723 (median) while the typical fine artist earned only £10,000 (median)”. It reflects the risky nature of working lives in cultural occupations.

[See Kretschmer M., Singh S., Bently L., Cooper E., *Copyright in Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers* [DACs; 2011].

Where the rightholder does not depend on cultural/creative work for their living, the situation, remains similar. In the academic world, questions remain in relation to the remuneration of rightholders. Whilst the system has been developed extensively, from the mid-2000 to the present times, the problems have not gone away completely. The issue was also highlighted in 2009 when a research monograph highlighted the discrepancies which exist in the collection of licence fee from educational establishments and its ultimate distribution to right holders within those establishments.

[See, Mendis D., *Universities and Copyright Collecting Societies* [The Hague: T.M.C. Asser Press; 2009].

Finally, remuneration remains a grey area in relation to the remuneration of online works which have been created on the basis of pre-existing works. Having said that, a Study published in 2013 showed that in the case of parody works, the relative size of the audience for parody versions of a work does not appear to adversely affect the performance of the original in the marketplace and in turn the remuneration through the VEVO advertising revenue on platforms such as YouTube.

[See Erickson K., *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube* [London; Intellectual Property Office; 2013] p. 22 of 48].

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

The problems arise from copyright exceptions which are not clearly defined and from existing laws which do not address “interactions of private citizens, often via social networking sites, which (*sic*) encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy” [*Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Ian Hargreaves* (London: Intellectual Property Office; 2011) para 5.35 p. 50].

Problems have also arisen from more recent stringent laws, such as the ‘three-strikes’ law which have proved to drive end users to piracy rather than deter them away from it.

[See, Mendis D., Digital Economy Act 2010: Fighting a losing battle? Why the ‘three strikes’ law is not the answer to copyright law’s latest challenge. *International Review of Law, Computers and Technology*, 27 (1), 60-84].

The problem will be best addressed by the introduction of a clearly defined exception on UGC. It can complement existing exceptions which deal with parody, pastiche and caricature in Member States.

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?

A legislative solution along the lines of Canada's *Copyright Modernisation Act 2012* (2012 Act) is suggested. The 2012 Act introduced a new section 29 which recognised works of (education), parody or satire under the existing 'fair dealing' exception, which was further elaborated at section 29.21 for 'non-commercial user-generated content'. This section is also known as the 'mash-up' exception and has been clearly designed to deal with UGC.

The Centre for Intellectual Property Policy and Management's (CIPPM's) Commissioned Study into parody included the review of 7 jurisdictions – from the EU, USA, Canada and Australia. A number of lessons were learnt from this Study, particularly in relation to the elements which UGC should reflect. The findings from this 2013 Study, relevant to this question are set out below.

[See, Mendis D., & Kretschmer M., *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* [London: Intellectual Property Office; 2013], p. 47 of 92.

The provision addressing UGC should state that the work:

- i. Must be non-commercial;
- ii. Must not have an adverse effect on the market for the original;
- iii. Must not use more of the original than necessary;
- iv. Must add some significant new creation;
- v. Must not harm the personality rights of the creator of the original work;
- vi. Must be sanctioned under the rules of social custom; and
- vii. Must acknowledge source of original work.

IV. Private Copying and Reprography

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

YES.

In the UK, for example, the Copyright Act has not had a private copying exception, although there are proposed reforms under way. For a long time, it was felt that such an exception was not needed as rightholders would not pursue individuals for infringements which occur in their homes. However, the advancement of technology and the advent of the Internet has changed this perception as more and more infringements take place online which questions whether it is being done for 'private' use.

As connected devices continue to grow and develop making private copying and 'sharing' ever-more easy, it is necessary to clarify at EU level the scope and application of the private copying and reprography exceptions in the digital environment.

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?

NO.

The UK government intends to introduce a narrow private copying exception ‘which will *allow an individual to copy content they own, and which they acquired lawfully, to another medium or device for their own personal use*’ (see draft legislation [here](#)).

Under the new exception consumers will be allowed to copy a piece of music (from a CD for example) on to their MP3 player, laptop or smart phone. This will also include copying ‘in any private place, including a private cloud or other remote electronic storage’ – without infringing copyright. However, passing copies to family or friends will remain illegal.

Such a *limited exception* will cause minimal damage to rightsholders, and therefore no payment will be due. By limiting the private copying exception to narrow uses, the UK government will avoid the creation of a complex system of fair compensation as utilised in certain EU countries.

[See, Kretschmer M., *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* [London: Intellectual Property Office; 2011].

VI. Respect for Rights

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

In the last decade rightholders organizations and individual rightholders have pushed for an involvement of the ISP in the process of copyright enforcement, both at legislative (Articles 12 to 15 of Directive 2000/31/EC on electronic commerce, OJ L 178, 17.7.2000, p. 1) and judiciary level. Some theories have also emerged among copyright scholars (for example, Sobel 2003).

The European Court of Justice has been seized on several occasions on this topic (C-275/06 *Promusicae*; C-461/10 *Bonnier Audio*; C-70/10 *Scarlet Extended*). Although the EU Court is generally very protective with the right of the authors, it always repulsed these assaults with the shield of fundamental rights, such as privacy, data protection, freedom of business.

We do not believe a legislative action should take a different stance from that of the European Court of Justice on this matter. Every proposed filtering system imposed to ISP would run afoul of fundamental rights that, when balanced against copyright protection, have to prevail. If any, the position of the ISP should be clarified in order to confirm their neutrality and independence.