Public Consultation on the review of the EU copyright rules

Response by Wikimedia UK

5/2/13

Background

Wikimedia UK is an independent registered charity in England and Wales. It is the UK chapter of the global Wikimedia movement which works to support and promote Wikipedia, the free online encyclopedia (in many languages), and other Wikimedia projects such as Wikimedia Commons, Wikidata and Wikiversity.

Wikipedia is the fifth most visited site on the internet according to ComScore, and currently receives around 21 billion page impressions a month from around 520 million unique users. It and its sister non-English encyclopedia sites are of significant importance to European Union citizens, and their fundamentally cross-border approach to copyright licensing should make them sites that the Commission needs to consider carefully as part of this consultation.

Wikimedia UK exists to collect, develop, promote and distribute freely licensed knowledge. We do this by supporting volunteer editors and contributors – Wikimedians – and by working in partnership with cultural and educational institutions.

Wikimedia UK's mission is to help people and organisations build and preserve open knowledge to share and use freely. Our long-term vision is free knowledge for all.

We have significant experience in the area of cultural and educational heritage. We regularly work with some of the UK and Europe's most important cultural and educational institutions to help and encourage them to share their resources and archives under open licences. Current and recent partners include The Royal Society, The British Museum, The British Library, The Science Museum, The Natural History Museum and The National Library of Scotland.

Educational content that is released under open licences can be used on Wikipedia and other projects, making them available to others to use, reuse, distribute and adapt for other purposes, including commercial uses.

For the avoidance of doubt, we should stress that the expression 'Wiki' is a generic term, and that by no means all organisations that include 'Wiki' in their name are associated with us or with the worldwide Wikimedia communities. In particular, we have no connection whatsoever with the Wikileaks website.

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

Transparency Register ID: 743281012752-12

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

1. Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?

YES

We have two very major concerns:

See **80.1 'Freedom of panorama'**

and **80.5 The so-called 'sweat of the brow doctrine'**

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

YES

Although Wikimedia UK is not itself a service provider, our US associate organisation The Wikimedia Foundation[1] is, and it is faced with many cross border issues when attempting to provide a pan-European service via the various different language versions of Wikipedia, and via Wikimedia Commons, its central educational image and media file repository. We know from our personal experience that our users and volunteers and those who contribute to the Wikimedia projects, are faced with these problems on a daily basis. Please see the answer to question 1 for references to specific examples.

The current situation creates unjustified barriers to European citizens who wish to enjoy or learn from their cultural heritage, and is an unjustified restriction on the free movement of services and knowledge within the EU as set out in the Treaty of Rome. The intellectual property exceptions to the general rule of free movement within the EU are, in our view, being used in a manner which unfairly promotes the commercial interests of private right holders over the need to ensure citizens have free access to our common cultural heritage.

This is of particular importance when a local right holder in one state can prevent online access to digital records of cultural heritage in all member states. It is simply not realistic to run high-visibility global websites such as Wikipedia or Wikimedia Commons on a county-by-country basis, and the consequent need to ensure so far as possible compliance with the complex patchwork of copyright laws in each member state means that digital representations of many important cultural assets have to be excluded entirely. In many cases, even a single rights holder whose rights derive from a local copyright variant that is not recognised in any country but the home country can in practice prevent a particular cultural work from being viewed on any Wikimedia website, anywhere in the world.

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.***

The question appears to suggest that 'the number of requests' could be used to measure the importance of multi-territorial licences. However, that is not the case, as the well-known difficulties and consequent costs of complying with current European copyright laws inhibits many educational and cultural organisations from even thinking about licensing for use on the internet. Huge quantities of educational and cultural material could in a more conducive European legal environment easily be licensed, but that has to be possible without content holders such as museums and galleries having to obtain expensive legal advice on the cross border risks.

1 http://wikimediafoundation.org/wiki/Home

Multi-territorial open licences such as CC-BY-SA[2] are fundamental to the operation of all the websites of the Wikimedia Foundation, including Wikipedia in its various language versions. Although the Wikimedia Foundation is not directly 'asked to grant' such licences, as it is not the rights holder, content under such licences is being released constantly. Wikimedia Commons, for example, receives around 10,000 uploads per day of digitised photographs, scans, illustrations, sound recordings, videos and other educational media files, and the quantity of released educational material could be much higher if content holders and rights holders could easily license without exposing themselves to uncertainties and potential legal liability for accidentally getting it wrong. We, our partners and our volunteers expend huge amounts of time and effort in dealing with this.

Uncertainty and conflict of laws causes real, practical problems for all who want to see Wikipedia continue to improve, and have available to it the full variety of educational content, including images, that the citizens and organizations of member states would like to share on the internet, but cannot.

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

Copyright reform is needed to adapt to the fundamentally multi-territorial nature of the internet. We would like to see reduced complexity, more legal certainty for those who wish to release content under multi-territorial licences, more harmonised rules for member states, and a re-balancing of the interests of individual rights holders and the rights of European citizens in favour of a presumption of free access to our cultural heritage.

Making such changes would in our view encourage the development of innovative services with the EU, and would go some way to removing some of the intrinsic barriers that exist in Europe to providing legal access to educational and digital content that simply do not exist elsewhere, for example in the US.

5. 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

We would like to see a fully free market throughout the whole of the EU for the release of copyright-protected material on the internet. The old country-by-country approach that worked for print media is no longer appropriate in the digital world.

6. 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

Systematically limiting the viewing or re-use of content on a territorial basis, or redirecting on that basis, would be a practical impossibility for the Wikimedia sites, apart from being an undesirable thing to do. Where educational content is lawfully available, we wish to provide it with the widest possible international dissemination, and not to discriminate against users in particular countries whose copyright laws might be more restrictive than those elsewhere.

2 http://creativecommons.org/licenses/by-sa/3.0/

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

YES

We believe that legislative solutions are sorely needed, as the lack of a truly free market in Europe not only restricts European citizens from accessing much educational content, but also puts European innovators who could help provide practical solutions at a clear disadvantage compared with those in the US. Innovators in the EU have to negotiate a costly and complex legal minefield that those in the US do not need to worry about.

Neither individual rights holders nor the member states have provided a solution to the fundamental problems discussed above, and in most of these cases, structural features of the market make it unlikely that any sub-EU entity could resolve the problems. It makes sense, therefore, for the Commission to intervene.

The act of “making available”

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

NO

A principled and technology neutral definition of "making available" is needed to clarify this term, as one can tell from the sheer number of cases where this has been at issue.

Of particular concern to us are legally complex (but very common) situations such as where a photograph is taken of a copyright-protected publicly-visible building in a European member state, which is then uploaded to a server in the USA from where it is served via Wikimedia Commons or Wikipedia to the whole world.

Similar multiple-right situations are likely to become even more common as online users work to (legally) re-use and re-mix combinations of already-copyright-protected content in more and more complex ways.

In global online communities, and in particular in the Wikimedia community, there is often no clearly-defined 'country of origin', nor 'target of the publication'. Works are made available on the internet and are thereby published to all (internet-connected) countries, with the purpose of educating the entire world. Any proposed solution should consider and provide clarity for content which is of its nature collaborative and multi-national.

9. Could a clarification of the territorial scope of the “making available” right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief)?

YES

Because of the international way in which open collaborative projects like Wikimedia are created and made available, by authors and re-users from every Member State, it is difficult to predict how changes to the "making available" right would affect the rights of Wikimedia authors and the ability of the Wikimedia Foundation to distribute their content to citizens of the Member States. However, some impact seems likely, particularly if it exposed authors or service providers to liability in previously unanticipated locations.

Two rights involved in a single act of exploitation

10. Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems for you?

[NO OPINION]

Linking and browsing

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

NO. ABSOLUTELY NOT!

The whole idea of putting the use of hyperlinks under the control of rights holders in such as way is fundamentally misguided. Not only would it destroy the basic structure of the web, as designed by Tim Berners-Lee, it would represent a gross violation of the right of freedom of expression and association within the EU.

Any attempt to do such a thing would put citizens of the EU at a massive disadvantage compared with everyone else in the world who would continue to use hyperlinks in the normal, free, well-understood way. The EU should not be contemplating setting the European section of the internet totally apart from that which exists elsewhere, and which follows pretty-well internationally-agreed norms. We need greater international convergence of laws, not a separate European bunker.

Furthermore, this proposal confuses the subsistence of copyright in a work with the entirely separate licences that the rights holder may or may not grant to allow access and use. Licences and access permissions should, as now, be left to the rights owner to set up as desired. If the rights owner requires payment for re-use, for example, it should be the owner's responsibility to put an appropriate paywall in place.

Popular copyright-protected works may legitimately be linked to millions of times, but if each link required the owner's permission the internet would simply not be able to function. Even if a generic licence to link were to be given, the copyright owner could rescind that licence at a later date leaving all of the existing links in a legally-dangerous state as potential copyright infringements. Each of those of links would then need to be removed, by the respective website owners, one by one, to remain within the law. That would hardly be proportionate.

This proposal would destroy Wikipedia, which depends on the ability to freely link to other sites to provide citations which validate the encyclopaedia's content.

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?

NO

In digital technologies every use of content and every web page view inevitably produces a copy, and it makes no sense nowadays to treat the automatic creation of that copy as if it were somehow an act separate from the act of viewing. Any temporary cached or buffered copy of the page content should be treated as non-infringing.

Furthermore, requiring the authorisation of a rightholder for simply viewing and reading content that the rightholder has deliberately made available amounts to an additional permission which could lead to citizens into breaking the law by merely surfing the web.

We believe that European citizens should have the right to read openly available content without fear of a (technical) breach of copyright. This is part of our fundamental right to receive and impart

information. Of course this would not apply to content that a rightholder has deliberately and lawfully kept behind a paywall or other protection system that was then unlawfully hacked.

Download to own digital content

13. Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?

[NO OPINION]

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.

[NO OPINION]

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?

YES

See the answer to question 20.

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

Some increase in bureaucracy, but that could be outweighed by the public benefit

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

Additional copyright protection available for a further 20 years beyond the base period of 50 years pma.

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?

The EU should avoid involvement with commercial databases that are run, controlled or sponsored by rights holders, and in particular should avoid officially sanctioning technical or other 'solutions' that result in European citizens having even more restricted access to their cultural heritage than they have at present.

The list of organisations mentioned in the question is in itself worrying, as it omits any mention of the contribution that well-established and respected European Open Knowledge organisations such as Europeana[3] could and should provide.

At the minimum the European Union should ensure four things:

(1) that identifiers as well as rights ownership and permission databases are based on open standards, and that the indexes are available to all free of charge;

3 http://www.europeana.eu/

(2) that all identifiers and databases are interoperable, and work across all of Europe (and beyond) without splitting the internal market;

(3) that all databases are publicly accessible via machine readable interfaces; and

(4) that they include the ability to store information on out-of-copyright (public domain) works, as this is crucial to solving the orphan works problem (see **80.2 Orphan works)**

Any system that is created should be developed in a true multi-stakeholder approach (not only by rights holders and intermediaries) that should include representatives from outside the content industries such as the users who create the Wikimedia projects, and representatives of the public who benefit from out-of-copyright (Public Domain) works. It should be reflective of work already undertaken in this area (for example by Europeana).

Term of protection – is it appropriate?

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

NO

Current terms of copyright protection are not appropriate, because they do not support the purpose of copyright: enabling and encouraging artists and writers to create. Locking up our collective culture for, in many cases, a century or more inflicts an enormous opportunity cost on society. The inability of artists to build upon previous work diminishes the richness of culture for everyone, without providing additional incentive. This common-sense conclusion is confirmed by the overwhelming majority of academic and economic studies of the past 20 years[45].

A further and very real problem created by the current exceptionally long terms is that orphan works proliferate as the terms extend far beyond the memories of the heirs of the creator, and far beyond the point at which the heirs have any interest in keeping track of copyright details of historic non-exploited works. Apart from the exceedingly small proportion of works of significant commercial importance, this applies to almost all creative content.

To return to a more appropriate level of protection, the EU should begin by returning to the term lengths of the Revised Berne Convention. Once that is done, further international treaties and trade agreements should be ratified only if they shorten (or at least do not lengthen) term protection.

We would support further international harmonisation based on shorter terms that more accurately reflect the balance between providing the author with appropriate recompense where the work is commercially valuable, and the needs of society as a whole to encourage creativity and innovation by others.

We would like to see the EU engaging positively with the suggestion[6] by the Director of the U.S Copyright Office, Maria A. Pallante, that normal unregistered copyright could be limited to the 50 year pma period envisaged by the Berne Convention, with a possible extension to 70 years pma depending upon the rightholder completing some registration procedure. This might allow rightholders whose works are of true commercial value to retain protection for the longer term while releasing sooner into the public domain the vast majority of works that are of no interest to the rightholder and that in any event have no lingering commercial value.

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?

Yes, the Copyright in the Information Society Directive leaves the protections of depictions of architectural works entirely up to the member states. This causes a maze of legal regulations which results the fact that many of Europeans' holiday photos posted on Facebook or their own blog are outright copyright infringements. A similar maze of legal exceptions and limitations can be found when looking at government produced works - making their use and distribution difficult.

4 Falkvinge/Engström: http://www.copyrightreform.eu/
5 Rufus Pollock: http://rufuspollock.org/papers/optimal_copyright_term.pdf
6 http://www.copyright.gov/docs/next_great_copyright_act.pdf

See specifically **80.1 'Freedom of panorama'**

22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

YES

See the answer to question 25.

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

The current EU copyright regime offers some form of flexibility, but in practice everything tends to fall under copyright unless it is covered by a specific exception in the law.

The trouble is that these exceptions are narrow, specific and technologically outdated: the list was written in 2001, well before Wikipedia, YouTube and Facebook were created. As a result, everyday habits of online users could be considered illegal today. A blogger linking to copyrighted content, a meme based on a copyrighted image, a video with some footage from an existing movie or a song: all of that could create issues for the user that posted them.

We would like to see a specific exception excluding official government, government agency and EU produced works from copyright protection. This would make them part of the public domain and boost innovation, information and creativity. Countries/institutions that have a such an exception (most notably the US) clearly outperform the EU in this crucial area. Also, their agencies dominate the "global image" as the pictures of their press offices, for instance, can simply be used without having to clear permissions first.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

YES, within limits.

Harmonisation and flexibility by member states cannot entirely be reconciled, and we are of the view that the former is more important, given the current legal confusion, than the latter. We would be particularly concerned by any framework that gives member states 'flexibility' to introduce or maintain types of copyright protection that are not accepted elsewhere, or of any 'flexibility' to enforce non-standard longer terms. It is very much this type of non-standardised 'local copyright' that causes problems for re-users and for European and global website operators.

Flexibility that allows member states to provide additional exemptions to copyright or which limits the scope of protection that can be obtained are not as problematic, as such exemptions do not affect re-users or website operators who are trying to remain within the law.

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.

To ensure greater harmonisation we would advocate a re-written and updated list of mandatory minimum copyright exemptions with which all member states must comply.

The list may provide flexibility for member states to provide, if they wish, exemptions which go beyond the EU minimum requirements, for example to achieve or encourage some local social benefit. But nothing in the list should give flexibility for a member state to be more copyright-

restrictive than the harmonised rules of the European Union as a whole.

For the reasons, see the answer to question 24.

We would be in favour, in addition, of extending the current random patchwork of exemptions for education, private use, libraries and the like with some overarching fair use framework that could be more general and need updating less often as society's habits and needs change. However, where current or future exemptions provide copyright freedom, any fair use framework should respect and extend those freedoms, and not add further conditions on the user.

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

YES

This is a major problem for every single European website. It covers virtually all the content used online. It makes it oftentimes impossible to have the same version of a website in more than one language. It also makes running pan-European projects more time-consuming and drives up costs, resulting in smaller markets and target groups, which is of disadvantage to European projects on the global scale.

Territoriality of exceptions is a major problem for us, and we expect that it is a problem for every website that aims to target all of Europe. It makes running pan-European projects more time-consuming, drives up costs, and results in smaller markets.

For specific examples, see **80.1 Freedom of panorama** and **80.5 The so-called 'Sweat of the brow' doctrine.**

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?)

Fair compensation should be abolished. It adds costs to all citizens, primarily to the benefit of market incumbents, without a compelling public purpose.

Preservation and archiving

28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?
(b) [In particular if you are a right holder:] Have you experienced problems with the use by libraries, educational establishments, museum or archives of the preservation exception?

YES

The existing exception for preservation is not implemented consistently across the EU. As a result, most EU countries do not allow the making of copies for crucial activities like format shifting and structural digitization of collections. They may also put a variety of artificial constraints on digitalization, such as allowing non-commercial use only. This severely limits how libraries and museums can reliably archive and publish preserved materials. It further limits the ability of Wikimedia volunteers, who aim to put all of Europe's treasures online for education and reuse by the entire world, to help such institutions unlock their collections.

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

Legislation is required.

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?

The legislation should ensure the fullest possible range of exceptions to provide much greater freedom for libraries and museums to archive and publish preserved materials. Any legislation should allow the resulting digitised copies (other than those made of materials with pre-existing copyright restrictions) to be used freely by anyone, for any purpose (including commercially).

The legislation should ensure further a guarantee of public accessibility (with technical protections against mis-use if required by the copyright owner) of any digital copies that are made in reliance upon preservation or archive-related copyright exemptions.

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

[NO OPINION]

Off-premises access to library collections

32. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?
(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?
(c) [In particular if you are a right holder:] Have you negotiated agreements with institutional users that enable those institutions to provide remote access, including across borders, to the works or other subject-matter in their collections, for purposes of research and private study?

YES

32.1 Legal limitations on digital access.

We know from our partners and volunteers that this is a common problem. From both the perspective of publicly available libraries, archives and museums as well as the perspective of their patrons (end users/consumers) the existing exception that allows institutions to make works in their collections available 'for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises' (article 5(3)n) is extremely limited and is no longer aligned with the reasonable expectations of European citizens that where they have lawful access to content they can access that content from anywhere.

Limiting the availability of digitised works to dedicated terminals on the premises of cultural heritage institutions prevents them from reaching citizens that cannot travel to the premises (for example because they are disabled or because they lack the economic means to do so). Europe's citizens and researchers would greatly benefit from online access to the collections of Europe's publicly funded institutions.

The mission of many such institutions is to provide access to the knowledge and culture contained in their collections. As long as there are sufficient safeguards that prevent these institutions from interfering with the normal exploitations of copyright-protected works in their collections they should be allowed to make them available online for use by the general public.

32.2 Library-created limitations on digital access.

A further and serious problem is the tendency of some libraries, museums and and archives to use their physical ownership of out of copyright (public domain) material as a substitute for (non-existent) copyright protection. So, many libraries and archives will charge excessive fees for providing a digital copy of an out of copyright image or a page of text from an old newspaper,

magazine or book. These fees often bear no relation to the actual costs of providing the digital copy to the user, since the actual scanning has often been done already. Not only does the user have to pay a wholly unwarranted fee, but generally a contract has to be signed at the same time confirming that the copy will be used only for research or private study.

Some institutions even attempt to apply DRM to public domain content, which means that the user cannot access material that should be freely available to all without unlawfully circumventing the DRM protection.

This attempt to control access to the public domain, and to make excessive profits from public domain material held in libraries' collections, should be controlled by legislation. The legislation should ensure that public domain material is free for anyone to use, for any purpose, on payment of (at most) a reasonable copying, scanning, or reproduction fee.

One specific example is of a requirement by a major national UK library that exact (mechanical reproduction) microfilm copies of medieval manuscript documents held by them must not be re-copied and must be used for personal and private use only. Excessive page charges for digital copies of old books are common. This is particularly galling when done by libraries and archives that are publicly funded, and which in our view should be using their public funds to enable rather than restrict access to public domain material which is part of our European cultural heritage.

See also **80.1 'Freedom of panorama', 80.4 Untruthful claims of copyright on old out-of-copyright (public domain) content** and **80.5 The so-called 'sweat of the brow' doctrine**

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

EU legislation is required, harmonised across all member states.

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?

Allow libraries, museums and galleries the ability to provide access to all of their collections (whether in or out of copyright) over the internet, with appropriate technical safeguards for copyright-protected content. Allow them to provide full text search in all cases.

Make it unlawful for (publicly funded) libraries, museums and galleries, or those that have received public or EU funding for digitisation projects, to charge fees for digital access to public domain content over and above a reasonable level to cover their costs.

Make it unlawful for libraries, museums and galleries to require a re-user of a digital copy of public domain content to agree to use limitations by contract as a condition of providing the copy.

Make it mandatory for libraries, museums and galleries to provide public access (with technical protections against mis-use if required by the copyright owner) to digitised content that has been digitised in reliance upon a preservation or an archive-related copyright exemption.

European society would benefit from this, because it would broaden the range of materials available for authors, creators and innovators to draw knowledge, research, and ultimately inspiration from.

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

[NO OPINION]

E – lending

36. (a) [In particular if you are a library:] Have you experienced specific problems when trying to negotiate agreements to enable the electronic lending (e-lending), including across borders, of books or other materials held in your collection?
(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to borrow books or other materials electronically (e-lending), including across borders, from institutions such as public libraries?
(c) [In particular if you are a right holder:] Have you negotiated agreements with libraries to enable them to lend books or other materials electronically, including across borders?

YES

As a charity, we support the rights of consumers of content to read and access information wherever they go, and to access from whatever device they would like to.

Unfortunately, the existing frequent use of Digital Rights Management software to 'protect' e-lending materials cuts against all of these rights, by restricting access far more tightly than the law requires. For example, DRM frustrates the ability of users to make personal copies for educational use, a copyright exception which has been upheld repeatedly in a variety of court cases in the EU and the US. It also typically prohibits the creation of open source tools to read and create content, which further restricts access and creativity.

See also **80.3 Unjustified use of technical protection measures, 80.2 Orphan works** and **80.4 Untruthful claims of copyright on old out-of-copyright (public domain) content**

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

As it may not be technically feasible to construct DRM systems that allow for the exceptions and limitations that are necessary for an ethical and creativity-enhancing system of copyright, we believe that as an ethical and practical matter DRM should be prohibited for e-lending from public institutions like libraries.

In any event, EU law should make clear that it is legal to create and distribute tools that allow educators, researchers, the disabled, and others to remove DRM when that is necessary to exercise their legal rights including using the exemptions to access material over the internet.

38. What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?

We work intensively with cultural heritage institutions, like galleries, libraries, archives, and museums, to help them provide access and visibility to their digital collections. The differences between the no-cost, simultaneous, global access provided through the internet, and the high-cost, local access provided through physical collections, are so vast that it makes essentially no sense to compare the two. An institution that provides access through Wikipedia has provided it to half-a-billion readers every month, something no physical collection could ever hope to match in a lifetime. This change has the potential to radically improve the ability of publicly funded cultural heritage institutions to carry out their public mission to provide access to knowledge and culture.

Unfortunately this enormous potential is currently being held back by copyright rules that unnecessarily restrict how cultural heritage institutions can exercise their mission in the online environment. Under the current EU copyright rules, cultural heritage institutions are dependent on permission from rightholders in order to make protected works in their collection available online. This makes no sense, particularly since the majority of works held by these institutions are not commercially available because of their age or lack of commercial interest.

See also **80.3 Unjustified use of technical protection measures, 80.2 Orphan works** and **80.4**

Untruthful claims of copyright on old out-of-copyright (public domain) content

39. 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?

From an ethical perspective, the activities are the same: they are enhancing access to knowledge. The primary change is how much broader this access can be. Copyright law and policy should acknowledge that this broader access is a *positive development* and not something that should be prevented by DRM or other technological and legal measures for the sole benefit of commercial rightholders.

If copyright law does not begin to treat greater access as a positive social good, the legislative framework will continue to lose public support, as it will remain at odds with the needs, expectations, and ethical intuitions of users — and the next generation of creators.

Mass digitisation

40. 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?

We have not found that the 2011 MOU has had much practical effect on our activities, nor those of our partners.

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 OPINION]

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?

A major goal of all of the Wikimedia websites is to create teaching materials that can be used across all borders, and many Wikimedia editors are also consumers of teaching materials. The lack of standardization amongst the member states in all areas of copyright (including the teaching exception) makes creating licences that apply similarly across all the Member States extremely difficult.

All Wikimedia websites benefit from the excellent work on cross-border licences done by Creative Commons[7], but editors and re-users of Wikimedia content may not be able to benefit from such consistency when they are seeking to use existing educational materials.

See also **80.3 Unjustified use of technical protection measures, 80.2 Orphan works 80.4 Untruthful claims of copyright on old out-of-copyright (public domain) content,** and **80.1 Freedom of panorama.**

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

The licences used on all Wikimedia websites explicitly note that copyright exceptions, such as the teaching exception, should be respected. To make this more effective, the existing educational exception should be broadened and made mandatory for all Member States. This mandatory educational exception should cover all uses of all types of works for illustration of teaching, regardless of whether the use is institutional or private, and regardless of the institution. Uses of computer programs, databases and multimedia works (such as video games) should be expressly included.

7 http://creativecommons.org/

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

[NO OPINION]

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?

See question 43.

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

[NO OPINION]

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?

YES

The use of materials for research is of broad interest to us, given that an important goal of Wikipedia is to provide knowledge which references and cites to the best, most current research on a variety of topics. Unfortunately, users face a variety of problems with accessing and using scientific and research publications, not only in order to obtain factual information (short of re-using any copyright-protected content as such), but also simply to read and if appropriate provide a citation link on Wikipedia to validate statements of fact on the encyclopedia.

These problems are primarily practical, rather than fundamentally legal in nature. The existing exception allows for their use for research purposes, but other barriers - like restrictive licences, DRM, and publication in hard copy only - deliberately go beyond the existing exception, intentionally making it difficult to access and disseminate this knowledge even when it should be permitted by existing laws. This is particularly frustrating because so much scientific and other research is funded by the public, and should be available for Wikimedia users (who are themselves members of the public) to learn and create new educational works from.

See also **80.3 Unjustified use of technical protection measures, 80.2 Orphan works 80.4 Untruthful claims of copyright on old out-of-copyright (public domain) content,** and **80.1 Freedom of panorama.**

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

As a matter of principle, we believe that the results of all research financed wholly or in part by public funding should be freely available to all for all purposes (including commercial), but retaining moral right protections for the authors.

We would like to see research produced directly by Europeans governments and their agencies (including EU agencies) exempted from copyright altogether so that it falls automatically into the public domain, as is the case in the US.

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

[NO OPINION]

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 OPINION]

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

[NO OPINION]

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

[NO OPINION]

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?

YES

Our volunteers regularly attempt to mine data sources on the internet the contents of which are freely licensed or entirely in the public domain, only to find that technical measures have been put in place to prevent or hinder automated access. While this might sometimes be a proportionate response to a technical issue (for example to protect the servers from excessive queries that could affect the site's stability), we often find measures that have no apparent purpose other than to frustrate the attempts of legitimate users who wish to download lawfully-available content.

Examples include publicly funded museums and galleries that supply public domain images online but that protect them by the use of captchas, or that split such images up into extremely small tiles that are served separately in order to hinder downloading and re-use of the entire image. This is sometimes, again, an attempt to create by physical possession and by technical means new de facto rights which Intellectual Property law simply does not recognise.

Wikipedia and the other Websites of the Wikimedia Foundation are by design fully open to data mining, and no limitations are placed on users who wish to re-use either their contents or their data, provided the open licences are respected. Wikimedia websites are some of the most widely mined and analysed data sources on the planet. This has occurred because of Wikimedia's commitment to making this information freely available, and demonstrates that creativity and innovation are compatible with a scheme that reduces barriers to participation rather than increasing 'protection'.

See also **80.3 Unjustified use of technical protection measures** and **80.4 Untruthful claims of**

copyright on old out-of-copyright (public domain) content.

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

Publicly-funded galleries, libraries, archives and museums, and those have have received government or EU grants to enable digitisation of out of copyright (public domain) holdings, should be required to make such holdings available to the public via the internet free of charge and free of technical restrictions on downloading (save only for technical restrictions to protect the servers, for example by limiting load). Automated batch downloading at reasonable rates should be specifically permitted, as European citizens are denied effective access to their own cultural history when large holdings of out of copyright material can be accessed only on a one-at-a-time basis.

More generally, the EU should avoid creating new rights to protect previously unprotectable information, for example by new restrictive controls on data mining. Instead, legislation should provide a formal clarification that data mining is not prohibited by copyright, and that contracts and technical protection measures cannot be used to override that position.

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?

See answer to Q54.

The principle that "*the right to read is also a right to mine*" should be enshrined in legislation. The legislation should not differentiate between commercial and non-commercial activities, as such a differentiation would not be proportionate in the public interest.

To facilitate this, we would like to see a repeal of the Database Directive. This would ensure that vast amounts of information would be broadly available to the public and to researchers, which Wikimedia's experience shows will lead to a variety of new uses and means of delivery within the EU and across its boundaries.

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

[NO OPINION]

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

See answer to Q53.

See also **80.3 Unjustified use of technical protection measures** and **80.4 Untruthful claims of copyright on old out-of-copyright (public domain) content.**

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

YES

This is a constant problem faced by users of all of the Wikimedia websites. Wikimedia

Commons requires[8] that material uploaded is free or freely licensed both in the US (where the servers are located) and also under the law of each of the source countries of the originating works. This rigorous approach to ensuring that local copyright laws are complied with should, we submit, be celebrated, but in practice the inconsistent approach to copyright within European member states seriously limits users of the Wikimedia sites in comparison for example with those of less copyright-aware social networking sites.

European editors who wish to upload properly-licensed educational remixes of pre-existing material are inhibited from doing so by the inconsistencies that exist between laws of EU member states. That not in the public interest, and could and should be remedied by greater harmonisation.

While this is a major obstacle for freedom of creative expression in general, it is particularly problematic that Europeans have substantially fewer rights than, for instance, US citizens, who in some cases can refer to the Fair Use provisions of US copyright law.

It should be noted that this question apparently attempts to put 'end users' into a separate category from 'right holders'. This is already an unrealistic and outdated distinction, and will rapidly become even less tenable as available software and behavioural practices on the internet change.

Many 'end users' such as those who create Wikipedia, create and publish vast amounts of content that is as original and creative as the content generated by the traditional copyright industries. At the same time, 'rights holders' (by which is presumably meant the traditional companies such as Disney) regularly produce works that are based on pre-existing works. To assume that 'end users' only generate content that is remixed badly misunderstands the nature of modern broadly-distributed creativity, and unfairly tilts the playing field for copyright reform away from the needs of the public and towards the interests of the traditional industries.

See also **80.1 'Freedom of panorama'** and **80.5 The so-called 'sweat of the brow' doctrine**

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?

(a) NO
(b) YES

All Wikimedia websites make use of open source MediaWiki software[9] which allows editors the ability to tag uploaded content with appropriate licences, and to link where needed to the originating materials from which re-mixes have been made. Extensive licence information and metadata are provided, allowing others to easily and reliably reuse this information. The licence details and the links are automatically available at the click of the mouse to anyone who views the re-mixed content wherever it is re-used on the Wikimedia sites.

These freely-usable standards work well, while fully respecting the rights of rightholders, and we would encourage the Commission to facilitate the adoption of similar approaches and standardizations throughout the Europe Union

60. (a) [In particular if you are an end user/consumer or a right holder):] Have you experienced problems when trying to be remunerated for the use of the work you have created (on the basis of pre-existing works)?
(b) [In particular if you are a service provider:] Do you provide remuneration schemes for users publishing/disseminating the works they have created (on the basis of pre-existing works) through your service?

NO

8 https://commons.wikimedia.org/wiki/Licensing
9 https://www.mediawiki.org/wiki/MediaWiki

Not applicable, as all Wikimedia sites are entirely free of charge. The existence of Wikipedia and vast amounts of other creative, user-generated content despite a complete lack of remuneration suggests that the law could and should work to facilitate unremunerated creativity, not only paid creativity.

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

[NO OPINION]

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 OPINION]

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

None of the issues apparently being addressed by questions 59 to 62 appear at all relevant to the Wikimedia sites which are, on most measures, among the largest user generated content sites anywhere on the internet. There may be issues elsewhere, but any legislative solutions to those problems should not result in additional and unnecessary restrictions being placed on Wikimedia sites or their users.

In particular, solutions to perceived problems with social media and other sites that do not actively curate content, and that therefore tend to end up with high levels of copyright-infringements, should be targeted specifically at those sites.

The Wikimedia sites could be used as an example of good legal and community practice. The practice on Wikimedia Commons[10] (the file library used by all Wikimedia sites including Wikipedia) is that uploads must be free or freely licensed under the laws of both the US (where the servers are located) and the source country. A 'Precautionary Principle'[11] is applied, which says that where there is significant doubt about the freedom of a particular file it should be deleted. Files are actively curated against that standard by volunteer editors, with the deletions being performed by experienced and trusted members of the Commons community known as administrators[12].

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

The spirit and purposes that animated the original private copying exceptions remain important and valid in the digital environment, perhaps even more so now that individuals have the potential to make so many different constructive and creative uses of such material when they are not prevented by artificial constraints imposed by law, contracts, or technological protection measures. As a result, it must be made clear that the existing exceptions and limitations are applicable in the digital environment just as in other environments.

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

This question improperly mixes two issues: the licensing of materials for private uses, and private levies. Those issues are by no means connected and need to be dealt with separately. We cannot accept a formulation that inexorably leads directly from private uses to

10 https://commons.wikimedia.org/wiki/Main_Page
11 https://commons.wikimedia.org/wiki/Commons:Project_scope/Precautionary_principle
12 https://commons.wikimedia.org/wiki/Commons:Administrators

levies on physical media or hardware.

Levies unfairly benefit a specific business model and specific assumptions about content ownership, and therefore unfairly prejudice many new business models, including volunteer-driven models like that of the Wikimedia Foundation, that do not presume direct user payments for content as part of the model. Businesses developing new online services need legal certainty, and should not be burdened by levies that would compensate a loss that is not proven. The EU should focus on boosting creativity and innovation rather than on adding extra layers of burden.

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?

See question 65.

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

See question 65.

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 OPINION]

69. What percentage of products subject to a levy is sold to persons other than natural persons for purposes clearly unrelated to private copying? Do any of those transactions result in undue payments? Please explain in detail the example you provide (type of products, type of transaction, stakeholders, etc.).

While we cannot answer the specific question, we can say that the vast majority of all internet users in the EU regularly visit the Wikimedia websites where users have legally, voluntarily, and freely shared information without intention of compensation. To presume that these users are committing a harm, and thus require them to pay a levy to the shrinking number of creators represented by the traditional copyright industry, is clearly unsupported by the actual uses of these computers.

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?

[NO OPINION]

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

Scrap the levy system entirely. See question 65.

The levy system presumes the 'guilt' of all users involved, which has always been questionable, and becomes increasingly untenable as ever more content becomes (like Wikipedia) created by users for other users, without assumption of compensation. As a result, this system is fundamentally unfair, and the only way to resolve the problem is to abolish the levy system, replacing it with market mechanisms for content creators - both traditional ones, like the sale of products and event tickets, and new ones, like crowd-funding.

Fair remuneration of authors and performers

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

This is a loaded question, as it presupposes that any and all exploitation should imply some sort of compensatory 'remuneration'. That is a false premise, since many re-uses of copyright content are entirely without detriment to the right holder. We would like to see a

thorough analysis of the economics underlying the creation and dissemination of culture, rather than blindly assuming that each and every use of work should be remunerated in order to satisfy right holders' interests.

Where there is evidence that these interests are not harmed, or where there is an overriding public benefit, such uses should not be remunerated. Such an analysis should be systematically undertaken before further legislative action is contemplated in this area.

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

[NO OPINION]

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

See question 72.

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?

[NO OPINION]

76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

The limitation of intermediaries' liability is important. Without it, there is a high risk of censorship and curtailment of freedom of expression, freedom of communication, and even freedom to conduct a business. Middlemen should not be liable and privatised enforcement is not the solution. The rule of law needs to apply.

The problem is that community wireless networks, anonymizing services, fixed internet service providers, online data storage places, search engines and other actors suffer uncertainty because of the potential intermediary liability in copyright. As a result, they sometimes take down things that are legal, out of fear of being sued. That is bad for EU citizens' rights of free expression and can chill innovation and creativity.

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?

[NO OPINION]

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?

YES

Having European legislation fully harmonized within a single EU copyright title would in our view greatly contribute to the further development of European cultural interchange. It would,

on many levels, increase legal certainties while providing a concomitant reduction in the level of worry and potential legal risk that individuals and organisations who wish responsibly to re-use content while respecting the rights of copyright owners are currently exposed to within the European market.

Everyone on the internet would benefit from this, including both commercial entities as well as the voluntary organisations (such as Wikimedia) that cooperate internationally.

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?

YES to the first question. NO to the second

It should be the immediate next step, and should be given high priority.

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.

Apart from the urgent need for general harmonisation, the most important specific issues for attention, that we come up against on a daily basis, are:

80.1 'Freedom of panorama'[13]

On Wikimedia websites the EU permitted exception relating to '*works of architecture or sculpture, made to be located permanently in public places'* is normally known as Freedom of panorama ('FOP') after the term used in German copyright law, '*Panoramafreiheit*'. We will use that term here.

The works to which this exception applies under local law vary widely between European member states. The exception generally applies only to works on permanent public display. In some countries, it applies only in outdoor public places; in others it extends to indoor places including places open to the public where an admission fee is charged. It may cover only architecture, only architecture and sculpture, or all permanently-displayed copyrightable works including literary works.

The extent of confusion, coupled most importantly with the fact that some member states have not used the exception at all creates real problems for global websites such as Wikipedia and Wikimedia Commons that make great efforts to ensure they host only lawfully-permitted content.

The practice on Wikimedia Commons[14] (the file library used by all Wikimedia sites including Wikipedia) is that uploads must be free or freely licensed under the laws of both the US (where the servers are located) and the source country. A 'Precautionary Principle'[15] is applied, which says that where there is significant doubt about the freedom of a particular file it should be deleted. Files are actively curated against that standard by volunteer editors, with the deletions being performed by experienced and trusted members of the Commons community known as administrators[16].

In order that the Wikimedia sites can collect and curate a comprehensive collection of freely-available images of European cultural heritage objects, including buildings and sculptures, volunteers need the ability to be able to photograph freely (at the very least) buildings and sculptures which are visible to any member of the public standing in a public place. Such a freedom has long been taken for granted in several member states, including the UK (which has had such freedom within its law since at least as early as 1956), but it does not exist at all, or only to an extremely limited extent, in other member states including Italy, Belgium and

13 https://commons.wikimedia.org/wiki/Commons:Freedom_of_panorama
14 https://commons.wikimedia.org/wiki/Main_Page
15 https://commons.wikimedia.org/wiki/Commons:Project_scope/Precautionary_principle
16 https://commons.wikimedia.org/wiki/Commons:Administrators

France. The freedom of panorama page[17] on Wikimedia Commons provides a handy though not definitive reference to the situation in various countries.

The practical consequence of the failure of Italy, Belgium and France to avail themselves of the exception is that is is typically impossible for Wikipedia to illustrate any of the great public buildings of those countries, apart from those that are old enough for the architect's copyright protection to have expired. This situation disadvantages citizens of those countries, who are unable to take or obtain any access to free photographs of often important buildings that anyone standing in a public street can see with their own eyes.

We can take as a practical example the international public photographic competition that Wikimedia Commons has been running for several years called *Wiki Loves Monuments*[18], the purpose of which is to collect freely-licensed photographic images of cultural heritage monuments, including buildings, throughout the world. The 2012 competition was formally recognised[19] by Guinness World Records as the World's largest photography competition, with over 350,000 entries, many of which came from the member states of the EU.

The sheer numbers of people involved, and the number of images taken, demonstrate the very high levels of public interest and support for this type of initiative within the EU. And yet, volunteers from Italy, Belgium and France were disadvantaged when compared with those from other member states and had to censor the images they uploaded because of their local copyright laws. Those that were uploaded in ignorance of local laws – some of which were extremely good and potentially very useful - had to be deleted by Commons administrators.

No doubt many of the very same people happily photograph modern buildings in those countries and upload their holiday snaps and the like onto a whole range of social media sites, probably without even knowing that such uploads are in fact copyright infringements. The Wikimedia sites, that make huge efforts to comply with copyright restrictions are at a huge disadvantage in collecting educational images when compared with many social media sites who do not particularly care about copyright.

We do not believe that such a situation is sustainable, nor is it at all compatible with the free transfer of services and knowledge within the EU, and we recommend that appropriate freedom of panorama exceptions be made mandatory in all member states. This should bring the level of exceptions in this area up to the existing norm in most states. The new standards could conveniently be based on the longstanding and influential *Panoramafreiheit* rules as used in Germany. It should be noted that *Panoramafreiheit* covers all types of artistic works permanently visible from a public place - not only buildings but also sculptures and the like.

Where some member states such as the UK[20] and the Netherlands[21] have long had within their national laws wider-ranging exceptions, they should be allowed to retain those. More generally, the list of exceptions should set out minimum standards that member states should cater for, while allowing them the option of going further where local circumstances warrant it.

While such a change would, of necessity, remove from architects and building owners the rights to copyright control of photographs taken of their properties, that would in practice be a small price to pay, since architects are typically not in the business of making money by selling postcards or other reproductions of their buildings. An architect would still be able to rely on moral rights in the normal way in the event that a photograph presented the building in a derogatory manner, which should provide a perfectly adequate continuing level of protection.

80.2 Orphan works

EU directive 2012/28/EU on certain permitted uses of orphan works should be revisited and significantly revised as it is not in practice providing libraries, museums and the like with the ability they and the public need to make their collections available where those collections include considerable numbers of orphan works. Directive 2012/28/EU requires the organisation holding a potentially orphan work to arrange for a 'diligent search' to be carried out before the work can be granted orphan status.

Such an approach has been part of the law of some member states (though the UK requires

17 https://commons.wikimedia.org/wiki/Commons:Freedom_of_panorama
18 http://www.wikilovesmonuments.org/
19 http://www.guinnessworldrecords.com/records-6000/largest-photography-competition/#
20 http://www.legislation.gov.uk/ukpga/1988/48/section/62
21 Article 18 of the Dutch copyright law

a lesser standard of 'reasonable enquiry'[22]) for many years already, and has not resulted in any great progress largely due to the significant costs involved in carrying out such searches on a case by case basis. The issue is of particular concern to archives holding large collections of old photographs or postcards, a significant proportion of which are frequently unattributed to any particular photographer or potential rightholder. And the issue is exacerbated by the increases in copyright period from 50 to 70 years pma.

To achieve the desirable social ends set out in paragraphs (1) to (3) of the preamble to directive 2012/28/EU requires the EU to consider more innovative approaches that are significantly less expensive for content-holding institutions.

We recommend that serious consideration be given to fixing the base copyright term for works of unknown authorship to 25 years from first lawful publication to correspond with the period set out in Article 4 of the the EU Term directive, as amended, 2006/116/EU. If before the 25 years expires a rights-owner comes forward, copyright could then revert to the extended 70 year pma term, but should exclude any possibility of claims for retrospective damages or payment for any uses that took place before the date that the rightowner came forward.

To protect the legitimate rights of owners who might not be aware that a copyright work of theirs was held without attribution within an archive's collections, the EU should mandate member states to set up insurance schemes to provide the rightholder with adequate compensation in such a case, on proof of copyright ownership and to an amount which would vary according to the circumferences including evidence of commercialisation already achieved by the rightholder, and any evidence of independent commercial value that could be demonstrated.

80.3 Unjustified use of technical protection measures

European users need to be protected from the effects of unjustified uses of technical protection measures. Circumvention of technical protection measures must be allowed when exercising user rights created by the list of EU exceptions, or when accessing any public domain works. Using technical protection measures to hinder or impede privileged uses of a protected work, or access to out-of-copyright (public domain) material, should be subject to penalties.

80.4 Untruthful claims of copyright on old out-of-copyright (public domain) content

It is extremely common for websites that make out-of-copyright (public domain) material available on the internet, whether free of charge or behind a paywall, to claim falsely that the material is copyright-protected with the website owner holding that copyright. We believe that such statements effectively amount to a fraud on the public, and that they should be outlawed, with transgressors subject to penalties.

80.5 The so-called 'sweat of the brow' doctrine[23]

Historically, copyright protection in the UK and other Common Law countries has been accorded to "*original, literary, dramatic, musical or artistic works*"[24]. To distinguish works that are sufficiently original to warrant copyright protection from those that are not the concept of the "*threshold of originality*"[25] is used. Works that fall below that threshold are denied protection as not being sufficiently original.

Civil law countries (the majority of EU member states) typically do not distinguish by threshold of originality but instead tend to rely on the extent to which the work shows some degree of creativity by the author. A variety of approaches are used, but mostly to a similar end.

The United States was initially close to the UK position, but has moved towards a requirement that copyright works should possess "*at least some minimal degree of creativity*"[26]

22 Copyright, Designs and Patents Act 1988, section 9(5): http://www.legislation.gov.uk/ukpga/1988/48/section/9
23 https://en.wikipedia.org/wiki/Sweat_of_the_brow
24 Copyright, Designs and Patents Act 1988, Section 1 (1)(a): http://www.legislation.gov.uk/ukpga/1988/48/section/1
25 https://en.wikipedia.org/wiki/Threshold_of_originality
26 Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991):

The expression '*sweat of the brow*' is sometimes used to characterise the UK's position, on the basis that the UK grants copyright protection to works which are not original in any meaningful way, but rather as a 'reward' for the effort or labour that has gone into the making of the work, even if the result is completely unoriginal. Proponents of the UK approach reply that the characterisation is unfair, since by definition protection is provided only to "***original**, literary, dramatic, musical or artistic works*"[27].

The distinction had not been of any great practical importance within the EU until 2005 when the case of Hyperion Records v Sawkin[28] clarified the meaning of "original' in UK law to include works which are intended to be *exact copies* of pre-existing works. This decision made it clear that - contrary to what is often supposed - originality is not determined merely by comparing the original with the copy and asking "what is different?" Indeed, the court made it plain that there can be originality *even if nothing at all is different*. Rather, one has to ask [para 85] "*whether the [copy] is sufficiently original in terms of the skill and labour used to create it?*"

Purely mechanical copying requiring no skill and little labour, such as a raw scan or photocopy, will not be enough, but a faithful-reproduction photograph does require considerable labour and skill to make, and accordingly could well acquire copyright in the UK. Originality does not require a work to be unique or novel.

These developments in UK jurisprudence have moved the UK far out of line with conventional expectations of what is protectable by copyright in other EU member states, and indeed puts it out of line with current international expectations, including the US.

Of particular concern to us and to Wikimedia websites as a whole are the increasing claims by UK organisations including cultural institutions that they are entitled to copyright protection on digitised copies of two-dimensional public domain art, such as old paintings, where the digitised copy is derived from a scan or a photograph and is intended to replicate the original as closely as technology will allow. While we recognise that a significant amount of skill and time may be involved in replicating (say) an old master as accurately as possible, by definition the final result is the product merely of hard work and cannot demonstrate any true creativity by the copyist.

Accordingly, we believe that such "faithful reproductions of a 2D public domain works" should not be entitled to benefit from copyright protection within the EU.

This specific issue has not so far been directly tested in a UK court, but the state of the UK law was considered in the 1999 US case of *Bridgeman Art Library v Corel Corp*[29] *where* the New York District Court held that *"a photograph which is no more than a copy of a work of another as exact as science and technology permits lacks originality. That is not to say that such a feat is trivial, simply not original"*. In spite of the effort and labour involved in creating professional-quality slides from the original works of art, the Court held that copyright did not subsist as they were simply slavish copies of the works of art represented.

A similar position[30] has been taken on the Wikimedia sites, and the Wikimedia Foundation (WMF) has stated[31]:

"To put it plainly, WMF's position has always been that faithful reproductions of two-dimensional public domain works of art are *public domain, and that claims to the contrary represent an assault on the very concept of a public domain. If museums and galleries not only claim copyright on reproductions, but also control the access to the ability to reproduce pictures (by prohibiting photos, etc.), important historical works that are legally in the public domain can be made inaccessible to the public except through gatekeepers".*

We believe that the courts of most other member states would also exclude protection for faithful reproductions, apart perhaps from those Nordic countries that have 'simple photograph' neighbouring rights.

We believe that the divergence of law in this area has now grown to such an extent that the EU should step in to ensure a reasonably flat playing field between the member states in

---

http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=499&invol=340

27 Copyright, Designs and Patents Act 1988, Section 1 (1)(a): http://www.legislation.gov.uk/ukpga/1988/48/section/1

28 http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2004/1530.html

29 *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999): http://www.law.cornell.edu/copyright/cases/36_FSupp2d_191.htm

30 https://commons.wikimedia.org/wiki/Commons:When_to_use_the_PD-Art_tag

31 https://commons.wikimedia.org/wiki/Commons:When_to_use_the_PD-Art_tag#The position of the WMF

defining the limits of what is and is not capable of copyright protection. Such a harmonisation would achieve the significant goal of protecting public access to the public domain and promoting free movement of knowledge and innovation in the internal market.

Only a very small change would in fact be needed to nudge all member states back into line with international norms. This could be done by requiring member states to exclude from copyright protection works which do not demonstrate at l*east some minimal level of creativity by the author*.