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DG Internal Market and Services

By email (markt-copyright-consultation@ec.europa.eu)

Dear Sirs

***Re: Public Consultation on the review of the EU copyright rules City of London Law Society IP Committee response***

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the European Commission's Public Consultation on the review of the EU copyright rules has been prepared by the CLLS Intellectual Property Law Committee.

The CLLS is registered on the European Commission's Transparency Register, and its registration number is **24418535037-82**.

We set out below our responses to specific questions in the consultation.

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

We are not in a position to identify specific problems in online access or licensing but we would urge the Commission to consider carefully whether the extent of any problems identified justify any legislative solutions. If identified problems are sector-specific and economically and culturally insignificant (i.e. if in most sectors online licensing works most of the time), legislation would be inappropriate. If this were the case, it would prove very difficult to legislate in a way that was proportionate to and accurately targeted at the problems identified.

For example, if the evidence is that licences for digital use are only granted on a territory-by-territory basis and cross-border access is prohibited by forms of geo-filtering, we would query

whether it would be proportionate or appropriate for legislation to prohibit these practices unless the evidence demonstrated that any problems caused were sufficiently economically and culturally significant and widespread. There may be many good and supportable economic and cultural reasons for such practices. Great care should be taken before disturbing the status quo, particularly as the digital marketplace is still in its infancy (relatively speaking) and as piracy remains a considerable threat to digital business models.

**Question 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?**

If any reforming measures are to be introduced (whether legislative or non-legislative) it is important that they take place at EU level. Unless there is compelling economic and cultural evidence requiring legislation, our strong preference is for the market to take the lead in providing solutions (supported by the Commission where appropriate and helpful). Ultimately, copyright is a property right and it should, prima facie, be for the owner of that property right to determine how best (if at all) to exploit it. To the extent that there is not a pressing public interest need for restricting a rights holder's control over its property, such a course should be the last resort.

The legislative changes needed to regulate digital copyright licensing would likely be radical and far-reaching so should require substantial and compelling supporting evidence. In the absence of such evidence, it should be the market that leads the development of licensing.

In particular, if the problems in digital licensing are sector specific, a market-led solution would be able to tailor a solution accordingly. Legislation is likely to struggle to differentiate between sectors, even if it were possible to do so in a way that complies with international copyright law. Indeed, given the ever-increasing convergence of technologies and markets in the digital arena, even sector specific interventions can have unexpected consequences.

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

Yes.

Even if it were not, we would query the benefit of legislating to improve the clarity. Legislation will inevitably struggle to find a solution that would apply satisfactorily and predictably to all factual situations. Attempting to "future-proof" legislation is very difficult. Courts are better suited to providing the solutions than searching in vain for a predictive legislative solution to all situations. In general, the CJEU has, over the course of a number of judgments, started to provide a clear description of the making available right. That is not to say its decisions are always easy to understand or apply (such as *Airfield*). However, the approach it has taken to where the making available right is infringed (e.g. *Football Dataco*) and when the act happens (e.g. *Svensson*) is as clear and easy to apply as we could hope for.

What is less clear from the case-law to date is the extent to which a licence covering one Member State is sufficient to cover acts in other Member States. There appears to be a conflict between *Svensson*, on the one hand, which provides that the making available happens when a new public may access a work and *Football Dataco*, on the other, which says that it happens at least where that access is targeted. A single act, which may happen simultaneously in more than one Member State, may therefore, on the face of the case law,

require licensing more than once (i.e. at source where the access is provided and at destination where the access is targeted).

Although the consultation does not directly address this question, we consider that the more important uncertainty results from the decision in *Pinckney* on jurisdiction. The result of that decision appears to be that the courts of a Member State (A) have jurisdiction over a defendant not domiciled in Member State A where that defendant's service is accessible in Member State A. This is so even if the substantive rules on liability (as set out in cases such as *Football Dataco*) provide that there would be no infringement in Member State A unless that territory was targeted by the defendant. This decision could lead to unsatisfactory forum shopping and a waste of judicial resources, when the dispute would be more appropriately heard in a jurisdiction in which an infringement has actually occurred.

There may come a time when the decisions from the CJEU will need to be reconsidered by legislators, to ensure that the law still provides adequate, appropriate and practicable protection for rights holder and users alike.

**Question 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?**

We consider that the answer to the question would be best left to developing case law. As discussed in our response to Question 8, legislation is ill-suited to deal with the vast array of factual circumstances that can arise. Dealing specifically with hyperlinking by legislation (whether under the communication to the public exclusive right or otherwise) seems to be an unnecessarily piecemeal approach to digital issues. If the evidence demonstrates that there is a problem with how the making available right operates in current and future online environments, those problems should be addressed head-on and at a generally applicable level, rather than targeting a specific application of that right. We are not aware of such fundamental flaws in the making available right.

It is important to recognise that providing a hyperlink does not just potentially engage the communication to the public right. Depending on the circumstances, it might also engage national laws on secondary liability for copyright infringement such as, in the UK, authorising a third party's infringement or being jointly liable for that infringement. Those laws are not harmonised at EU (or international) level. If the Commission wished to produce a consistent approach across the EU to the question of hyperlinking (and wider issues of liability for digital activity), we would suggest that it begin to consider whether secondary liability for third party copyright infringement should also be harmonised.

**Question 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?**

Rightsholders' underlying concern is that users should not be immune from infringement proceedings if they are knowingly accessing and using copyright works without a licence. There is a need for users to understand and respect copyright in a way which is perhaps currently lacking. If they are otherwise properly licensed, however, their activities should not be blocked by the technical need to temporarily cache material. In our view, the temporary reproduction exception in the Copyright Directive is not fit for the purposes for which this question is seeking to use it. That it is about to receive the fourth CJEU judgment on its meaning, in light of each of the three existing judgments having provided conflicting

interpretations, demonstrates this unsuitability. If the exception is relied on by courts to permit browsing then it renders the "lawful use" requirement of the exception meaningless. A much more convincing analysis would be to rely on implied licences under national law.

**Question 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.**

Resale of previously purchased digital content (other than software in cases equivalent to *UsedSoft*) is, as the law stands in the EU, unlawful unless the licence is transferable. The Commission should therefore be very slow to propose enabling resale of previously purchased digital content without rigorous analysis of the cultural and economic impact of resale. Unauthorised resale infringes two exclusive rights: the reproduction right and the communication to the public right. To permit resale would therefore be to deprive rights holders of those two rights once they had made a first sale of a digital copy of their works. This is a radical result. Very careful attention should therefore be paid to whether permitting resale would be compatible with the three-step test.

The EU should also carefully consider its international obligations in respect of whether the *UsedSoft* decision is actually correct. There is no basis under the WIPO Copyright Treaty to treat computer programs as a *lex specialis* vis-à-vis the remainder of copyright works. Article 4 of the WCT is clear that computer programs are to be treated in the same way as all other literary works. It is therefore incompatible with that treatment to apply different rules to works under the Software Directive than would apply to works under the Copyright Directive.

**Question 15. Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?**

No.

For a registration system to be effective it would have to be authoritative, even if optional. To be authoritative would, amongst other things, require the system to have a process by which parties who apply to register a work can have their applications challenged by third parties who claim to have a competing interest in that work and provide for a decision-maker to rule on such challenges. To do so would require harmonisation of, for example, rules of ownership and assignment of copyright. Registration could, therefore, only follow harmonisation and the establishment of EU judicial bodies (such as the opposition and cancellation divisions and Boards of Appeal of OHIM). These are a long way from being achieved.

Far better and more achievable would be for the EU to support initiatives such as the UK's Copyright Hub. In this context, such initiatives could provide helpful assistance in at least three areas. Firstly, they could create a central hub for rights databases which acts as a signpost to discovering who owns what. Secondly, they could generate consistent standards of meta-data relating to ownership information. That meta-data could also potentially be developed to enable electronic automated licensing. Thirdly, standards could be established to facilitate such licensing. These developments could help to achieve the key benefit of a registration system, being to facilitate licensing, without needing whole-scale reforms to substantive copyright law.

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

No opinion.

If the Commission wishes to harmonise exceptions, we would expect it to do so only on the basis of substantial evidence that there would be compelling economic and cultural benefits for doing so. Our impression is that the problems, if any, caused by the current system are largely theoretical rather than actual. For example, we would query how many digital services are held back from launching because of different copyright exceptions. However, we do acknowledge that there may be some works which can be created and exploited in one Member State in reliance on an exception which could not be exploited in other Member States without such an exception. There may also be some technologies which use third party content without a licence that benefit from exceptions in one Member State which are not available in another Member State. Those technologies could not therefore freely be sold across borders. It will be important for the Commission to identify how serious and widespread problems they are.

It would, however, be an enormous upheaval to national copyright laws for the exceptions to be harmonised and would require years of difficult negotiations to create a harmonised list. Without compelling evidence, we would query whether the investment required in bringing about harmonisation of exceptions and the considerable uncertainty it would produce would be justified or proportionate. The scope of any harmonised exception could only be determined by the CJEU and it would be difficult to rely with confidence on any Member States' existing case law without an authoritative CJEU ruling in support of it. This would take many years.

That said, we endorse the present situation that the introduction of new exceptions should only be possible by amendment to the Copyright Directive. However, when preparing such a new exception, the Commission should be mindful of the lessons learned from the temporary reproduction exception which, as discussed in our answer to Question 12, is not fit for the purposes for which it is currently being used.

If there is a sufficient economic and cultural benefit from harmonising the exceptions, then it would be a worthwhile exercise for the Commission to begin considering how it might do so. For example, it could provide a useful "test case" for the feasibility and desirability of a single EU copyright title.

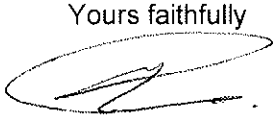
**Question 79. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?**

A single EU copyright title could only be a longer term project. Given the extent of reform it would require, the reforms presently under consultation should first be given the Commission's full and exclusive attention and thereafter allowed the opportunity to operate in practice to see whether they are able to bring about the benefits of a single title without the costs of doing so. A first step along the journey to a single EU copyright title could be to assess whether it would be desirable and achievable to harmonise exceptions. If not, then it would not seem to be worth engaging in the much wider project of establishing a single title along with everything that goes with that.

**Question 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.**

Member States currently protect different types of work by copyright. There is no harmonised definition of what constitutes a work protectable by copyright, whether in relation to the nature of the work (e.g. perfume) or the nature of the way in which it is created (e.g. author's own intellectual creation). The CJEU has begun to formulate a concept of what types of works fall within the scope of the Copyright Directive (e.g. *Infopaq*, *FAPL/Murphy*, *Painer* and *BSA*). It appears to have done so without a clear basis in the Copyright Directive allowing for harmonisation of the subject matter of copyright. One effect of its decisions may be that the UK "closed list" system to identifying the subject matter of copyright is incompatible with the Copyright Directive. As far as we are aware, that was not the intention behind the Copyright Directive. Nevertheless, if the EU legislative organs believe that it is appropriate for the subject matter of copyright to be harmonised in the EU, our view is that authority to do this should come from a Directive and that the Directive should set out a harmonised view of what is protected by copyright.

Yours faithfully



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**INTELLECTUAL PROPERTY LAW COMMITTEE**

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