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CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

SUMMARY REPORT

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CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

PROJECT TEAM

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The answers to the 15 FAQs on the basis of which the present Summary Report was drafted reflect the status of the relevant legal framework as of October 2016 for Poland, and as of March 2016 for the other 27 Member States. Regarding the work of the content coordinator, only CJEU decisions handed down before the end of May 2016 have been taken into account.

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EXECUTIVE SUMMARY

CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

Copyright law throughout the EU[3] does not give unanimous answers to the Consumers' 15 Frequently Asked Questions. While international and EU law have approximated the different copyright traditions to a certain extent, a closer look reveals that divergences still prevail. These might relate to the fact that even in areas that have already been the subject of harmonisation measures, Member States have often not implemented provisions of EU secondary legislation in a uniform way. Moreover, some key aspects of copyright law have not been harmonised so far. The result is the following: even if a few common basic principles can certainly be identified, the exceptions to these principles as well as their implementation vary significantly.

Generally speaking, the differences between the two main copyright traditions, namely common law copyright (predominant in Ireland (IE), Cyprus (CY) and the United Kingdom (UK)) and civil law author's rights[4], still appear to be significant — even if international and European law has brought both systems somewhat closer. This holds true both as regards systematic differences and nuances. To name but a few examples, at least in the United Kingdom and in Ireland, no private copying exception and no levy system have been established. Moreover, exceptions to the principle of initial ownership, lower restraints on transfers of rights, and the notion of fair dealing still largely distinguish common law jurisdictions from continental Europe.

However, there are also nuances and at times different approaches within each of the two traditions. As to the common law tradition, for example, Cyprus presents some distinctive features. With regard to author's rights countries, which traditionally focus on the personal boundaries of the author to his or her work, there are different degrees of protection for the author's material and moral interests. Notable differences relate, for example, to limitations to exclusive rights: the conditions of application of a specific limitation may be more or less permissive in different Member States. As to copyright contracts, it appears that the Nordic countries, the Netherlands, some of the Baltic countries (Estonia (EE), Latvia (LV)), and even Luxembourg (LU) are more 'liberal' when it comes to transfers of (at least economic) rights. Jurisdictions that follow the Germanic author's rights approach present some systemic particularities that have an impact on how the existence and exercise of copyright are construed: unlike in other countries, copyright (including economic rights) can, for example, not be 'transferred' in Germany (DE) or Croatia (HR), but an author may grant a 'right to use' the work. Nuances also exist for the threshold of protection; in addition, only some Member States provide for special regimes that protect even non-original photographs.

The analysis of the information provided by the 28 national experts revealed that the issues addressed in the 15 consumer questions can be grouped in three categories, demonstrating that there is a degree of convergence on certain basic principles of copyright law, but some

3 - In the absence of an EU copyright title, copyright law is territorial in nature, i.e. it only applies within the confines of the territory of a specific Member State. Therefore, and despite harmonisation measures, there are still 28 copyright systems in the European Union.

4 - As to the hybrid legal system of Malta, Maltese copyright law is essentially based on the common law tradition, with a number of civil law author's rights principles. The difference between author's rights and copyright systems is explained further below, under Consumer Question 1. In this Summary Report, the term 'copyright' is used indistinctively.

divergence as to their implementation (1); that there is a relatively high degree of divergence on specific copyright rules (2); and finally, that a number of open questions or 'grey areas' remain, in particular around uses in the digital and online environment (3). Depending on what category the consumer question falls into, the uncertainty for consumers and rights holders on the legality of certain uses can be significantly higher.

With regard to the first category, it can be noted that several consumer questions relate to basic principles of copyright protection, or to aspects that have largely been harmonised. Answers on these aspects in general converge, but exceptions to those principles remain and they reveal diverging approaches; differences can also exist in the details. Certain common rules can easily be identified, such as automaticity of protection, protection of exclusive rights of creators, protection against circumvention of Technical Protection Measures (TPM) (although some exceptions still exist), or free use for quotation (differences exist as to the specific requirements). Even in areas where national laws still diverge, some common, very basic principles can be singled out. A common basic principle is, for example, that the creator is the initial author and owner of the work. However, exceptions to that principle exist, and these exceptions, as well as rules relating to transfers of ownership diverge within the EU. Moreover, certain similar criteria for copyright protection exist in all Member States. In the details, however, these criteria may slightly diverge and in practice, the threshold of protection is still higher in some countries than in others[5]. Another basic principle is that rights holders may exploit their work, for example, through licences, and take actions against infringers. Nevertheless, rules relating to contracts as well as to the scope and modalities of the sanctions available in the Member States diverge. And finally, as a principle, Member States allow certain uses without the authorisation of the rights holder. However, the scope and conditions of such uses, which are commonly known as 'exceptions and limitations', can be very different, depending on the jurisdiction.

The second category generally comprises less harmonised aspects or specific copyright rules, which reveal a high degree of divergence. Specific exceptions and limitations such as the private copying exception, as well as remuneration systems for uses that are lawful even without the rights holder's authorisation, differ significantly. Moreover, lack of a uniform implementation and interpretation of the so-called three-step test[6] may increase disparities when it comes to the scope of application of limitations. Five Member States have no levy system; two of them do not provide an exception for private copying (IE, UK). Regarding the other Member States, differences exist as to the operation of the 'levy' systems and the remuneration they provide. Copyright contracts are a matter of national law, and rules vary significantly.

The third category generally relates to the adaptation of copyright rules to changing user behaviour in the online environment. The information provided by the national experts revealed several 'grey areas' that cause uncertainty to both consumers and rights holders. In

5 - In theory, as a consequence of case-law of the Court of Justice of the European Union (CJEU), and notably of Case C 5/08, Infopaq International A/S v Danske Dagblades Forening [2009], a common standard should be applied in all Member States.

6 - This provision is laid down in international and EU law and provides that uses without the rights holder's authorisation must only be allowed in certain special cases (step 1), which do not conflict with a normal exploitation of the work or other subject matter (step 2) and do not unreasonably prejudice the legitimate interests of the rights holder (step 3).

many Member States, legislation or case-law provides no, or at least insufficient guidance on issues such as streaming, users' liability for 'automatic' uploads to social media platforms, or avatars and virtual worlds. As to linking and embedding, many national experts refer to the conditions established by the CJEU; but the situation is not clear in all Member States. There is no clarity as to how a user can determine whether a work has been uploaded lawfully.

Overall, it appears that the copyright framework in the EU is fragmented to a significant extent. Certain basic principles of copyright law appear to be valid across borders. It should therefore be possible to explain the general functioning, purpose and value of a copyright system to consumers in simple terms. Nevertheless, the overall analysis of the information provided by the national experts suggests that many questions related to 'everyday' uses of copyrighted works in the online world currently still lack a clear and straightforward answer as regards their legality.

INTRODUCTION

CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

BACKGROUND AND OBJECTIVES OF THE FAQ PROJECT

In line with its mission and objectives, the European Union Intellectual Property Office (the EUIPO), acting through the European Observatory on Infringements of Intellectual Property Rights (the Observatory), is creating a **copyright guide for consumers** (the Guide).[7] The Guide aims to give 'answers to the most frequently asked questions (FAQs) average consumers have in relation to copyright for all twenty-eight EU Member States.' It ought to 'provide consumer-friendly information about what is legal and what is not as far as the usage of copyright and related rights-protected content on the internet is concerned[8].' To this end, representatives of consumers and civil society presented a number of consumer questions that the Observatory transformed into 15 specific consumer questions in the framework of the 'IP in the Digital World' stakeholder meetings. The project consists of two phases: the first phase focuses on consumers by providing them with answers to the 15 FAQs. The second phase focuses more on policy makers, and provides them with a horizontal synthesis of the answers to the FAQs (the Summary Report).

Copyright law has only been partially harmonised by various EU directives[9] ; it was to be expected that no single European answer could be given to each of the 15 consumer questions. For that reason, 28 renowned national copyright experts were asked to respond to the consumer questions against the background of their respective jurisdictions. In this context, the Content Coordinators[10] prepared a template and explanatory notes for the national experts (see Annex 2). The aim of these documents was to ensure uniform interpretation of the consumer questions. The European Commission services and the Observatory provided some input on the template. Once the national experts had handed in their responses, the latter were sent to the respective national public-sector representatives at the Observatory.

The main purpose of the present **Summary Report** (the Report) is to **highlight the convergences and differences in national copyright laws in relation to the 15 consumer questions.**

METHODOLOGY

In order to be easily understandable, the 15 consumer questions were phrased in layman's terms. In the template (see Annex 2), the questions were broken down to the legal issues behind them. This was done with the aim of identifying some of the differences between

7 - The FAQs were published on the Observatory's website on 21 September 2016: https://euipo.europa.eu/ohimportal/en/web/observatory/faqs-on-copyright (accessed December 2016)

8 - Office for Harmonization in the Internal Market (Trade Marks and Designs) — now the European Union Intellectual Property Office (EUIPO) Observatory, Terms of Reference for Frequently Asked Questions of Consumers in relation to Copyright, 2015, paragraph 1.

9 - The following nine directives are the most directly relevant to copyright and related rights: the Collective Management of Rights Directive (Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72-98), the Orphan Works Directive (Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5-12), the Resale Right Directive (Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32-36), the Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19), the Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28), the Satellite and Cable Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to

satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15-21), the Term Directive (Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10. 2011 repealing Directive 93/98/EEC), the Rental Right Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, p. 28-35, repealing Directive 92/100/EEC) and the Computer Program Directive (Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5. 2009, p. 16-22, repealing Directive 91/250/EEC).

national systems in relation to the 15 consumer questions more clearly. In most cases, two broader categories per question were identified. Within each category, the national experts were asked to reply to various sub-questions. These sub-questions often correspond to the different intellectual steps required in order to give an appropriate (legal) answer to the consumer questions.

The present Summary Report is mainly based on the answers given to the 15 consumer questions. In most cases, these answers followed the structure that had been suggested by the categories and sub-questions in the template (see Annex 2, Template and Explanatory Notes). At times, the Summary Report also refers to information given in the answers to the more detailed 'sub-questions', where this appeared necessary on account of completeness and accuracy. The more detailed answers to the sub-questions in the template will not be published. They were drafted to help the Content Coordinator understand the national law relating to the legal questions behind the FAQs.

In line with the objectives of the FAQ project, the 15 consumer questions are phrased from the consumer's perspective, and — as already mentioned — in layman's terms. They address practical issues concerning copyright that average internet users may face when they want to use works protected by copyright made available online, or when they become creators themselves. Some of the questions are straightforward and closed, that is to say, they should in principle (or seemingly) be answered with 'yes' or 'no'. Others are more open, and also require interpretation. Certain questions ask for a descriptive answer, while others require more analysis. The characteristics of the questions naturally have an effect on the answers to them. This issue has been addressed to a certain extent by the more 'objective' questions in the template.

10 - Content coordinators and authors of the Summary Report: Christophe Geiger, Professor of Law, Director General of the Center for International Intellectual Property Studies (CEIPI), christophe.geiger@ceipi.edu, Franciska Schönherr, Researcher in the Research Department of CEIPI, franciska.schonherr@ceipi.edu

The scope of the FAQ project is limited to copyright, and the purpose of the project is to provide guidance to consumers only as far as copyright is concerned. It should be acknowledged that as regards certain uses described in the consumer questions, other intellectual property rights might also be relevant. However, these issues have not been addressed[11].

11 - An exception is Consumer Question 14 (relating to avatars and user liability for infringement of rights), which touches upon other areas such as trade mark rights and personality rights. The national experts' answers, in this sense, are briefly summarised.

STRUCTURE OF THE SUMMARY REPORT

The Summary Report follows a tripartite structure, in that it groups the 15 consumer questions in **three different categories.** The analysis of the information provided by the national experts revealed that there is a degree of convergence on certain basic copyright principles, but at the same time divergence on the details and on the implementation of these principles (1); on a number of issues, national copyright laws diverge significantly (2); finally, several questions have not been clarified by law or case-law (3).

The Summary Report will discuss each of the 15 consumer questions within the three categories and the respective responses individually; the objective is to make the Copyright Guide easier to understand. In line with the template and the explanatory notes, the background of the consumer question will be outlined briefly. This will usually entail identifying the legal issues in question, and indicating whether these have been tackled or not at EU or international level.

As to the summary of the responses to the individual consumer questions, it may often be stated whether there is (generally) more divergence or convergence on the issue in question. Answers will frequently converge on principles, but differences will remain in the details and simple answers must, in general, be tempered. Differences will be outlined briefly, and groups of Member States with similar solutions can often be identified. Exceptions or specific solutions that depart from these main approaches will be highlighted.

At least three consumer questions call for a descriptive answer. Several consumer questions apparently require a simple answer, either 'yes' or 'no'. In a vast majority of cases, however, these simplified answers have to be tempered, and additional conditions apply ('yes, but …' or 'no, but …'). This is the case for a total of eight consumer questions; at least six of which also contain descriptive elements. In certain situations, the legal solutions are simply still unclear and/or uncertain ('maybe'). At least four of the consumer questions fall into this last category.

As to the form of the Report, official abbreviations for the 28 Member States will frequently be used[12].

12 - The abbreviations used are the ones suggested by the *Interinstitutional Style Guide,* at http://publications.europa.eu/code/en/en-370100.htm (last accessed in January 2016).

DISCLAIMERS

The sections entitled 'summary of responses' in the Summary Report are **based on the 28 national experts' answers to the consumer questions in English and in their national language, as scrutinised by the respective national public authorities.** The Content Coordinators are not responsible for the information provided in relation to the national copyright systems.

While the structure of the Summary Report is analytical, the summary of the answers is **descriptive.** The Report therefore does not make or imply any recommendations for legislative or policy measures.

The Summary Report is primarily based on the information provided in the experts' answers to the 15 consumer questions[13]. In general, the answers given to the consumer questions follow the structure suggested by the categories and sub-questions in the template.

13 - General explanations about basic copyright principles and/or the EU legal framework for copyright law were added by the Content Coordinators when it appeared necessary for better comprehensibility of the Summary Report. The case-law of the CJEU was referred to only when necessary and taken into account until the end of May 2016.

For certain consumer questions, no clear answers were given by numerous national experts, notably when the issue has not been settled at the national or the EU level. This will be indicated in the Summary Report.

The answers provided by the experts were finalised in the first half of 2016. They do not take into account more recent legislative changes or judgements of national courts or of the Court of Justice of the EU. Neither the FAQs project nor the answers of the national experts nor the Summary Report are related the possible reform of the EU copyright framework currently envisaged by the European Commission.

SUMMARY/ANALYSIS OF RESPONSES

CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

1. A DEGREE OF CONVERGENCE ON CERTAIN BASIC PRINCIPLES OF COPYRIGHT LAW, BUT DIVERGENCE AS TO THEIR IMPLEMENTATION

Some aspects of copyright law have largely been harmonised by international and EU law. As a result, Member States agree on some basic copyright principles. A number of consumer questions therefore revealed a certain degree of convergence. However, exceptions to common principles diverge, and differences exist in the details. In addition, provisions of EU secondary legislation[14] have frequently not been implemented uniformly across the EU. These disparities can be explained by the different copyright traditions represented within the EU to some extent, that is to say, notably common law 'copyright' and the civil law 'author's rights'. However, as to the specific rules, there may also be differences between Member States belonging to the same tradition.

14 - See footnote 2 for an overview of the directives most relevant to copyright law.

a. Consent on the basic characteristics of copyright and related rights; differences in how protection is conceived and implemented (Consumer Question 1)

Background: 'copyright' and 'related rights' and different 'copyright' traditions in the world

Consumer Question 1 reads as follows: 'What does copyright and related rights mean and cover, and is it the same all over the world?'

The terms 'copyright' or 'author's rights' refer to a bundle of rights of a pecuniary and non-pecuniary nature that are granted to authors of original works. In addition, certain subject matter related to original works may be protected by 'neighbouring rights' or 'related rights'. Traditionally, Member States have granted protection to authors or works based on different theoretical justifications. Different rationales have entailed differences, notably regarding the scope of protection.

International conventions and harmonisation at EU level have brought the copyright traditions of the Member States closer together. However, certain differences remain.

Consumer Question 1 can best be answered by dividing it into three intellectual steps: an easy definition of what 'copyright' and 'related rights' mean (1) and cover (2); and an answer to the question whether copyright and related rights are the same all over the world (3).

Summary of responses

Consumer Question 1 is descriptive in nature and relates to a matter that has, to a large extent, been the subject of harmonisation measures. Identifying detailed differences in the scope of economic and moral rights would go beyond the scope and purpose of this Summary Report. Rather than this, the following paragraphs focus on common principles of copyright and related rights protection.

Member States generally recognise a difference between 'copyright' and 'related rights'. International treaties and EU law have established and fostered different regimes of protection for different categories of beneficiaries. These regimes will usually diverge in object/subject matter, threshold of protection, scope and/or duration. Many civil law countries prefer to speak of 'author's rights' instead of 'copyright'. This denomination refers to the idea that traditionally, these systems have focused on the author, namely, the physical person who created the work. In this perspective, the author's economic interests and his or her personal relation to the work must foremost be protected. Typical examples are France and Germany; but most jurisdictions in southern and eastern Europe as well as Belgium and Luxembourg are part of the author's right tradition. The Nordic countries and the Netherlands belong to the civil law author's rights tradition, but present certain distinct features. The common law 'copyright' systems are usually said to put more emphasis on investment in creative activities, that is to say, on strengthening the position of derivative rights holders and so-called copyright industries. Ireland, Cyprus, and the United Kingdom are common-law jurisdictions. Cyprus also presents some features of the civil law tradition. Maltese copyright law is essentially based on the common law tradition[15].

Beneficiaries of 'copyright'[16] are authors of original works in the literary, scientific or artistic field, such as musical compositions, paintings, photographs, drawings, or novels and other writings, but also of, for example, computer programs. 'Related rights' or 'neighbouring' rights are rights that may protect 'selected achievements in the cultural field that are not authors' works, but are considered an artistic achievement or an (technical, financial or organisational) investment that is sufficiently important for culture to be protected (and may vest in legal persons)[17]'. Most often, these rights are 'related' to copyright in that they are dependent on the existence of a work protected by copyright. For example, the lyrics and the composition of a song may be protected by copyright; the performance of that song by someone as well as the sound recording may be protected by a related right. The exact categories of beneficiaries of related rights and their specific prerogatives may diverge within the EU[18]; yet, Member States at least protect certain interests of, notably, performers, producers of phonograph (or audiovisual) records and broadcasters.

15 - See, the information provided by the Maltese expert, p 7.

16 - The present Summary Report uses the term 'copyright' indistinctively.

17 - See the information provided by the German expert, p. 7 et seq.

18 - In Germany, e.g. '[p]ress publishers have the exclusive right of making available to the public their press products', Section 87(f) of the German Copyright Act (§ 87f UrhG), see the information provided by the German expert, p. 7.

In accordance with international law, there is a hierarchy between copyright and related rights: neighbouring rights must not prejudice an author's rights[19]. Usually, the protection offered by copyright is larger in scope and lasts longer than the one offered by related rights[20].

To sum up, all Member States provide for both economic and moral rights for authors of copyrighted works. Economic rights may consist in both exclusive rights and rights to remuneration. Exclusive rights give the author control over certain acts related to his or her work. The exact definition and scope of exclusive rights may vary from country to country; but EU Member States protect at least the rights to reproduction (i.e. to copy), to dissemination/distribution and to communication to the public/making available of the work to the public (e.g. uploading a work to the internet). Other rights, such as translation or adaptation may also be protected. In practice, the author may often authorise others to exercise his or her exclusive rights, for example, by way of licence or assignment. Rights to remuneration do not entail control, but give the author a claim for remuneration or compensation when the work is used. Type and scope of remuneration rights vary across the EU. Moral rights protect the author's personal or intellectual relation to his or her work. Scope and duration of moral rights vary within the EU; Member States at least protect the right to be named as an author (paternity right), and the right to integrity of the work. The scope of the integrity right is not the same in all EU counties. In many Member States, an author cannot waive his or her moral rights.

As to related rights, many experts point out that only performers enjoy moral rights' protection. Related rights are diverse, but often cover economic rights, such as the right to fixation, reproduction or communication to the public in relation to the subject matter protected (see, e.g. the information provided by the experts from Bulgaria or Denmark). Holders of related rights may also be granted rights to remuneration in some Member States (see, e.g. the information provided by the experts from Germany (DE), France (FR) or Italy (IT)).

In common-law countries, the distinction between copyright and related rights is less clear than in author's rights countries. In Cyprus specifically, 'the concept of authorship is broader than in civil law jurisdictions. Copyright is unofficially divided in: a) "authorial copyright" and b) "entrepreneurial copyright"[21].' In Ireland, another common-law jurisdiction, 'the dichotomy between copyright and related rights [...] does not follow the distinction between copyright and related rights in International Treaty law. For example, the producers of sound recordings enjoy copyrights under Irish law rather than related/neighbouring rights[22].'

As to the last part of Consumer Question 1, asking whether copyright is the same all over the world, many experts refer to the territoriality of copyright. According to the principle of territoriality, sovereign States may only lay down rules, for example, relating to copyright

19 - International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on 26 October 1961, 'the Rome Convention', Article 1 (see the information provided by the French expert, p. 4).

20 - The duration of copyright and (certain) related rights has been harmonised by EU law. Copyright '[...] shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public' (Article 1(1) of the Term Directive). Article 1(2) provides that '[i]n the case of a work of joint authorship, the term [...] shall be calculated from the death of the last surviving author.' Some exceptions to these general rules exist. Regarding related rights, the term of protection for rights in published or publicly communicated phonograms, (see Article 1 of Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights and performances fixed in such phonograms) was extended from 50 to 70 years by the EU institutions. Rights of film producers and rights of broadcasters should last 50 years from the date of fixation or publication or first transmission respectively (Articles 3(3) and 3(4) of the Term Directive). EU law also provides for a right in first publications of previously unpublished works, which must last 25 years from the date of the first publication (Article 4 of the Term Directive).

21 - See the information provided by the Cypriot expert, p. 8: '[...] Cypriot copyright law expressly classifies as holders of related rights only the performers. Producers of phonograms and film producers are defined as "authors". Nonetheless, in its substance and scope of protection "entrepreneurial copyright" is similar to the related rights protection. Consequently, producers' copyright differs substantially from authorial copyrights: they are not vested with moral right prerogatives and their

copyright has the duration of related rights.'

22 - According to the information provided by the Irish expert, p. 7.

23 - See the information provided by the French expert, p. 7.

24 - See the information provided by the Lithuanian expert, p. 8.

within the borders of their own territory. In this context, it is explained that 'copyright and related rights are rights granted by the State according to its conceptions of cultural and/or innovation policy. Consequently, the rationales, scope and content of the protection may vary from one country to another depending on the stress put on the different interests at issue (protection of the creator or performer, protection of the investor, access to the public, etc.)[23] '. It is commonly agreed that two major copyright traditions have developed (at worldwide level): the Anglo-Saxon copyright tradition and the civil law author's rights tradition (see above). The differences may, in a simplified perspective, be explained as follows: 'The civil law author's rights tradition is centred around the author: the author is always a natural person who created the work and the author is granted not only pecuniary rights, but also moral rights to ensure respect to his work and his name. Differently, the common law copyright system protects the interests of those who invested and organised creation of the work, therefore, hereby copyright protects labour and investment, while author's moral rights [...] [enjoy lower protection and] may be easily waived or transferred [...][24]'.

However, due to, amongst others, international and regional harmonisation measures, copyright laws have converged; some of the experts even conclude that 'the essence of copyright and related rights is the same everywhere' (see, e.g. the information provided by the expert from Bulgaria).

b. Consent on the principle of initial ownership; differences in the exceptions to the principle and on transfer of ownership (Consumer Question 2)

Background: authorship, ownership and the 'balance of interests' in copyright law

Consumer Question 2 reads as follows: 'Who owns copyright and how does copyright benefit creators, right holders, consumers, society, economy and culture as a whole?'

Questions of authorship and ownership are still largely a matter of national law. However, in the borderless online environment, knowing 'who owns copyright' is important for consumers, both when they want to lawfully use a work and when they become creators themselves. Beyond national borders, the question of how copyright benefits creators, rights holders, consumers, society, economy and culture as a whole is at the centre of any copyright debate and reform.

Summary of responses

Consumer Question 2 consists of two different questions. The first question relates to ownership (and authorship) of copyright, and is phrased in very broad terms. The second question ('How

does copyright benefit creators, right holders, consumers, society, economy and culture as a whole?') is an open question. It should be noted that the answer to this question will always also depend on the point of view of the respective national expert.

Presented in a simplified manner (that does not take into account the differences in the details), the answers to the first question are based on similar principles: normally, the author of a work, namely, the physical person who created the work is the initial owner of the work. This entails that initially, the author has all economic and moral rights relating to the work he or she created. Exceptions to this rule exist, for example, as regards works (and notably computer program) created in the course of employment or in the framework of an audiovisual production. The author, as the initial owner, may transfer his or her rights — at least the exclusive economic rights — to others; this usually happens by means of licensing agreements, either exclusive or non-exclusive, assignments, or inheritance (see also below, Consumer Question 13).

The more extensive answers to the sub-questions in the template showed that in the details, there are various discrepancies regarding ownership in different types of work (e.g. relating to the categories of 'collective' works or others)[25], as well as regarding the possible extent and modalities of transfers of ownership. In addition, exceptions to the principle that the author is the initial owner vary significantly — notably between the common law copyright and the civil law author's rights systems.

A detailed analysis of the different regimes of authorship and ownership of the EU's 28 Member States goes beyond the scope and purpose of this Summary Report. Works created in the framework of employment may serve as an example of differences relating to initial ownership. While Member States generally allow some sort of transfer of copyright to the benefit of the employer, the scope and the modalities of the transfer differ. This will mainly depend on how protective the respective system is of the author's interests. In many Member States, the copyright initially arises for the author, and (at least the economic rights) are subsequently transferred (at least in part) to the employer (as pointed out by, e.g. the experts from Belgium (BE), Bulgaria (BG), Denmark (DK), Germany (DE), Estonia (EE), Greece (EL), Spain (ES), Croatia (HR), Hungary (HU), Austria (AT), Slovenia (SI), Finland (FI), Sweden (SE)); the transfer usually covers uses necessary for the purpose of the employer's business. Conditions of the transfer vary. In practice, this often entails that '[...] the creator will [...] not be entitled to a specific remuneration, apart from his salary or commission' (see the information provided by the Bulgarian expert)[26]. Notable exceptions to that principle are computer programs, in the case of which economic rights will vest in the employer (see, e.g. BG, IT, Luxembourg (LU), Poland (PL), LV, MT, Romania (RO), FI)[27]. In France, with the exception of collective works, audiovisual works, computer programs and works created by

25 - In BE, DE or CY, e.g. the category of 'collective works' does not exist according to the information provided by the experts from BE, p. 8, CY, p. 10, DE, p. 9. In FR, the natural or legal person under whose name the collective work has been disclosed should be the owner (not the author) of copyright. This is the 'only situation where moral right can be vested in a legal person' in France; (p. 10). Similar solutions exist, e.g. in EE, MT, PT, SK (authorship belongs to the individual creators), RO. In LU, all the participant creators are considered as authors of a collective work (p. 8). The UK expert, e.g. specifies that '[i]f the contributions of individual authors can be distinguished, then the individual authors hold the copyright to the relevant parts that they have authored' (p. 8). In FI, '[t]he copyright belongs to the person who has created the collective work/work of compilation by combining works or parts of works, but his right shall be without prejudice to the rights in the individual works' (p. 9; see also the information provided by the experts from BG, EL, ES, LV, LT, SI [rebuttable statutory presumption on the transfer of economic rights], where similar solutions exist). In IT, '[t]he **author** of a collective work is the organiser or supervisor of the same work [...]. The **economic rights** in the collective work belong to **the publisher,** unless a different allocation has been agreed upon by the parties' (emphasis added, p. 9). It should be noted that the definitions of 'collective work' also vary. In DK e.g., collective works are treated as joint works, i.e. 'anyone who has made a creative contribution to the work' is considered an author and owner (see also, the information provided by the expert from SE, p. 9). In the NL, different possibilities of ownership exist, 'depending on the degree of collaboration, whether individual contributions are identifiable and whether such collaboration was supervised'. In addition, 'if a work is disclosed under the name of a legal entity and the work does not mention a natural person as its author, the legal entity is considered the author, and hence entitled to the owner, copyright of the work involved, unless such attribution would be unfair to the creator of the work' (p. 8).

26 - The Bulgarian expert notes that the author may demand additional compensation when the 'received salary or

civil servants and journalists, 'the existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded to the author. The transfer of the rights supposes a specific contract[28].' It might be noted that the French system is known to be particularly protective of the interests of authors.

Works created in the course of employment are frequently used as an example to illustrate the differences between common and civil law copyright systems as regards initial ownership: 'common law jurisdictions generally recognise that where a work is created by an employee acting in the course of his or her contract of employment copyright in that work will first vest in the employer[29]'. In the United Kingdom, the employer is considered the first owner of copyright. In Cyprus, employers and producers may be copyright owners 'either initially (through the entrepreneurial copyright scheme) or by transfer[30]'. In Malta, apart from computer programs or databases, '[...] it must be expressly provided in the contract of employment that copyright is being transferred to the employer, otherwise the presumption at law is that copyright would be deemed to vest in the author or joint authors[31].'

In the Netherlands also, 'Unless otherwise agreed in writing, the employer is deemed to be the author of works created by the employee under the employment contract[32].'

As regards transfers of ownership, the moral right cannot be waived in many Member States, or only to a certain extent (this was noted, e.g. by the experts from the Czech Republic (CZ), EL, LV, LT, PL, FI, but also applies to other Member States; see also below, Consumer Question 13). This is commonly thought to be a typical feature of the more author-protective civil law 'author's rights' tradition, to which most EU Member States adhere. In practice, this means that even when a third person exercises the economic rights relating to a work, that person must respect the author's moral rights, for example, of paternity and integrity[33]. It was also noted that certain rights of remuneration are not waivable[34]. This means that an author will always maintain a claim for remuneration for certain uses, where the law provides so.

As to the second part of Consumer Question 2, experts were asked to explain how copyright benefits creators, rights holders, consumers, society, economy and culture as a whole. The explanations given differ in style and approach, but there are several overlaps, and common principles may be identified.

A concise answer, distinguishing the different stakeholder groups mentioned in Consumer Question 2, is given by the Slovenian expert.

> The author (creator), as a natural person, owns copyright in the first place. Copyright benefits authors (by enhancing their creativity and personality, by ensuring a monetary reward for

commission proves to be inadequate with the revenues collected as a result of the work's use' (p. 11). Note that the statement in the text does not hold true for all Member States. In FR, the 'royalties due in counterpart of the exploitation of the work are [...] a remuneration different from the salary, which pays the "making" of a work', p. 11.

27 - Article 2(3) of the Computer Program Directive provides that '[w]here a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.'

28 - According to the information provided by the French expert, p. 13.

29 - See the information provided by the Irish expert, p. 12.

30 - See the information provided by the Cypriot expert, p. 11.

31 - According to the information provided by the Maltese expert, p. 11.

32 - See Article 7 of the Dutch Copyright Act; according to the information provided by the expert from the Netherlands, p. 8 et seq.

33 - Considering the practical implications of that rule, notably as regards the marketing of a work, there is, in reality, some flexibility. The German expert, e.g. points out that an author may agree not to exercise his or her moral rights by contract, p. 48.

34 - See, e.g. the information provided by the Spanish expert, p. 12: 'Moral rights, as well as the statutory remuneration rights which are unwaivable and unalienable, can only be transferred mortis causa.'

their living), right holders (by assuring the return of their investment into the production of works), consumers (by enabling them the enjoyment of culture, art and science), society (by enabling and accelerating cultural, scientific and economic growth), economy (by contributing significant shares to a country's GDP, employment, export) and culture as a whole (by assuring creativity and cultural diversity).

In practice, the different abovementioned stakeholder groups may often have diverging interests and priorities in relation to a specific question. For that reason, copyright systems aim to achieve what is referred to as a 'balance of interests'. Indeed, the copyright system as a whole is shaped so as to achieve this balance: '[…] limited duration of economic rights and exceptions are reflecting the acknowledgement of public interest within the law, when provisions dedicated to the ownership and assignment of rights are more related to the interests of the owner of the IP right[35].

The way in which the different interests are balanced will also depend on the policy choices made in a specific Member State. In traditional civil law, 'author's rights' countries, for example, protection of the author and of his or her economic and moral interests will be a major objective (see, e.g. the information provided by the experts from DE, EL, FR). In other Member States, copyright is rather considered as an 'incentive for industries[36]'. While this approach is thought to be more typical for countries following the Anglo-Saxon copyright tradition, the objective of providing incentives and rewards is also mentioned by the experts from EE, HR, IT, HU, PL, Portugal (PT) and SE.

c. Consent on the principle of automaticity of copyright protection; differences in the threshold of protection (Consumer Question 3)

Background: 'works' protected by copyright and copyright formalities

Consumer Question 3 reads as follows: 'Do I automatically get copyright protection, for example, if I take a photograph with my phone, or do I have to register my work to get protection?'

International treaties oblige Member States to grant protection for a minimum number of categories of subject matter. Article 2(1) of the Berne Convention[37] explicitly names 'photographic works' among the 'literary and artistic works' that may be protected by copyright.

EU law has brought about some clarity regarding the threshold that 'works' must meet in order to enjoy copyright protection[38]. As regards (portrait) photographs in particular[39],

35 - See, e.g. the information provided by the French expert, p. 13.

36 - See, e.g. the information provided by the Maltese expert, p. 15.

37 - Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979 (the Berne Convention).

38 - See notably the CJEU decision in Case C 5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009], paras 37, 44 and 48.

39 - Article 6 of the Term Directive states that '[p]hotographs which are original in the sense that they are the author's own intellectual creation' must be protected by copyright.

the CJEU elaborated various criteria as to when they can be considered as the 'author's own intellectual creation[40]'. However, the exact conditions under which, for example, a photograph qualifies as a 'work' still vary throughout the Union. Certain Member States offer a distinct regime of protection, even for non-original photographs[41].

Despite the general prohibition of copyright formalities prescribed by international copyright law[42], optional registration systems may be available to creators. In practice, these mechanisms fulfil a purely administrative or evidential function.

Summary of responses

The simplified, unanimous answer to Consumer Question 3 is 'yes, you automatically get copyright protection, for example, if you take a photograph with your phone'. However, this answer must be tempered and is based on the assumption that certain conditions are fulfilled.

Most Member States require that a work present a degree of 'originality[43]' in order to qualify for copyright protection. Usually, there is no statutory definition in this regard, but courts have established a number of criteria that can be applied to an individual case; these criteria may vary from Member State to Member State. However, many experts refer to the threshold of protection as defined by the CJEU, suggesting that a work must be the 'author's own intellectual creation[44]'. Variations of that wording include 'personal intellectual creation' (DE), 'original creation' (ES), 'own individual creation' (LT), or the threshold of 'peculiarity' (AT). Some experts state that a work is original when it reflects the author's own creative choices (e.g. DK, HR, the Netherlands (NL), AT, UK), or the author's personality (e.g. FR). Traditionally, the threshold of protection has been lower in copyright systems mainly based on the common-law tradition, as confirmed by the experts from Cyprus, Malta, Ireland and the United Kingdom. In Cyprus, for example, a photograph is protected when a consumer has 'not copied it from another work. It does not further need to express creativity.' In Malta, a photograph will be protected 'provided that the author can demonstrate some degree of time, skill and labour in producing the photograph'.

As regards copyright protection for photographs, some criteria may suggest that a photograph is an author's own intellectual creation: in Denmark, for example, a photographer's creative choices may be shown by 'such issues as the background, the subject's pose, the lighting, the framing, the angle of view and the atmosphere created' (see also, e.g. the information provided by the experts from HU, RO and FI). Creative choices can also be made by using particular developing techniques (see the information provided by the Hungarian expert). In one of its opinions, the Finnish Copyright Council held that 'a photo was considered original when

40 - In relation to portrait photographs, the Court held in Case C 145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] that 'the photographer can make free and creative choices in several ways and at various points in its production' (para. 90): '[i]n the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software' (para. 91). 'By making those various choices, the author of a portrait photograph can stamp the work created with his "personal touch"' (para. 92).

41 - Article 6 of the Term Directive states that 'Member States **may** provide for the protection of other photographs' (emphasis added).

42 - Article 5(2) of the Berne Convention states that the 'enjoyment and the exercise of these rights [provided for in the Berne Convention] shall not be subject to any formality'.

43 - This term, or variations of it, has traditionally been used in author's rights countries rather than in 'copyright' jurisdictions.

44 - See, e.g. Case C 5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009], para. 48.

the end-result was a dramatic feeling that the photographer had created through creative choices in his use of lighting, timing, composition and demarcation.'

Apart from copyright protection, in some Member States 'special rights' or related rights protection is also available for photographs (DK, DE, ES, IT, AT, Slovak Repulic (SK), FI, SE). This entails that non-original photographs or photographs with a very low degree of originality (e.g. 'snapshots') also enjoy protection. The scope of protection is often narrower and the term of protection is shorter. In Spain, for example, 'mere photographs are granted fewer rights (the exploitation rights of reproduction, distribution and communication to the public — no right of transformation, no moral rights, and no remuneration rights) and for a shorter term (25 years from its making) than photographic works[45]'. In Germany, a related right protects simple photographs 'to the same extent as [...] authors' rights[46]'. In Bulgaria, there is a special regime for portrait photography, providing that the consent of the photographed person does not affect the copyright of the photographer.

No registration is necessary in order for copyright protection to arise. Protection usually arises 'at the moment of creation of a work', that is to say, usually the 'moment of expression of the work in any objective form that allows its perception and copying' (see, e.g. the information provided by the Estonian expert). Sometimes, the exercise of certain moral rights, for example, the right to be identified as the author or director may require prior assertion by the author (see the information provided by the expert from the United Kingdom[47], see also in this context, the information provided by the expert from Portugal[48]).

Different possibilities for voluntary deposit or registration exist in several Member States. Such an act of 'registration' exclusively serves administrative or evidential purposes; it has no effect on copyright protection itself. The possibilities suggested include deposit with a notary public (BG, CZ), CRMO (CZ, EE, IT, LT), IP offices (Benelux, DE — for anonymous and pseudonymous works, ES — general IP Registry, HU, RO, SI), different public and private institutions (EL — National Library, the Parliament Library and Public Libraries, HR — Croatian Copyright Agency, IT, LT, PT, SK), online repositories/registries, or individual measures such as adding a note or sending oneself an email or a telefax (see in this sense, e.g. the information provided by the experts from HU and PT) or by 'sending and receiving by registered mail a self-addressed letter containing the author's work[49]'.

45 - According to the information provided by the ES expert, p. 18.

46 - According to the information provided by the DE expert, p. 16.

47 - See Section 78(1) of the Copyright, Designs and Patents Act 1988 (Chapter 48): 'A person does not infringe the right conferred by Section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.'

48 - 'In some cases the law provides requisites from which depends the exercise of author's right over his protected work. In the case of photography, the same must bear the photographer/ author's name in the samples which are disclosed.' See the information provided by the PT expert, p. 17.

49 - See the information provided by the BG expert, p. 14.

d. Consent on the definition of copyright infringement, differences in the scope and enforcement of sanctions (Consumer Question 4)

Background: copyright infringement and enforcement of copyright

Consumer Question 4 reads as follows: 'What is copyright infringement? Can I get in trouble for copyright infringement? What if I wasn't aware that I infringed something protected by copyright?'

Digital technologies and the online environment have made it easier for consumers to use and disseminate works, and not always in a lawful way. As a response, the international community laid down some minimum enforcement standards. The TRIPS Agreement[50] 'requires local judicial authorities to have the power to order disclosure of evidence, issue injunctions, assess damages, order seizure and disposition of offending goods, and impose border controls[51].' While TRIPS is technically a trade agreement, copyright enforcement was further strengthened within the framework of international IP law[52]; finally, certain measures were also harmonised at EU level. The Enforcement Directive[53] contains, amongst other things, provisions on provisional and permanent injunctions and on damages.

50 - Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Agreement Establishing the World Trade Organization, 1994 (the TRIPS Agreement).

51 - Goldstein, P., Hugenholtz, B., *International Copyright, Principles, Law, and Practice*, Oxford University Press, Oxford, 2013, p. 410; see the TRIPS Agreement, Articles 41(1), 43-46, 50-60.

52 - See the WIPO Copyright Treaty (WCT), adopted in Geneva on 20 December 1996, Article 14(2) and the WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on 20 December 1996, Article 23(2).

53 - See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (text with EEA relevance), OJ L 157, 30 .4.2004, p. 45-86 (the Enforcement Directive).

Summary of responses

Consumer Question 4 consists of three separate questions that are better answered consecutively. National experts were asked first, to provide a comprehensible definition of copyright infringement; second, to outline what types of sanctions end-users may face when they infringe copyright; and third, to clarify the question about whether knowledge has an impact on liability, or the scope of the sanctions.

Regarding the first question, answers diverge in style and level of detail, but converge on principles, that is to say, what rights can be infringed and what acts could amount to infringement. They can be summarised as follows.

An act that is covered by any of the author's economic or moral rights or by any related right, and that has neither been authorised by the author or rights holder, nor is allowed on the basis of an exception or limitation or any other defence, amounts to copyright infringement.

While many experts focus on infringement of exclusive rights, rights to remuneration, where they exist, may also be infringed (see, e.g. the information provided by the experts from HU, SK). In practice, this would entail that no remuneration is paid to the author where the latter has a (statutory) claim to it.

As to infringement of exclusive rights, examples given include the upload of a work without the author's permission, the download of a work without authorisation or without a statutory defence being applicable, the distribution of copies of a work, or the adaptation of a work (see, e.g. the information provided by the Irish expert). Typical examples for infringement of moral

rights would be the use of 'another person's work without indicating his name or referring to it as your creation ([so-called] plagiarising) [or] distorting another person's work[54]'.

In Malta, a user must have used a substantial part of a copyrighted work in order to be liable for copyright infringement.

Regarding the second question contained in Consumer Question 4 ('Can I get in trouble for copyright infringement?), the simplified, unanimous answer is 'yes'.

In a few Member States, the risk that rights holders will initiate legal actions against end-users appears to be relatively low. In Belgium, for example, it appears that 'in practice, only end-users committing large scale infringements will be targeted, although rarely, as the copyright owners focus on the intermediaries'. According to the Croatian expert, up to the date on which the answers were handed in, there had been no cases on the issue. According to the Polish expert, there is no established practice of granting injunctions against end-users in Poland.

However, so-called coercive and monetary sanctions are available in all Member States, and may in theory be imposed upon end-users. The exact nature, scope and modalities of these sanctions may diverge across the EU. A detailed analysis of copyright enforcement in the 28 Member States goes beyond the scope and objective of this Summary Report. Rather, a simplified overview of common principles in direct connection with Consumer Question 4 should be given.

In all Member States, a rights holder may ask a court to order an injunction against an (individual) infringer; through an injunction, a rights holder urges the infringer to terminate the infringing use. An injunction may be temporary and/or permanent. This is one of the most typical sanctions that would be imposed on end-users if the rights holder decides to initiate legal actions. Other coercive remedies available in the Member States include seizures or publicity measures. In France and in Spain, the internet connection of a (repeated) infringer may be suspended[55].

Apart from coercive measures, different monetary remedies are available in all Member States. Usually, a rights holder may claim damages for the prejudice suffered. Modalities of determining the amount of damages vary. Other monetary damages mentioned in the submissions of the experts include the restitution of profits made through the infringement, penalties where the judgment is not respected, compensation or a payment of a 'reasonable royalty[56]'. Some experts mention the possibility of unjust enrichment claims (see, e.g. the information provided by the experts from CZ, EE, SK).

54 - See the information provided by the Lithuanian expert, p. 22.

55 - In Ireland, 'ISP/Rightsowner graduated response agreements [...] may ultimately lead to an ISP terminating subscriber access to services' (p. 53).

56 - See the information provided as regards DK and SE.

In theory, criminal sanctions can be imposed upon an end user in several Member States (BE, BG, CZ, DK, DE, IE, EL, ES[57], FR, HR, IT, CY, LV — in the event of substantial harm caused to the rights holder, also in LT, LU, HU, MT, NL, PL, RO, SI, SK, FI, SE, UK). The experts from Belgium, Croatia, France, and Malta highlight that in practice, criminal sanctions against end-users acting in the private sphere appear unlikely in these countries. In Hungary, criminal sanctions do not relate to infringements of the right to reproduction for non-commercial purposes[58].

As to injunctions, knowledge usually does not play any role, or only a minor one in some Member States. In BG, LV, LT, LU, PT and FI, knowledge or the lack of it may be taken into account in the context of coercive remedies. In Spain, injunctions will not apply to copies acquired in good faith for personal use[59].

As to monetary remedies, the fact that an infringer knew or had reasonable grounds to know that he or she was infringing copyright, can have an impact at least in the context of damages in many Member States (CZ, DK — no damages if no knowledge, DE, IE, EL, HR, IT, CY, LU, HU, MT, NL, AT, PL, SI, SK, FI, SE, UK). Where knowledge plays a role, it is usually considered when weighting the different interests at stake or when determining the amount of damages; it does not necessarily play a role in the principle of liability itself. Many experts point out that knowledge has no impact on at least civil liability (see, e.g. the information provided by the experts from BE, BG, CZ, IE, ES, FR, CY, LV, LU, MT, NL, PL, RO, SK, SE). Some mention that even where no damages can be claimed due to lack of knowledge, the infringer can be held to pay compensation (see, e.g. LT, SK, FI, SE). In Cyprus, for example, a rights holder can still claim the profit made by the infringer[60].

As regards criminal sanctions (where applicable), knowledge or intent is usually a precondition (as stated by, e.g. the information provided by the experts from BE, BG, DK, ES, FR, LU, HU, MT, PL, PT, RO, SK, SE).

e. Consent on the principles of copyright exploitation, differences in the modalities and on specific copyright limitations (Consumer Question 5)

Background: lawful uses of works protected by copyright — with or without authorisation

Consumer Question 5 reads as follows: 'Under which conditions can I use a work protected by copyright created by another? I was told that using works created by others is simply a quote and thus is always allowed.'

Using a work protected by copyright will not necessarily amount to copyright infringement: first, the rights holder may authorise uses of his or her work in the framework of copyright

57 - In Spain, 'infringement of copyright (and related rights) may also qualify as a criminal offence when it is done with the intent to obtain some economic profit (directly or indirectly) and in prejudice of third parties (Article 270.1 *Código Penal*)', p. 23 et seq. The Spanish report (p. 23) also notes that '[t]he Spanish Criminal Code (*Código Penal*) was amended by Organic Law 1/2015 and a new Article 270.2 *Código Penal* now qualifies linking to infringing contents as a criminal offence, as long as it is done with the intent to obtain some economic profit (directly or indirectly) and in prejudice of third parties (i.e., the same two requirements set for the "general" copyright crime) […]. […] [T]he amendments operated by LO 1/2015 are clearly meant to facilitate the criminal prosecution of P2P infringements and overcome the restrictive readings that kept the majority of users of P2P systems safe from criminal prosecution.'

58 - See the information provided by the Hungarian expert, p. 20.

59 - See the information provided by the Spanish expert, p. 22.

60 - This is when 'the person who infringed copyright proves that he did not know that the work was protected by copyright when infringement occurred'. An injunction can also be requested; see Article 13, para. 6 of Law 59/1976. See the information provided by the expert from Cyprus, p. 17.

contracts, or of 'open content' licences. Furthermore, most jurisdictions allow certain uses without the explicit authorisation of the rights holder. Commonly, these uses are said to fall under 'exceptions and limitations' to copyright[61]. While such limitations or defences exist in all Member States, their scope and modalities of application vary across the EU.

Quotation is one example of these 'free uses[62]'. International copyright treaties oblige Member States to allow quotations as long as the relevant conditions are met[63] . EU law suggests that Member States (may) permit 'quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose[64]'.

61 - See the wording of Article 5 of the Information Society Directive.

62 - Terminology used in the Berne Convention, Article 10.

63 - According to Article 10(1) of the Berne Convention, '[i] t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.'

64 - Article 5(3)(d) of the Information Society Directive.

65 - According to the information provided by the Spanish expert, p. 30.

Summary of responses

Consumer Question 5 consists of two sentences, each of which addresses a different issue. First, experts are asked to explain to consumers under which conditions they may use a work protected by copyright created by another. As to the first sentence of Consumer Question 5, national experts' answers converge on the principles: uses of works protected by copyright are allowed either when the rights holder authorises them, or when they are covered by an 'exception or limitation' to copyright.

Explanations of how rights holders may authorise consumers to use their work vary. As regards uses in the online environment, uses are typically allowed through **licensing agreements**, for example, in the form of terms and conditions of a website or standard licences incorporated in a document or file (see, e.g. the information provided by the expert from Belgium). Common examples are services that offer uses against remuneration (see also below, Consumer Question 11 relating to streaming and downloading), or 'Creative Commons' or open content licences that allow certain uses without remuneration. Consumers are advised to read the terms of a licence agreement carefully, since not all types of uses are necessarily allowed (see, e.g. the information provided by the experts from DK, LU). Indeed, the terms of a licensing agreement usually specify under what conditions a work can be used: rights holders may resort to a standard agreement (e.g. Creative Commons licences) or an agreement tailored to the individual needs of the parties (see the information provided by the EE expert); the licence can be exclusive or non-exclusive; and conditions of use relating to territory, duration, and costs should be stated clearly (see in this sense, the information provided by the experts from BG, PT). Often, written form of a licensing agreement is a requirement. In Spain 'implied' licences could in theory be 'inferred from the facts — for instance, with an icon to "re-tweet" content available online', although there appears to be no relevant case-law[65]. Collective

licensing mechanisms through collective management organisations are also mentioned (see, e.g. the information provided by the experts from IE, LU, HU). The specific rules applicable to copyright contracts are not harmonised, and vary across the EU (see below, Consumer Question 13).

Beside uses authorised by the rights holder, all Member States allow a certain number of uses without authorisation. The terminology for these types of uses diverges among Member States. Experts frequently speak of 'exceptions and limitations' (see, e.g. BG, CZ, FR, HR, IT, LT, LU, NL, SK, FI), 'compulsory licences' (CZ), 'limitations' (DE, ES), 'exceptions' (MT), or 'defences' (UK).

Generally, '[t]he law allows [certain uses of protected works, such as] the use of a work for private purposes, quote, training and research purposes [...]' (see, e.g. the information provided by the expert from LT). An exception especially relevant for consumers is the so-called private copying exception. It does not exist in all Member States, and the conditions and the scope of the exception vary (see below, Consumer Questions 7 and 8). In many EU countries, the conditions of application of specific exceptions are laid down in the relevant provisions of copyright law. In the United Kingdom, 'certain exceptions under UK copyright law only apply if the use of the work is a "fair dealing". [...] There is no statutory definition of fair dealing — it will always be a matter of fact, degree and impression in each case. The question to be asked is: how would a fair-minded and honest person have dealt with the work[66]?' The concept of fair dealing also exists in Ireland and Cyprus, two other common-law jurisdictions. Cypriot law establishes both a flexible fair dealing clause and a closed list of specific exceptions.

Regarding the second part of Consumer Question 5, all Member States allow quotations. In the United Kingdom, an exception for quotation was introduced in 2014[67]. Certain conditions must be fulfilled in order for the exception to apply. As mentioned above, EU law sets out various conditions for lawful quotations. However, important differences/nuances still exist due to the optional character of the implementation of this provision according to the Directive. A quote must relate to a work or other subject matter that has already been made available lawfully to the public. The extent should be justified by the specific purpose of the quote, and the use should be in accordance with fair practice (this condition is only mentioned by some national experts[68]). Whenever possible, the source, including the author's name, must be indicated[69]. Several experts note that the purpose of the quote should be criticism or review, information or education[70]. In Cyprus, the 'purposes for which quotations can be made are not strictly defined by the law and, therefore, quotations can be made for various purposes[71].'

Regarding the length of the quote, some experts mention that only fragments of the work may be used (see, e.g. DK, ES, FR, LU). In view of specific categories, the entire work may be quoted in Slovenia (photographs, works of fine arts, architecture, applied art, industrial design,

66 - See the information provided by the UK, p. 17.

67 - Section 30(1ZA) of the Copyright, Designs and Patents Act 1988 (Chapter 48). 'Under the new UK quotation defence copyright in a work is not infringed provided that: (1) the work has been made available to the public; (2) the use of the quotation is fair dealing with the work; (3) the extent of the quotation is no more than is required by the specific purpose for which it is used; and (4) the quotation is accompanied by a sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise.' see, the information provided by the UK, p. 16.

68 - See, e.g. the information provided by the Lithuanian expert, p. 25; the Danish expert, e.g. refers to 'proper usage' (p. 18), the expert from the Netherlands to 'social customs' (p. 17).

69 - This condition is mandatory for the use to qualify as a quotation in some countries, e.g. in France. See, in this sense, the information provided by the French expert, p. 22.

70 - The Spanish expert, e.g. states that strictly speaking, quotations are only allowed for 'teaching or research purposes'. In practice, it appears that courts resort to the 'three-step test' in order to adopt a more flexible approach. They consider that the purpose is admissible 'as long as the specific use is made "to the extent justified by the purpose of the inclusion" and within the parameters of Article 40bis *TRLPI* (that is, it does not prejudice either the author or the normal exploitation of the quoted work)'. On the 'three-step test', see below, Consumer Question 7.

71 - According to the information provided by the Cypriot expert, p. 21.

cartography). Sometimes, only literary and scientific works, and not works of art, may be quoted (see, e.g. the information provided by the experts from Latvia and the Netherlands). Some national laws add that the use should not prejudice the economic interests of the rights holder (IE), for example, not 'erode the economic value of the quoted works substantially' (AT), or damage the normal commercial use of the work (IT, LV, RO).

It is stressed that the quote must be used in another, independent work (see, e.g. the information provided by the experts from DE, SI and SK). In Germany, a quote may 'not simply [be] the addition of supplementary thoughts to one's work; a merely associative reference does not suffice[72]'.

Regarding the nature/contents of the quote, the 'idea of the work as a whole which is being quoted [must be] conveyed correctly' in Estonia[73]. In Finland and Germany, there must be a true, internal relation between the quoted part and the quoting work[74]. In Sweden, the quote may not be prejudicial to the author's artistic reputation or individuality[75].

As to proper usage, this may consist in using quotation marks, or making sure that the quoted work is clearly recognisable from the quoting work (see, e.g. the information provided by the expert from Finland).

In the United Kingdom, the quotation exception must fulfil the requirements of fair dealing.

72 - According to the information provided by the German expert, p. 23.

73 - According to the information provided by the Estonian expert, p. 21 et seq.

74 - According to the information provided by the experts from Finland and Germany, p. 23.

75 - According to the information provided by the Swedish expert, p. 19.

76 - 'Gervais, D., 'The tangled web of UGC: making copyright sense of user-generated content', Vanderbilt Journal of Entertainment and Technology Law, Vol. 11, No 4, 2009, Vanderbilt University Law School, Nashville, pp. 841, 858, 865 and 869.'

f. Consent on the principle of protection by means of certain exclusive rights, differences in the limitations of protection (Consumer Question 6)

Background: user-generated content — rights affected and possible exceptions

Consumer Question 6 reads as follows: 'Am I allowed to use music protected by copyright as a soundtrack for a home video that I made and want to upload on a video platform?'

Consumer Question 6 relates to the issue of 'user-generated content' (UGC) or 'user-derived content[76]': internet users use pre-existing works and add to them substantially, with the aim of uploading the 'content' to a website. It is often not clear to users whether they may do so without infringing copyright and related rights.

In terms of copyright law, the making and the uploading of a home video constitute two separate acts: the use of the music for the 'home video' necessarily entails at least an act of reproduction (1); the upload of the home video to a video platform also entails an act of communication to the public (2). The two respective exclusive rights have largely been

harmonised by EU law[77]. In order for these different acts to be lawful, they must either be covered by an exception or limitation, or the rights holder must have authorised them. Even if step 1 were to be allowed on any basis, the answer to Consumer Question 6 would be negative if step 2 could not be justified.

Summary of responses

In principle, the simplified answer given almost unanimously to Consumer Question 6 is 'no'.

It may, however, be noted that the act of reproduction entailed by the sole making of the home video could be lawful in a number countries if the conditions for private copying are fulfilled[78].

However, the uploading of a home video that includes music protected by copyright could only be justified by exceptions or limitations in certain Member States, and only under specific conditions. In Spain, Cyprus, Luxembourg, the Netherlands or the United Kingdom (within fair dealing), the quotation exception could be applicable if certain conditions are met (on quotations, see above, Consumer Question 5). In the United Kingdom, for example, the exception may not apply if the amount taken of the work is excessive, and if the use is non-transformative and commercial. In Spain, the music would have to be used — to the extent necessary — in a specific scene of the video, and for purposes related to it, 'assuming [...] that the homemade video may be considered for purposes of research or teaching[79]'.

Under certain conditions, the parody exception could be applicable in Spain, France, Croatia, Luxembourg, Hungary or the United Kingdom (within fair dealing). In order for the exception to apply, the home video must qualify as a parody under the relevant national law. In Hungary, for example, 'the essential characteristics of parody are, first, to evoke an existing work, while being noticeably different from it and second, to constitute an expression of humour or mockery[80]'. It could be noted that the CJEU recently declared the concept of 'parody' to be an autonomous concept of EU law, which must be interpreted uniformly throughout the EU[81]. According to the Court, 'the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery[82].' This decision might affect the future understanding of the parody exception by national courts.

In Cyprus, the use of the musical work may be considered fair dealing if the purpose of the derivative work is criticism or review or reporting current events.

In Malta, a consumer may use parts of music or recordings protected by copyright, as long as the amount of music he or she uses is not 'substantial'. In certain, very limited cases, the 'education exception' may be applicable in Malta[83].

77 - See Articles 2 and 3 of the Information Society Directive, which have been interpreted by an important number of decisions by the CJEU.

78 - On the admissibility of private copying in the different Member States see below, on Consumer Question 7, p. 34.

79 - See the information provided by the Spanish expert, p. 33. The Spanish expert notes that it is unlikely that the quotation exception would be applicable to the situation described in Consumer Question 6.

80 - According to the information provided by the Hungarian expert, p. 33.

81 - Case C 201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Grand Chamber [2014], para. 15.

82 - Case C 201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Grand Chamber [2014], para. 33. The Court goes on to explain the '[t]he concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.' In addition, the exception for parody must strike a fair balance between the interests of rights holders and the freedom of expression of the user of a protected work who is relying on the exception for parody (para. 34).

83 - See Section 9(1)(h) of the Maltese Copyright Act. In Malta, the lawfulness of the uses mentioned in Consumer Question 6 'need to also be assessed in line with the Berne "three-step test" as implemented in [Section 9 of the Maltese Copyright Act] which states that all exceptions are only applicable insofar as their application is confined to particular cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.' According to the information provided by the Maltese expert, p. 34. On the 'three-step test', see also below, Consumer Question 7.

Several experts point out that in any event, the author's or the performer's moral rights need to be respected.

Moreover, it is suggested that a consumer could avoid infringing copyright if the upload does not constitute a communication to 'the public'. A home video could be uploaded to a video platform only if non-public access to it is possible, that is to say, only if persons that are inside the usual circle of a consumer's family or the circle of his or her personal acquaintances can see it (see the information provided by the Slovenian expert).

Should none of the abovementioned conditions be met, the only way in which a consumer can lawfully use music protected by copyright for a home video to be uploaded to a video platform is with the rights holder's authorisation.

Authorisation may be granted by the author directly by, for example, a Creative Commons Licence.

Alternatively, authorisation could be sought from the relevant collective rights management organisations (CRMO), for example, the ones responsible for music and for the music producers (see, e.g. the information provided by the Belgian expert).

In practice, authorisation may have been granted to the video platform. Users are advised to check the terms and conditions of the website (see, e.g. the information provided by the Latvian expert). Finally, consumers could choose music that is in the public domain, that is to say, music that is no longer protected by copyright. However, the performance might still be protected by a related right; as one expert has noted, to be safe, consumers should therefore play the music themselves (see, e.g. the information provided by the Polish expert).

g. Large consent on the protection of the right to reproduction; differences in its limitations (Consumer Question 8)

Background: the scope of the exclusive right to reproduction

Consumer Question 8 reads as follows: 'Am I allowed to download a work protected by copyright from the internet and does it matter which technology is used and whether I download only parts of the work?'

'Downloading' a work protected by copyright from the internet entails an act of reproduction. In principle, acts of reproduction are covered by the author's exclusive rights. In practice, the author may always decide to authorise third parties (e.g. internet users) to use his or her

work in a certain way. In addition, the Member States' copyright laws allow certain uses without the author's authorisation, as long as certain conditions are fulfilled. The number of available 'exceptions and limitations[84]' and their respective conditions vary from country to country. At EU level, the right of reproduction has been broadly defined as 'the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part[85].'

In order to give a pedagogic answer, it appears useful to rephrase Consumer Question 8, and to divide the answer into different intellectual steps. First, a short answer, either 'yes' or 'no', can be given to the question about whether a consumer may download a work **without** the author's explicit authorisation. Second, a brief overview of the conditions under which a consumer could lawfully download a work without the author's authorisation can be given. Third, some situations in which an author authorises downloads of his or her work can be mentioned. Finally, it should be clarified whether it matters what technology is used and whether the consumer only downloads parts of a work.

Summary of responses

As to the question whether a consumer may download a work from the internet **without the author's authorisation** (under certain conditions), the majority of national experts answered affirmatively. In Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Spain, France, Croatia, (Cyprus), Latvia, Lithuania, Hungary, (Malta), the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden, consumers may download works within the framework of the **private copying exception.**

In order for that exception to apply, a number of conditions must be fulfilled; these conditions vary slightly from country to country[86]. A main condition, recently established by the CJEU, is that the source from which the work is downloaded from must be lawful[87]. This means that the work found on the internet must have been uploaded there with the rights holder's authorisation. Furthermore, according to EU law, the download must be made for personal, non-commercial use and the author must receive fair compensation for the use[88]. The last condition constitutes a problem in Cyprus and Malta: both countries have a private copying exception, but no levy system is in place; that is to say, there is no mechanism that ensures that authors are compensated/remunerated for private uses of their work (on copyright levies, see below, Consumer Question 10). Private copying is a 'grey area' in these two Member States[89]. Some experts note that the private copying exception does not cover certain types of works, such as notably computer programs. In some countries, the exception does not allow users to download entire books (see, e.g. the information provided by the experts from Croatia and Hungary). Furthermore, there is no private copying exception in the United Kingdom and in Ireland.

84 - Terminology used in Article 5 of the Information Society Directive.

85 - Article 2 of the Information Society Directive.

86 - A detailed analysis of the conditions of private copying in those Member States that envisage an exception goes beyond the scope of this Report.

87 - See, e.g. Case C 435/12, *ACI Adam BV and others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* [2014], para. 31. On the lawfulness of the source copy, see also below, Consumer Question 15.

88 - Article 5(2)(b) of Directive 2001/29/EC states that Member States may allow uses of protected works 'in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'.

89 - Note that according to the information provided by the Luxembourg expert, no levy system has been established in LU (p. 30).

In Italy and Greece, although there is a private copying exception, downloading works from the internet appears not to be exempted on the basis of that exception. In Italy, the private copying exception, '[...] which refers to copying for strictly personal and non-commercial use, is reserved to the user who has accessed or acquired a copy of the work in a legitimate way (i.e. with the authorisation or licence of the copyright owners)[90].' According to the Greek Copyright Office, downloading a work from the internet would, unless authorised by the rights holder, probably be considered to contravene the 'three-step test'. This is a provision that was originally included in international copyright law to establish legal criteria for the Member States when implementing limitations and exceptions in their national laws[91]. At EU level, the 'three-step test' is laid down in Article 5(5) of the Information Society Directive. It requires that each of the 'exceptions and limitations' described in Article 5 'shall only be applied in certain special cases (1) which do not conflict with a normal exploitation of the work or other subject-matter (2) and do not unreasonably prejudice the legitimate interests of the rightholder (3).' There are currently, however, some important discrepancies about how to understand these conditions, which have been construed differently by courts at national level. A uniform reading is lacking at EU level. Especially in the context of digital private copying by consumers, the 'three-step test' can therefore cause additional uncertainty when trying to define what is permitted and what is not[92].

90 - According to the information provided by the Italian expert, p. 34.

91 - Article 9(2) of the Berne Convention provides that '[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

92 - The Greek Copyright Office noted, e.g. that even downloading for private purposes from **lawful** sources might constitute infringement because it might contravene the 'three-step test'.

Alongside the private copying exception, downloading may be lawful on the basis of other exceptions such as, for example, use for the purpose of research, teaching or private study (such a defence is also available in the United Kingdom and in Ireland), for information purposes or for the needs of persons with a disability.

Downloads may be lawful if they have been **authorised by the author or rights holder. This is a principle confirmed by all the national experts.** Uses such as downloads are thus always possible if they are covered by a licensing agreement.

A recurring example that many national experts name are 'Creative Commons' or 'open content licences', by means of which creators may allow consumers to use their work in certain ways. Such licences may only authorise specific uses, for example, non-commercial ones. It is therefore recommended that consumers read the terms of use carefully (see, e.g. the information provided by the Luxembourg expert).

The Spanish expert also mentions the theoretical possibility of implied licences, that is to say, licences implicitly derived from facts. In theory, courts 'might imply the existence of an implicit licence to download any content which is lawfully posted online (by its copyright owner) without any technological or contractual restrictions preventing it.' However, no relevant case-law in Spain is cited.

As to the last part of Consumer Question 8, national experts agree that it **generally does not matter what technology is used for downloads.** This can be explained by the principle of technological neutrality of the law. It is noted that the technology used is not relevant as long as it allows only downloads and not uploads at the same time (see, e.g. the information provided by the experts from EE, PL). The upload required by so-called file-sharing software would entail an act of making available to the public, and not only an act of reproduction. Only the former, not the latter, could be justified, for example, on the basis of the private copying exception (subject to certain conditions).

93 - See, e.g. Case C 5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009], where the CJEU held that copying a sequence of eleven words 'is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation [...]', para. 48.

Regarding the download of '**parts**' of works, the decisive question is whether those parts are protected by copyright themselves. If they are, there is no difference between downloading parts of a work or the entire work. Usually, 'parts' are only protected by copyright if they fulfil the **general requirements of protection** (see, e.g. the information provided by the experts from DK, DE, EL). In Germany, for example, parts are protected 'if they are personal intellectual creations by themselves and not only, for example, individual words or smallest or banal excerpts from a work'. It is noted that the question has to be assessed in the light of CJEU case-law[93] (see, e.g. the information provided by the UK expert).

94 - According to the information provided by the Maltese expert, p. 40 et seq.

In Malta, a reproduction of an **insubstantial** part of the work would not entail copyright infringement. 'In such cases, there may indeed be a copy but not one that is 'substantial' enough to give rise to copyright infringement[94].'

In Cyprus, in the framework of **fair dealing**, the assessment of fairness will, amongst other things, depend on the amount of the work taken.

h. Predominant consent on the protection against circumvention of Technical Protection Measures (TPM) (Consumer Question 9)

Background: TPM and their relation to lawful uses of works

Consumer Question 9 reads as follows: 'I tried to copy a movie from a DVD to my computer, but could not do it because of something called 'Technical Protection Measures'. What is that and am I allowed to get around them in order to make private copies?'

95 - Article 6 of the Information Society Directive uses the term 'technological measures'.

In EU law, TPM[95] are defined as follows:

> [...] **any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law** [...]. Technological measures shall be deemed

> **effective** where the use of a protected work or other subject matter is controlled by the rightholders through application of an **access control** or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a **copy control mechanism**, which achieves the protection objective[96]. (emphasis added)

96 - Article 6(3) of the Information Society Directive.

According to the EU legal framework, which implements obligations arising from international copyright treaties[97], rights holders are protected against the circumvention of TPM[98]. TPM entail a practical issue: certain uses may be lawful without the authorisation of a rights holder because they are covered by an exception or limitation (see above, Consumer Questions 7 and 8). However, in practice, the use may not be possible because the rights holder has decided to use TPM. EU law obliges Member States to make sure that a certain number of lawful uses are possible for consumers. However, in the case of the private copying exception, Member States do not have such an obligation[99]. It is up to them to decide whether they take the necessary steps so that consumers can benefit from the private copying exceptions even if TPM are in place. If they decide to do so, the type of measures and the procedure consumers must follow may differ from country to country.

97 - See Article 11 (and Article 12) of the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996, and Article 18 (and Article 19) of the WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on 20 December 1996.

98 - Article 6(1) of the Information Society Directive requires Member States to 'provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.'

99 - See Article 6(4) second paragraph of Information Society Directive.

An easy definition and examples should help the consumer understand what TPM are. The answer to the question about whether the consumer may 'get around' TPM in order to make private copies is clear in most countries; in others, it must be tempered.

Summary of responses

The simple definitions of 'TPM' submitted by the national experts are close to the one given by EU law. In less technical language than in the Directive, a definition could be phrased as follows: 'Technology used to control access to protected works or other subject matter or to prevent users from copying protected works or other subject matter' (see the information provided by the Estonian expert).

Some experts also mention that TPM have the benefit of providing information relevant for the management of copyright (see, e.g. the information provided by the experts from ES and IT). While the definitions of TPM provided by the experts largely converge on the principles, Sweden appears to be an exception: in this Member State, TPM 'specifically concern technology that restricts reproduction or the making available of the work, i.e. the two economic rights that are expressly granted by copyright. Not every measure is a protected technological measure, for instance regional protection of DVDs[100].' It was also stressed that TPM may 'help to protect the integrity of a work by preventing [users] from changing its form or content (e.g. a digital signature)' (see the information provided by the Polish expert).

100 - According to the information provided by the Swedish expert, p. 30.

National experts were also asked to provide some examples of TPM. These can be classified in TPM that provide access control, and TPM that ensure copy control.

Examples of TPM that **ensure access control**:

- time limits (e.g. TPM that limit the viewing for a certain duration in the case of VOD used, e.g. by streaming services);
- DVD player region codes (no TPM in Sweden);
- digital coding that prevents counterfeit or unlicensed DVDs and games from being played on consoles, chips in games consoles;
- deliberately placed defects on BD-ROMs;
- hidden sectors on CDs/DVDs;
- PIN codes to be input prior to use; username; password;
- more complicated paywalls, paywalls for newspaper websites.

Examples for TPM that ensure **copy control**:

- encryption (e.g. Content Scrambling System on DVDs or the Advanced Access Content System for Blu-ray discs), anti-copying measures in DVDs and CDs;
- encryption systems, which make it impossible to change format of a text document (e.g. 'locking' a PDF file);
- encrypted signals for TV broadcasts;
- scrambling;
- measures that only allow to make a copy from the original but not a copy from a copy (Serial Copy Management System, SCMS);
- measures that count the number of copies done of a work;
- 'read only' functions built into a website;
- watermarks;
- measures that prevent reverse engineering;
- technology making unauthorised copies unusable (e.g. of films or computer programs).

In principle, rights holders are protected against the circumvention of TPM. Cyprus appears to be an exception as only preparatory activities of circumventing TPMs are prohibited, namely 'any form of manufacture, distribution or promotion of circumvention devices and services. The circumvention itself is not prohibited[101].'

101 - According to the information provided by the Cypriot expert, p. 33 et seq.

In most Member States — even where a private copying exception exists — the consumer may not 'get around', that is to say, directly circumvent TPM in order to make private copies. This is the case in Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece,

Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Austria, Portugal, Romania, Slovenia, Finland, Sweden and the United Kingdom.

In Slovakia, the new Copyright Act (effective from 1 January 2016)[102] allows users to circumvent TPM in order to benefit from exceptions and limitations; under the condition that the beneficiary has legal access to protected work[103].

In Cyprus, there are no civil or criminal sanctions for the circumvention of TPM; yet, the circumvention of TPM appears to be a 'grey area', and the user should be cautious.

In Estonia, while TPM may in principle not be circumvented, no sanctions are applicable to the end-user if the use is personal and the consumer does not act in order to receive benefits.

In Finland and Sweden, a user may circumvent TPM for the sole purpose of consuming a work, that is to say, in order to watch a film or listen to a song. No additional copy of the work may be made, and the initial copy must have been legally acquired. In the case in question, a consumer could thus circumvent TPM of a DVD he or she purchased in order to watch the film on his or her computer.

In Italy, an exception to the protection of TPM allows users to make at least one private copy of a DVD onto an analogue medium (not onto a computer).

In a number of Member States where users may not 'get around' TPM, users may ask for access to the work in order to make private copies (see, e.g. CZ (except for internet uses), ES, FR, IT (only analogue copies), LV, LT, LU, AT, PT, RO, SI). Users should contact the rights holder in order to ask for access to the work; in some countries, mediation procedures are available (see, e.g. FR, LT, PT, SI). The Maltese expert notes that where the rights holder 'fails to abide by his or her obligations at law there are very limited cases where [a user] may possibly be allowed to circumvent TPM in a lawful manner[104].'

102 - Zákon č. 185/2015 Z. z., Autorský zákon.

103 - According to the information provided by the Slovak expert, p. 29.

104 - See the information provided by the Maltese expert, p. 48. The expert notes that these situations are very limited, and that users should seek legal advice before circumventing TPM.

A RELATIVELY HIGH DEGREE OF DIVERGENCE ON SPECIFIC COPYRIGHT RULES

Until now, the copyright laws of the 28 Member States have only been partially harmonised. Some aspects have only been addressed by non-mandatory measures, and others remain outside the 'copyright acquis'. The analysis of the information provided by the experts revealed a high degree of divergence as regards specific copyright limitations and exceptions, such as private copying, as well regarding copyright levies. Rules relating to copyright contracts diverge significantly.

a. Divergence on the lawfulness and allowed scope of private copying (Consumer Question 7)

Background: the scope of the right to reproduction, exhaustion of the right to distribution, private copying

Consumer Question 7 reads as follows: 'Am I allowed to give a copy of a work protected by copyright to a family member or a friend?'

Exclusive rights do not give rights holders absolute control over each and every copy made of their work. Notably, most jurisdictions allow private copying if a certain number of conditions are fulfilled. However, the scope of the exception and the understanding of what qualifies as 'private' vary.

Consumer Question 7 can be understood to refer to two different situations: first, a consumer could give his or her own physical copy of a work protected by copyright to a family member or friend. Second, the consumer could make a personal copy (i.e. carry out an act of reproduction), and then give that copy to a family member or friend. In this case, the answer to the question (which should ideally be 'yes' or 'no'), will essentially depend on three factors: whether the respective Member State allows private copying (1); whether the private copying exceptions covers copies made for 'family or friends' (2); and whether the source copy is lawful (3).

Summary of responses

Regarding the first situation, that is to say, the question whether a consumer could give his or her own lawfully acquired physical copy of a work protected by copyright to a family member

or friend, the answer appears to be clear: yes, because the so-called principle of exhaustion would apply. The latter, which is enshrined in EU law[105], entails that the rights holder may no longer control uses of physical copies of his or her work once these have been lawfully put on the market.

As to the second situation, that is to say, the question as to whether a consumer could give a copy that he or she has made of a protected work to a family member or friend, the answers are more nuanced.

The simplified answer to Consumer Question 7 is that a consumer **may not give a copy** that he or she has made of a protected work to a family member or friend in Bulgaria, Ireland, France (although the situation is not quite clear)[106], Italy, Luxembourg, Malta, the Netherlands, Portugal (unless if the family member or friend does not have the necessary means of reproduction), Spain and in the United Kingdom.

It could be noted that several of the Member States in which a consumer may not give a copy to a family member or friend have an exception for private copying[107]. However, the conditions of application of the exception are stricter when compared to other Member States. In Italy, Spain or the Netherlands, for example, private copies are permissible only for **personal**, non-commercial use, if the source copy is lawful.

Under certain conditions, which vary from country to country, a consumer ***may give*** **a copy** that he or she has made of a protected work to a family member or friend in Belgium (family member only, except if the friend lives with the family), the Czech Republic (although there is no case-law), Denmark (digital copies may be made for personal use of the person making the copy himself or herself, or the household but not for anyone else; analogue copies may also be made for close family members, good friends and colleagues), Germany (family member or a friend with whom the consumer has personal ties), Estonia (although according to the information provided by the Estonian expert, up to the date on which the answers were handed in, there had been no case-law), Greece (narrow circle of family and the immediate social circle), Croatia, Cyprus, Latvia, Lithuania, Hungary, Austria, Poland, Romania, Slovenia, Slovakia (although according to the information provided by the Slovakian expert, up to the date on which the answers were handed in, there had been no case-law), Finland and Sweden.

If the simplified answer to Consumer Question 7 is apparently 'yes' in the abovementioned countries, various conditions must be fulfilled in order for the private copying exception to be applicable. As already suggested, one condition relates to the definition of 'friends'. In this context, it is stressed that a large group of acquaintances such as 'Facebook friends' are not

105 - Article 4(2) of the Information Society Directive provides that '[t]he distribution right shall not be exhausted within the Community in respect of the original or copies of the work, **except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.**' (emphasis added)

106 - See the information provided by the French expert, p. 28.

107 - On the scope of the right to reproduction and private copying see also above, in relation to Consumer Question 8, p. 27.

considered 'friends' in the context of copyright law (see, e.g. the information provided by the experts from DE and PL).

Another condition relates to the **compensation or remuneration** for authors that is due for private copying. In Cyprus, Malta and Luxembourg[108], a private copying exception exists, but no levy system has been established (on copyright levies, see below, Consumer Question 10). Therefore, the mandatory claim for fair compensation that rights holders have according to EU law[109] cannot be exercised[110].

Next, a condition that has been introduced or confirmed at EU level by CJEU case-law is the **legality of the source copy**[111]. In practice, this means that the work must have been made available to the public, for example, uploaded to the internet, with the rights holder's authorisation. The legality of the source copy requirement is of particular importance in the context of file-sharing. Many national experts explicitly mention that the source has to be lawful.

Other requirements mentioned by national experts include that the copy has to be made for private purposes only (and not for commercial ones), that no TPM are circumvented, that no commercial advantage is gained through the private copy, or that the use must be made by a natural person, not a legal one[112]. Some national experts state that certain works such as computer programs[113], architectural works in the form of a building, sheet music (e.g. EL, LT) or the whole text of a book or a major part of a work (e.g. LT) are excluded from the exception.

b. Divergence as to remuneration for private copying (Consumer Question 10)

Background: remuneration systems in the EU

Consumer Question 10 reads as follows: 'What are copyright levies?'

Article 5(2)(b) of the Information Society Directive allows Member States to permit private copying, under the condition that rights holders receive fair compensation for the use. The mandatory nature of the claim for compensation has been confirmed by the CJEU[114]. The modalities and amount of payment due are generally left up to the national authorities to decide. Recital 35 of the Information Society Directive simply states that 'when determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. [...].' In practice, many Member States that provide for a private copying exception have established a so-called levy system. While the CJEU has started to elaborate some guidelines[115], modes of operation of national levy systems still diverge largely.

108 - See below, Consumer Question 10, p. 36.

109 - See Article 5(2)(b) of the Information Society Directive.

110 - As pointed out by the Cypriot expert, 'this is a grey zone of the legislation' of Cyprus, and private copying would probably not be compatible with the 'three-step test' (p. 25 et seq.).

111 - See, e.g. Case C 435/12, *ACI Adam BV and others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* [2014], para. 31. On the question how consumers can distinguish between works that are offered lawfully online and those that have been uploaded without the rights holder's authorisation, see below, Consumer Question 15.

112 - A detailed comparison of the different conditions applicable in those Member States that have a private copying exception goes beyond the scope of this Report.

113 - Note that Article 5 of the Computer Program Directive does not mention private copying as an exception to the acts restricted by the Directive.

114 - See, e.g. Case C 467/08, *Padawan SL v Sociedad General de Autores y Editores de España* (SGAE) [2010], para. 30 et seq.

115 - See, e.g. Case C 467/08, *Padawan SL v Sociedad General de Autores y Editores de España* (SGAE) [2010]; Joined Cases C 457/11 to C 460/11, VG Wort [2013]; Case C 435/12, *ACI Adam BV and others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* [2014]; C 572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL [2015].

Levies can serve to compensate or remunerate various types of uses[116]. Given that the FAQs are phrased in the consumer's perspective, it appears useful to focus on compensation for private copying.

Summary of responses

Consumer Question 10 is of a descriptive nature. A detailed comparison of the different modalities and functions of copyright levies in those Member States that have a levy system goes beyond the scope and objectives of this Summary Report. Instead, a simple explanation that focuses on common principles should be given.

Overall, experts' definitions or explanations of what copyright levies converge in essence.

Where copyright levies exist, they are, amongst other things, thought to remunerate or compensate rights holders for private uses of their work. Levies are often due for uses covered by the exception for reprographic copying or uses that are allowed on the basis of other limitations, upon the condition that remuneration is paid[117]. Normally, manufacturers, producers and importers of blank media or reproduction equipment pay the levy directly[118]. In practice, the end-user will pay the levy indirectly through a higher price for the product[119]. The competent collective rights management organisations (CRMO) of the respective Member States administer the levies, that is to say, they collect and redistribute them among the different groups of beneficiaries.

According to the information provided by the experts, the beneficiaries of the income generated are typically authors and related rights holders, such as performers or producers of phonograms or audiovisual works. The specific groups of rights holders that benefit from copyright levies vary across the EU[120]. In some Member States, a percentage of the levies collected are used to foster cultural actions[121]. A recent CJEU decision appears to suggest that the allocation of a part of the fair compensation payable to rights holders to the publishers of works created by authors seems problematic as regards EU law. According to the Court, national laws must make sure that 'authors benefit, even indirectly, from some of the compensation of which they have been deprived[122].' This ruling is likely to have an influence on certain national practices. In fact, some national experts mention publishers as beneficiaries of levies, notably collected in the framework of reprographic reproductions[123].

Depending on the Member State, a levy may be due on different devices and carriers. Typically, levies will be charged on storage media or on reproduction equipment. There are some differences as to whether levies are also due on hardware, such as personal computers, smartphones or tablets[124]. In some Member States, the respective rules have been recently

116 - Recital 36 of the Information Society Directive specifies that '[t]he Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.'

117 - See, e.g. the information provided by the experts from CZ, DE, NL. These types of uses vary across the EU.

118 - See, e.g. the information provided by the experts from BE, BG, CZ, DK, EL, FR, HR, IT, LV, LT, HU, AT, PL, RO, SI, SK.

119 - See, e.g. the information provided by the experts from LV, LT, AT.

120 - Note that a detailed comparison of the specific rights holder groups that benefit from copyright levies in the different EU Member States goes beyond the scope of this Report. By way of example, it could be noted that some of the experts specifically mention publishers as beneficiaries of levies. See, e.g. the information provided by the experts from BG, DE, IT, LT, HU, SI.

121 - See, e.g. the information provided by the experts from FR, LT, PT.

122 - See C 572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015], para. 49.

123 - See, e.g. the information provided by the experts from DE, HU (type of use is not specified), BG, IT, LT, SI.

124 - The experts from, e.g. BE and DK, e.g. mention that these devices are not subject to a levy. In France, e.g. there appears to be a detailed, up to date list of devices on which a levy is due, established by a special administrative Commission (p. 37).

reformed in this context or discussions or reforms are ongoing. According to the new Slovak legislation, for example, 'levies will be paid also from the price of computers, tablets, cameras, video cameras, mobile phones, set-top boxes, smart TVs, MP3 and MP4 recorders, video game consoles, etc.[125].'

In addition, the exact modalities of collection, calculation of the amounts charged, or methods of redistribution may diverge from Member State to Member State. A detailed comparison of the modalities of collecting and redistributing levies goes beyond the scope of this Report. Usually, the rules on redistribution of the sums collected and on the amount charged will be determined by the relevant legal provisions of the Member State[126] and/or by CRMO[127]. In many cases, the amount of the levy will consist in a percentage of the price of the relevant device, as determined by legal or administrative provisions or CRMO[128].

It could be noted that the terminology chosen by national experts diverges: while certain experts state that levies ought to provide 'compensation' for the losses suffered, for example, through the private copying exception (see, e.g. the information provided by the experts from BE, BG, FR, HR, AT, PL, SI, SK, FI, SE), others refer to levies as a form of 'remuneration' for authors (see, e.g. the information provided by the experts from DK, EL, IT, LV, LT, HU, NL).

Not all Member States have a system of copyright levies: in Ireland and in the United Kingdom, neither a private copying exception nor a levy system has been established.

In Cyprus and Malta, a private copying exception with a claim for compensation exists, but no levy system or other remuneration scheme is in place. This makes private copying a 'grey area' in the two Member States (see also above, Consumer Questions 7, 8).

In Luxembourg, no levy system is currently in place. 'The law foresees a copyright levies system to be introduced by regulation, but the regulation has not been taken to this day.' In practice, '[a]ll recordable media have to be imported [to Luxembourg] and the copyright levies that are already included in the import price are not deducted. This means that levies are already paid via the import price of recordable media[129].'

In Spain, a levy system was in force until the beginning of 2012. 'Since then, private copying is compensated from the General Budget of the Spanish Government. Compensation received by copyright owners is calculated annually by the Government[130].'

The Finnish expert speaks of 'levies'; however, since the beginning of 2015, the 'Finnish Government is responsible for paying copyright owners compensation for private copying. There will be a separate appropriation in the state budget for the copyright compensations.

125 - See the information provided by the Slovak expert; see also the information provided by the experts from AT and PT regarding recent reforms of the levy system. The experts from EL, PL, and SI mention ongoing discussions that, amongst others, relate to the development of new devices, which enable consumers to carry out copyright-relevant acts.

126 - This is mentioned, e.g. by the experts from BE, CZ, FR, IT, HU or SI in relation to the division of revenues, and by the experts from BG, DK, DE, EE, FR, AT or SK in relation to the amounts due.

127 - This is mentioned, e.g. by the experts from CZ, DE, FR, HR, AT, PL or SK in relation to the division of revenues, and by the experts from HR, HU or RO in relation to the amounts due.

128 - See, e.g. the information provided by the expert from Lithuania in relation to blank media, p. 44: '[…] a levy is 6 % calculated on the basis of the price, excluding all taxes, of the first sale in the Republic of Lithuania of devices and blank media, specified in the Annex of the Copyright Law, produced in the Republic of Lithuania or brought into its territory, and released for circulation in the Republic of Lithuania for sale or a levy in a fixed sum the amount of which depends on the capacity of the blank media.'

129 - See the information provided by the expert from Luxembourg, p. 30. It appears that Luxembourg lawmakers wait for a proposal from the EU institutions for the harmonisation for copyright levies. A private copying exception with a claim for fair compensation exists in Luxembourg (see the information provided by the expert from LU, p. 23 et seq.).

130 - See the information provided by the ES expert, p. 46.

The appropriation shall be so big that it can ensure proper and reasonable compensations for authors. Private copying and the frequency of it will be investigated by an independent research body in order to scale and focus the compensations correctly.' Similar reforms have been discussed in Estonia[131]. In other Member States, levy systems were recently reformed in order to increase their efficiency[132].

c. Divergence on copyright contracts (Consumer Question 13)

Background: transfers of rights — limitations and formal requirements

Consumer Question 13 reads as follows: 'When I create a work and upload it online, terms and conditions of many sites ask for me to transfer my copyright to the site. Does that mean I lose all those rights in them for the future?'

Copyright contracts remain a matter of national law. Rules regarding formal requirements and the possible scope of transfers thus vary. Usually, the type of prerogatives guaranteed to the author will depend on how protective the respective copyright system is of the latter.

Summary of responses

Consumer Question 13 relates to copyright contracts, a field that is not harmonised at EU level. A detailed comparison of the rules applicable to copyright contracts in the 28 Member States goes beyond the scope and purpose of this Summary Report. However, given the technicality of the question, the answers to some of the sub-questions in the template were taken into account.

In principle, the simplified answer to Consumer Question 13 is 'no'; nevertheless, consumers who create copyrighted works should be cautious, because in general they may license at least their economic rights to a certain extent. Therefore, several experts advise consumers always to read carefully the terms and conditions of a website (see, e.g. the information provided by the experts from LV, MT, NL).

Overall, the experts' replies reveal that there is convergence on certain basic principles. Generally, exclusive (economic) rights can be licensed, although more rarely assigned in their entirety (i.e., given away on a permanent basis, without any constraints). By means of a licence, the author grants the other party authorisation to exploit the economic rights in his or her work. For that reason, there can be a difference between the 'author' and the '(derivative) rights holder' of a specific work. A licence may be exclusive or non-exclusive: a non-exclusive licence allows the author to continue exploiting the work, for example, by

131 - See the information provided by the EE expert, p. 43. The Estonian expert mentions that a court case relating to State liability in this context was pending at the time the Estonian answers were handed in. See The Constitutional Review Chamber case No 3-4-1-22-15, available at http://www.riigikohus.ee/?id=11&tekst=222579133, accessed 23 October 2015.

132 - See the information provided by the expert from AT (the Austrian legislator introduced a new system of copyright levies on 1 October 2015, Urheberrechts-Novelle 2015 — Urh-Nov 2015), SK (new Copyright Act effective from 1 January 2016, Zákon č. 185/2015 Z. z., Autorský zákon), PT (Law No 49/2015 of 5 June 2015).

using it personally or by licensing his or her economic rights to other parties. Due to some systemic differences, certain Member States do not technically allow 'transfers' of rights (see CZ, DE, HR, SK). In Germany, this means that while copyright as such may not be transferred, an author may grant 'rights to use' for the work[133].

In principle, an agreement may allow the parties to determine the object, type, scope, duration and territory of the permitted use, as well as the remuneration for the use. However, most Member States' copyright laws protect authors by regulating the extent of possible grants. The degree of protectionism varies significantly within the EU. Overall, common-law countries are, in this regard, more 'liberal' than civil law author's rights jurisdictions. However, it appears that within the latter category, the Nordic countries (DK, FI, SE), the Netherlands, some Baltic countries (EE, LV), as well as Luxembourg, leave the parties more freedom when it comes to copyright contracts.

Moral rights, for example, the rights to paternity and to integrity of the work, cannot be waived in most Member States. The possibility of waivers of moral rights is known to be a major point of dissent between the two main copyright traditions. Traditionally, author's rights countries consider the moral right to be inalienable and therefore as not transferrable (at least *inter vivos*). In certain situations, an author may agree not to exercise his or her moral rights (see, e.g. the information provided by the experts from DE, EE — where the situation appears to be unclear, or the information provided by the expert from EL). In Finland, Denmark, the Netherlands and Sweden, moral rights can be waived to a certain extent or partially. In Luxembourg, '[a]ll moral rights but the right to oppose against offence against the author's reputation can lawfully be transferred[134]'. In the United Kingdom, authors may waive their moral rights, but cannot assign them. In Ireland, there are 'no restraints on waivers relating to moral rights[135]', but the waiver must be in writing. In Malta, moral rights cannot be assigned throughout the lifetime of an author. In Cyprus, the situation as to waivers of moral rights appears not to be quite clear.

Some experts mention that remuneration rights, which are different from exclusive rights, may not be waived (see, e.g. the information provided by the experts from ES, SI). This means that even if a contract stipulates the transfer of economic rights, the author will retain his or her (statutory) claim for remuneration.

Different mechanisms to protect authors' interests also exist for exclusive rights. The concrete scope and nature of these mechanisms differ, even if some common principles can be identified. Generally, more of these mechanisms exist in author's rights countries. Protection may, amongst other things, relate to **future uses of the work**, which are still unknown at the moment the licence is granted, or which are not clearly identified in the agreement (see, e.g. BE, CZ, DE, EL, ES, FR, IT, LT, HU, AT, RO, SI — to a minor extent, PL). In Germany, for example, even

133 - See the information provided by the German expert, p. 46. Note that Germany, Austria, Croatia and Hungary belong to the monistic copyright tradition. According to the monistic approach (which differs from the dualistic approach adopted in many author's rights systems), the author's moral and economic rights are considered to form an inseparable unity. As a consequence of the specific nature of moral rights, the author's 'rights' as a whole can technically not be transferred. Another consequence is that under the monistic approach, economic and moral rights will have the same duration. In Slovakia, 'both moral and economic rights cannot be the subject of transfer to other person and the moral rights expire by the death of the author' since 2004 and according to the current Copyright Act (Act No 185/2015 Coll.), effective from 1 January, 2016. Slovak law has 'some quasi-dualist features with some variations within its development' (see the comments provided by the Slovak expert).

134 - According to the information provided by the LU expert, p. 38.

135 - See Section 116 of CRRA 2000; according to the information provided by the IE expert, p. 55.

if authors may license future, still unknown types of uses, they will have 'a right of revocation if the platform wants to start such kind of use; if [they] do not revoke [their] right, [they] have a right to claim remuneration for the new kind of use[136].' Similar rules exist for uses through **different media** (see BE, DE, IE, ES, FR, IT, HU, PL, RO, SI). In Portugal and in the Netherlands, an author may claim additional remuneration or compensation for such 'new' types of uses.

Some Member States provide for guarantees that relate to the **remuneration** of the author (see BE, BG, DE, EE, IE, EL, ES, FR, IT, NL, PL, RO, SI). These may apply, for example, where the contract is silent on the issue of remuneration, or where the remuneration appears clearly imbalanced.[137] In the Netherlands, 'the Copyright Act has introduced a new specific provision entitling the author to an equitable remuneration for granting exploitation rights[138].'

In many Member States, **judicial interpretation of the agreement will favour the author** in the case of vagueness or ambiguities (see, e.g. DE, EL, ES, FR[139], LT, AT, RO, FI). In Romania, for example, the scope of the provisions of a contract will be interpreted narrowly, that is to say, 'all rights not specifically mentioned as being transferred are considered not transferred'. In Austria, in the case of doubt, 'a licence agreement comprises only the necessary powers for the practical purpose of the intended use of the work[140]'.

Protective legal mechanisms may also relate to the **term of the grant** (see notably BE, BG, IE, EL, ES, FR, IT, PL, PT, RO). While some laws provide that a grant may not be longer than the duration of copyright (see LU, MT, FI), others lay down a maximum duration if the contract is silent on the term of the grant. In Belgium, constraints as to the term only relate to future works. Some Member States allow the author to **terminate the contract** in certain cases and under certain conditions (see BE, BG, DE, EE, IE, ES, FR, IT, LV, LT, HU, NL, AT, PT, RO, SI). This frequently applies where no term is indicated in the contract, or where the licensee does not exploit the work during a given time.

Formal requirements for copyright contracts vary across the EU, and are, amongst others, a means to protect the author's position. At least a (full) transfer of economic rights or even an exclusive licence will often have to be made in writing (see BE, BG, DE, EE, EL, ES, FR, IT, CY, LV, LT, HU, PL, PT, SI, UK). In Romania, a written agreement will at least be necessary in order to prove existence and contents of the transfer. In Malta, Ireland and the Netherlands, formal requirements relate to the assignment of rights. In Portugal, a public deed is required for the total and definitive transfer of economic rights. In Poland, for example, formal requirements entail that simply '[c]licking "agree" to terms and conditions on the site does not amount to written signature[141].'

Usually, at least the clauses of a contract that do not respect the protective provisions of the applicable national copyright law will be considered void.

136 - See Sections 31 et seq. of the German Copyright Act (UrhG) relating to 'rights to use' *(Nutzungsrechte)*; according to the information provided by the DE expert, p. 48.

137 - See, e.g. the information provided by the DE expert, p. 47: Section 32 in conjunction with Section 36 of the German Copyright Act 'provides for a system according to which an author may claim an equitable remuneration for the grant of a licence, even if the contract has not determined any, or not an equitable remuneration.' Moreover, 'where a disproportion arises between the agreed licence fees and the factual revenues from the use of the work, the author has a right to claim amendment of the contract so as to receive an additional equitable remuneration' (Section 32a UrhG).

138 - See Article 25c of the Dutch Copyright Act; according to the information provided by the NL expert, p. 36.

139 - The French expert notes that 'consumer law has also contributed to protect authors' rights from terms and conditions [CGU] that have been found to be unfair according to French law in that they create a significant imbalance between the parties involved. Recently, the French *Commission des clauses abusives* (Commission for unfair terms) has issued recommendations regarding the CGU of social networks. According to the expert, unfair terms consist (among others) of conditions that are too generic and difficult to read or understand for users' (p. 47). In the same vein, the Greek answer notes that 'the terms and conditions can be viewed from a consumer law perspective in order to decide whether some of the terms and conditions are unfair according to Greek law.'

140 - See the information provided by the Austrian expert, p. 41, referring to decisions of the Austrian Supreme Court: Case 4 Ob 104/11i, Natascha K. V (*Phantombild V*) [2011]; Case 4 Ob 163/09p, *Autobahnstation (Masterplan II)* [2009]; Case 4 Ob 112/07k, *Internetwerbung mit Lichtbildern* [2007].

141 - According to the information provided by the Polish expert, p. 46.

OPEN QUESTIONS OR 'GREY AREAS', IN PARTICULAR AS REGARDS THE ONLINE ENVIRONMENT

In the online environment, new technologies and new business models also bring about changes in user behaviour. The existing copyright framework often cannot provide clear guidance on new types of uses of works, unknown at the time the copyright rules were adopted. Even if the courts at EU and national levels were sometimes asked to rule on the legality of such uses, these 'grey areas' entail considerable uncertainty for both consumers and rights holders.

a. Uncertainty as to the lawfulness of streaming (Consumer Question 11)

Background: streaming and copyright

Consumer Question 11 reads as follows: 'Am I infringing copyright if I watch a movie by streaming it instead of downloading it from the internet?'

Downloading a work from the internet constitutes an act of reproduction (see above, Consumer Question 8). During the process of streaming, no fixed copy or file is created on the user's computer. There is great uncertainty among consumers about whether the transient display of an audiovisual work may amount to copyright infringement. In practice, the question will often relate to streaming from websites to which works were uploaded without the rights holder's authorisation. A CJEU decision on, amongst other things, the question whether streaming from unlawful sources infringes copyright is pending[142]. In any event, should a streaming service require a simultaneous upload — and communication the public — of a protected work at the same time as the streaming is going on, use of such a service cannot be exempted from constituting infringement.

142 - Case C 610/15, *Stichting Brein*, Request for a preliminary ruling lodged by the *Hoge Raad der Nederlanden* in November 2015.

Experts were asked to clarify whether streaming can involve an act of — even temporary — reproduction, and if yes, whether such reproduction could be justified by a specific exemption. Consumer Question 11 appears to suggest that an answer can be given in simple terms, that is to say, in the form of 'yes' or 'no'. However, in reality the situation is not entirely clear in many Member States, and answers must be tempered.

Summary of responses

The answer to Consumer Question 11 is not a settled one in many Member States. Therefore, the answers given by national experts are frequently based on doctrinal opinions.

First, as experts make clear, streaming is always allowed when the rights holder has authorised it, for example, in the framework of a licensing agreement. Experts give examples of streaming services that require the user's subscription and the payment of a fee, such as Amazon or Netflix.

The answer is different where the rights holder has not authorised the use by means of streaming.

In Ireland and Italy, streaming would probably amount to copyright infringement if it took place outside the framework of a licensing agreement.

According to the Slovenian expert, streaming may not involve an act of reproduction, that is to say, it would not amount to copyright infringement since it would amount to mere consumption of a work. In the view of the experts from Poland and Finland, streaming would probably not entail an act of reproduction.

Certain experts take the view that even if an act of reproduction were involved, the latter would be exempted as transient, incidental copying (see, e.g. BE, BG, EE, CY, HU, AT, PL, SK, SE), which is covered by a specific limitation and exception in many Member States and in the EU acquis[143]. Some experts mention that in order for the exception to apply, additional conditions must be met. Notably, the work must have been uploaded to the internet with the rights holder's authorisation[144].

Some experts mention that if streaming involved an act of reproduction, it could be justified on the basis of the private copying exception, if the conditions for the latter are met (see, e.g. CZ, HU, PT, FI; on the conditions of the private copying exception see above, Consumer Questions 7, 8. One of these conditions is the lawfulness of the source copy).

In sum, several experts state that streaming a work is lawful as long as the source is lawful, that is to say, when the work has been uploaded with the rights holder's authorisation (see, e.g. the information provided by the experts from DK, DE, EL, ES, FR, CY, LV, LT, RO). Some experts note that it is unclear whether streaming from an unlawful source can be lawful (see, e.g. the information provided by the experts from CZ, LU, MT, FI, UK).

143 - Article 5(1) of the Information Society Directive obliges Member States to exempt '[t]emporary acts of reproduction [...] which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance [...]' from constituting copyright infringement. Note that this is the only **mandatory** exception in the Information Society Directive.

144 - Nevertheless, according to the Swedish expert, '[...] streaming is lawful in Sweden irrespective of whether the work that is streamed is lawfully or unlawfully available on the internet because of the temporary copies limitation' (p. 34).

b. Uncertainty as to users' liability for copyright infringement on social media, and as to linking and embedding (Consumer Question 12)

Background: social media, the right to communication to the public and linking

Consumer Question 12 reads as follows: 'If copyright-protected works are included into my posts automatically by social media platforms, am I responsible for this and is this a copyright infringement? What if I link to them or embed them in my own website or blog?'

Use of works protected by copyright on social media platforms causes much uncertainty among consumers. While certain activities may qualify as acts of communication to the public, others do not. Despite some clarifications brought about by the CJEU[145], the question of lawfulness of linking remains controversial. Moreover, solutions regarding the liability of users for copyright infringement on social media platforms vary.

145 - See, e.g. Case C 466/12, *Svensson and others* [2014]; Case C 348/13, *BestWater International GmbH*, Order of the Court [2014].

146 - 'Embedding' describes the act of inserting a 'protected work, freely available on an internet site, [...] into another internet site by means of a link using the "framing" technique'. See Case C 348/13, *BestWater International GmbH*, Order of the Court [2014] at 19.

147 - On the scope of protection of copyright and limitations to exclusive rights, see above, on Consumer Questions 5, 6 and 8.

Summary of responses

Consumer Question 12 consists of two different questions. The first question relates to users' liability for copyright infringement that takes place 'automatically' on their social media account; the second question relates to the qualification of linking and embedding[146] as copyright relevant acts.

As to the first question, it includes a preliminary question, that is to say, whether the upload of a work protected by copyright is a copyright infringement. This question was addressed in more detail in the sub-questions in the template. The upload of a work protected by copyright affects both the author's right to reproduction and the right to communication to the public. This means that the upload of a work created by another person and protected by copyright would amount to infringement unless the use, including the upload, is authorised by the rights holder. Communication to the 'public' implies that the work is not only communicated to a small circle of family members or friends within a closed network. In brief, the only safe way of uploading a work created by another would be to obtain authorisation for the use. When authors of works have, for example, opted for a Creative Commons licence, users should check the terms and conditions in order to know what uses are allowed.

In some cases, the reproduction and the communication to the public may be allowed on the basis of an exception or limitation. Some experts mention the limitations relating to quotation, parody, to persons with a disability or uses for the purpose of information, teaching or research[147]. Another limitation mentioned is the one for uses relating to works of architecture, works of visual art, works of applied art or photographic works that are permanently located

in places open to the public (the so-called panorama exception, which is not implemented uniformly across the EU)[148].

Consumer Question 12 focuses on **user liability for** copyright infringement on a social media account. What should be clarified is whether, even if the described use amounts to copyright infringement, the user could be held liable if the upload happened 'automatically'. Overall, the situation regarding user liability for 'automatic' uploads on a user's social media account is unclear in several Member States (see, e.g. DE, IE, FR, HR, IT, MT, NL, FI, UK).

Many experts refer to the **user settings** in the framework of social media accounts, and to the active role that the user could take in accepting or rejecting the possibility of 'automatic' uploads. In this sense, numerous experts (BE, BG, CZ, DK, DE, EE, FR, LV, LT, LU, HU, PL, SI, FI) state that a user could (probably) not be held liable for copyright infringement if he or she has taken a purely passive role, for example, when the upload took place on the basis of the default and not the manual settings (see, e.g. the information provided by the expert from BG), if the user did not know or ought not to know about the infringement (see, e.g. the information provided by the experts from DK, DE, EE, HU, SI). In practice, it appears that the user normally has some control over his or her account and possible uploads (see the information provided by the EE expert).

According to the experts from Greece, Portugal and Slovakia, 'automatic' upload would probably **not** constitute copyright infringement in these jurisdictions. However, some experts point out that liability usually does not depend on intention or knowledge (see above, Consumer Question 4). Nevertheless, for example, in Ireland it appears unlikely in practice that a user will have to pay damages to a rights holder[149]. It appears that in Austria, Romania and Sweden, users may be held liable for 'automatic' uploads.

In addition, it was noted that in practice uploads will often take the form of embedding (see the information provided by the experts from Cyprus and Latvia). In this case, according to CJEU jurisprudence, the liability issue would often not have to be addressed because no liability would arise in the first place (if certain conditions are met, see below).

As to the second question included in Consumer Question 12 on **linking and embedding**, the situation is not entirely clear in many Member States. Several experts refer to relevant CJEU case-law[150]. While generally, there appears to be convergence on principles, answers given in relation to embedding still vary and are less clear.

As to linking, it does not amount to copyright infringement in most Member States, as long as certain conditions are fulfilled (see, e.g. the information provided by the experts from BE, BG, CZ, DK, DE, EE, IE, EL, FR, HR, IT, CY, LV, LT, LU, MT, AT, PT, RO, SI, SK, SE).

148 - See Article 5(3)(h) of the Information Society Directive, one of the optional 'exceptions and limitations' to the rights of reproduction and communication to the public. The Estonian expert explains that Section 20(1) of the Estonian Copyright Act 'allows to reproduce works of architecture, works of visual art, works of applied art or photographic works which are permanently located in places open to the public, without the authorisation of the author and without payment of remuneration, by any means, and to communicate such reproductions of works to the public except if the work is the main subject of the reproduction and it is intended to be used for direct commercial purposes. If the work specified in this section carries the name of its author, it shall be indicated in communicating the reproduction to the public' (p. 44). Analysis of the implementation of the 'panorama exception' in the EU Member States goes beyond the scope of this Report.

149 - See the information provided by the Irish expert, p. 51: 'As intention is not an element in the infringement of copyright this would be possible but it is difficult to see any court awarding damages to a rightsowner other than nominal damages. Under CRRA a court will assess damages by reference to the justice of the case and while innocence is not a defence it may minimise financial damages awards leaving the user only subject to a prohibition order or injunction.'

150 - See, e.g. Case C 466/12, *Svensson and others* [2014]; Case C 348/13, BestWater International GmbH, Order of the Court [2014].

The main conditions mentioned by the experts for linking to be lawful are that the work has been made available online with the rights holder's authorisation, and that the rights holder does not use TPM or any other measures to restrict access to the work for a specific audience[151].

Some experts state that the issue is unclear (ES, NL, UK).

As to embedding, a number of experts answer in a similar way about linking, that is to say, it is lawful if the work in question has been made available online lawfully, and if no TPM are used (see, e.g. the information provided by the experts from BG, DK, DE, EE, EL, FR, HR, IT, CY, LV, LT, MT, AT, PT, RO, SE).

151 - A detailed analysis of the Member States' law relating to linking goes beyond the scope of this Report.

Some experts state that embedding may amount to copyright infringement because it would entail an act of communication to the public (CZ, LU, PL). In Slovenia, embedding appears only to be lawful in the event of non-public access (persons that are inside the usual circle of a user's family or the circle of his or her personal acquaintances).

152 - Andrade, N. N. G. de, 'Striking a balance between property and personality: the case of the avatars', *Journal of Virtual Worlds Research*, Vol. 1, No 3, [S.l.], January 2009.

The situation is unclear in several Member States (BE, IE, ES, UK).

c. Uncertainty as to users' liability for infringement of rights in the virtual world (Consumer Question 14)

Background: virtual worlds and copyright and other immaterial rights

Consumer Question 14 reads as follows: 'My avatar is based on my favourite movie star, cartoon character or sports club. Can I get in trouble for infringement of copyright or any other legislation because of this?'

An 'example of new online collaborative environments, virtual worlds emerge as context for creation, allowing for users to undertake a digital alter-ego and become artists, creators and authors[152].' Users may draw inspiration from different sources to create an avatar. Uncertainty relates to whether and when copyright or other rights could be affected, and whether use of protected material could be justified.

Summary of responses

First of all, it should be noted that the answers to Consumer Question 14 were frequently not very detailed. Since the issue of avatars is not specifically addressed by regulation or case-law, most answers were given on a hypothetical basis. While some experts try to imagine different possible scenarios, others only state that the question has not been dealt with yet (see, e.g. the information provided by the experts from IE or SK), or only address part of the question.

In order to be more instructive, the answers to Consumer Question 14 will be divided into different intellectual steps. First, it should be clarified whether any of the uses described above are protected by copyright, and whether the end user can justify them in the context in question; that is to say, whether they may amount to copyright infringement, and whether the user 'can get in trouble'.

In several Member States, some of the uses described in Consumer Question 14 may (possibly) amount to copyright infringement (see, e.g. BE, BG, CZ, DK, DE, EE, EL, ES, FR, HR, CY, LT, LU, HU, AT, PL, SI, FI, UK). In Malta, exclusive rights are infringed 'when a substantial part of such character (e.g. the face of a cartoon character) is reproduced/distributed/displayed to the public etc. — either in its original form or in any form recognisably derived from the original[153]'.

153 - According to the information provided by the MT expert, p. 66.

Among the elements named in Consumer Question 14, several objects may be protected by copyright: cartoon characters (e.g. DK, DE, EL, FR, CY, LV, LT, LU; MT — although not settled), original logos (e.g. FR, LV, FI), the name of a sport club (e.g. LV), fictional characters (e.g. film or novel characters) (e.g. CY), a photograph representing a film star or an athlete (e.g. CY, FI; note that in certain Member States, a photograph may also be protected by a related right, see above, Consumer Question 3; in this sense, the Spanish expert notes that 'the maker of the ["mere photograph"] has neither moral rights nor the right of transformation').

Some national experts point out that even if a consumer were to use elements protected by copyright for the creation of an avatar, it would be highly unlikely that he or she would get into trouble because of it. It is noted that 'in general, use for the creation of an avatar of elements from the image of movie stars, cartoon character or sports clubs would not infringe the rights in the works, since such would not undermine the functions these rights are meant to ensure' (see the information provided by the Romanian expert). Similarly, it appears that in Belgium, Spain, Croatia and Slovenia, the risk that a rights holder will take any legal actions is very low due as long as the use of the avatar is non-commercial. This would mean that the rights are infringed but will probably not be enforced.

If the use described should affect the author's exclusive rights, this does not necessarily mean that the user will 'get in trouble' for copyright infringement. National experts could think of a number of defences that may exempt the end user from liability. First, of course, the user may obtain the author's authorisation. This would be especially important when the avatar is made available to the large public, and not only to a small circle of friends (see, e.g. the information provided by the German expert).

Next, a number of exceptions or limitations to copyright may be invoked. In that case, the use would have to fulfil the conditions of application of the relevant exception in the relevant

Member State. Where the elements protected by copyright are used in a humoristic way, the exception for parody may be applicable (see, e.g. the information provided by the experts from FR, HU, NL, FI). Moreover, for example, in Portugal or Finland, the use might under certain circumstances qualify as a quotation. In Denmark, a consumer may lawfully use only smaller, insignificant parts of the character in the creation of his or her avatar.

In addition, it might be possible in certain cases to invoke fundamental rights, such as freedom of expression (see the information provided by the Estonian expert). Other principles outside copyright law that might strengthen the user's position are abuse of rights or the principle of good faith (see the information provided by the Greek expert).

It was pointed out that 'if the avatar is created by the end-user in a pre-established framework of limited options, for example, in a computer game, this end-user (who has not programmed the game) cannot be held liable for copyright or other IP infringement' (see the information provided by the LU expert).

It was also suggested that users always have the option to use copyright-protected works (or elements of such works) only as **sources of inspiration**. In that case, there is no need to receive the rights holders' permission for (see the information provided by the experts from LV, NL, PL, SI, FI). In Austria, for example, 'in case that copyright protected elements are used, though completely absorbed in the avatar (so that the used elements take a "backseat"), the avatar is an entirely new creation that does not need approval for its use[154]'.

154 - The Austrian expert refers to Case 4 Ob 190/12p *Hundertwasserhaus VI* [2012]; Case 4 Ob 109/10y *Zeitungslayout* [2010]; Case 4 Ob 221/03h *Weinatlas* [2003] (p. 42).

In addition, some of the uses described in Consumer Question 14 may affect other IP rights. Many experts mention trade mark rights (DK, DE, HR, IT, CY, LV, LT, HU, MT, NL, AT, PL, SI, SE) or passing off (IE, CY, UK) and/or design rights (LT, AT, SI, SE). Notably, trade mark rights may often protect the distinctive signs in the logos of sports clubs or film stars or a cartoon character's or sport club's name. In most Member States, it appears that the user does not risk any actions for infringement when the use of the sign is non-commercial. However, the use 'must not, without due cause, take unfair advantage of or be detrimental to the distinctive character or repute of the trademark' (see the information provided by the expert from MT).

Furthermore, in many Member States, some of the uses described in Consumer Question 14 may affect personality rights, and notably the right to one's own image (see, e.g. the information provided by the experts from BE, DK, DE, EE, EL, FR, HR, IT, LV, LT, HU, PL), slander and defamation (MT), or publicity rights (BG). This will mainly relate to the image of a film star or a famous sportsperson.

Regarding possible defences, it was suggested to clarify whether the relevant person agrees with the use of his or her image for the creation of an avatar (see the information provided by the Latvian expert). In Lithuania, for example, the image of a film star may be used 'if his/her photo is taken in relation to his public activities or in the public place; however, this photo or its part should be used in such a way as to not damage his/her honour, dignity and professional reputation' (see also the information provided by the Polish expert). In Poland, consumers 'can also use a picture without infringing image rights when the person presented is constituting only a detail of a whole, such as a meeting, a landscape, or a public event[155]'.

Other fields of legislation that could, in theory, be relevant in the described situation are unfair competition (see the information provided by the LT expert), related rights (e.g. the performance of a film star, see the information provided by the Greek expert), or the Law on Corporations and Law on Associations (for signs or firm names, see the information provided by the Slovenian expert). In Greece, for example, the 'publication of an athlete's photograph for commercial or publicity use needs the written permission of the athlete or his professional association, according to a specific legislative provision[156]'.

155 - According to the information provided by the Polish expert, p. 49.

156 - According to the information provided by the Greek expert, p. 49-50.

157 - The optional exception for private copying is laid down in Article 5(2)(b) of the Information Society Directive.

158 - Case C 435/12, *ACI Adam BV and others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* [2014], para. 31.

d. Uncertainty as to decisive criteria for the legality of the source copy (Consumer Question 15)

Background: the requirement of lawfulness of the source copy

Consumer Question 15 reads as follows: 'How do I know whether a work is offered legally or illegally online?'

According to case-law of the CJEU, only copies made from lawful sources may be exempted from infringement under the private copying exception[157]. It is precluded that '[...] copyright holders [must] tolerate infringements of their rights which may accompany the making of private copies[158].' However, often neither the legal provisions of a Member State nor case-law give the consumer guidance as to when they should assume that a work is offered online in an unlawful manner.

National experts were asked to suggest criteria that may help consumers assess when a work is not 'obviously' made available online without the rights holder's authorisation.

Summary of responses

Given that Consumer Question 15 is phrased in quite open terms, the experts' answers to certain sub-questions were taken into account in the following summary.

Strictly speaking, Consumer Question 15 is not a legal question. On the contrary, it relates to the reality of online business models that may involve copyright infringement.

Several national experts point out that distinguishing between lawful and unlawful offers is not always an easy task for the consumer. Certain websites that offer works without the authorisation of the rights holder may have a reputation, and be well known to the average consumer. There appears to be a 'grey area' regarding sources that are neither 'obviously' lawful nor 'obviously' infringing (see information provided by the Hungarian expert). Many national laws require that a work must be lawfully made available to the public, notably, in order for the private copying exception to apply (where such an exception exists). It was stressed that the lack of knowledge does not necessarily exempt the consumer from liability for copyright infringement; that is to say, a user may be held liable even if he or she did not know that the source copy was infringing (see above, Consumer Question 4). In order to assess whether the source copy is lawful, the consumer must often appeal to his or her experience and common sense. In some Member States, courts have shed light on the question. In Denmark, for example, case-law established that when 'a website offers a very large number of popular works for free, the consumers ought to know that the works are illegal[159]'.

159 - The Danish expert, Thomas Riis, refers to a case from 2001, in which a court held that two teenagers 'ought to know that websites with a very large number of MP3-files with infringing music were unlawful', *Ugeskrift for Retsvæsen* 2001.1572V.

Overall, national experts came up with a multitude of factors or criteria that can indicate whether a work is offered lawfully on the internet or not. However, it was emphasised that there is no safe test for assessing the lawfulness of the source copy; instead, taken as a whole, the factors listed below can help the consumer determine whether the source is lawful (or infringing) (see the information provided by the Maltese expert). These indicators relate both to the copy of the work itself and to the website that offers the source copy.

Criteria relating to the **work** that indicate that the source copy is lawful include:

- the (high) quality of the reproduction of the work;
- a clear indication of the author of the work;
- the (plausible) temporal link between the original release (e.g. of a film) and the availability of the source copy;
- holograms or other marks that are difficult to reproduce;
- no spelling mistakes in the title;
- claims of protection or the use of symbols established for the indication of protected works;
- a copyright notice allowing the use of the protected work;
- a notice that the work is in the public domain;
- a notice that the work is disseminated under open content licences;
- a plausible link between contents and copyright owner;
- the known use of TPMs against private copying by rights holder.

Criteria relating to the **website** that indicate that the source copy is lawful include:

- the reputation/public knowledge of the source;
- advertisements of the platform on the television or in the other mass media;
- terms and conditions of the use of the works;
- access and download conditions of the website, such as accepting general terms and conditions or an end-user agreement, user registration with username, password, etc.; (restrictions of) the amount of works that can be downloaded;
- the domain name;
- the presentation of the site;
- a clear indication of the person operating the website (e.g. the official representative of the publisher or producer, or the owner of the work protected by the copyright);
- the trade mark used
- the scale of the prices;
- modes of payment, e.g. subscription, registration, individual payment, free use with advertisement support; whether payment for content is uploaded by a site or by other users;
- trust certificates (through the image on a website and registration through a third party organisation);
- warnings, explanations and notes on the website;
- available reviews of the website;
- the location of the website (e.g. the end-user did not find the website through a randomly generated email).

Some experts provide **examples** for websites that offer **lawful access:**

- websites of intergovernmental, regional or governmental organisations or of local libraries where works are made available freely;
- academic websites where the members of the given institute, association, etc. make their works available; blogs where someone makes available his or her works or objects of related rights (often on the basis of 'open content licences');
- local, national or international internet news portals;
- sites of well-known legal music or video licensing systems; book stores; music stores.

It could be noted that in France, the HADOPI (the *Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet*), an institution dedicated to the distribution of works and the protection of rights on the internet, grants the label 'PUR', which helps users identify works that are offered online lawfully. The label is granted upon completion of a procedure governed by the provisions of the French Intellectual Property Code[160].

160 - For more information see http://www.hadopi.fr/en/new-freedoms-new-responsibilities/legal-content (last accessed in January 2016). According to the French expert, Valérie-Laure Benabou, the label has had little success so far. She also points out that works are not necessarily made available without the rights holder's consent because they do not contain the label.

If the **consumer should be in doubt regarding the lawfulness** of the source copy, it is often suggested that he or she refrain from using the work[161].

Some experts encourage consumers to make some proactive inquiries[162] and 'act with reasonable care and diligence' (see the information provided by the Portuguese expert). In this context, it is suggested that consumers could 'ask around' in order to make sure that 'a sufficient number of people believe that the works are legal' (see the information provided by the Danish expert); or that they 'search for more information online' (see the information provided by the Latvian expert). Additional research could help consumers find out 'whether the same work is available from other websites (preferably official) and whether this work is usually offered for free or not' (see the information provided by the Estonian expert). To this end, the consumer may also contact the relevant collective rights management organisation (CRMO).

According to the German expert, such additional proactive steps are not expected from the consumer in Germany.

If a consumer does not want to refrain from using the work, many experts suggest he or she should try to contact the rights holder, either directly, via the website, or via the respective CRMO.

161 - See, e.g. AT, BG, HR, EE, FI, FR, IE, LU, MT, PL, SK, SE.

162 - The Bulgarian expert, Velizar Sokolov, e.g. cites a decision in which the Sofia City Court held that 'a local bank had used a portrait photograph of a famous Bulgaria painter which was downloaded from the internet without putting forth any effort to investigate the legality of the source and the ownership of the copyright over the image', *Rumyana Chapanova v Bulgarian National Bank* [2010], Sofia City Court, 800/2010 (p. 47).

ANNEX 1: LIST OF NATIONAL EXPERTS

CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

Belgium	Alain Strowel
Bulgaria	Velizar Sokolov
Czech Republic	Petra Žikovská, Zuzana Císařová
Denmark	Thomas Riis
Germany	Silke von Lewinski
Estonia	Aleksei Kelli
Ireland	*
Greece	Dionysia Kallinikou
Spain	Raquel Xalabarder
France	Valerie-Laure Benabou
Croatia	Marko Jurić
Italy	Giuseppe Mazziotti
Cyprus	Tatiana-Eleni Synodinou
Latvia	Rihards Gulbis
Lithuania	Edita Ivanauskiene
Luxembourg	IP Office/IP Institute Luxembourg
Hungary	Mihály J. Ficsor
Malta	Antoine Camilleri
Netherlands	Thomas Margoni, Alexander Tsoutsanis
Austria	Manfred Büchele
Poland	Krystyna Szczepanowska-Kozłowska
Portugal	Ana Maria Pereira da Silva
Romania	Paul-George Buta
Slovenia	Miha Trampuž
Slovakia	Zuzana Adamová
Finland	Petra Sund-Norrgård
Sweden	Sanna Wolk
United Kingdom	Eleonora Rosati

* The Irish copyright expert prefers not to be mentioned by name.

ANNEX 2: EXPLANATORY NOTES AND TEMPLATE NATIONAL REPORTS[163]

163 - Content coordinators: Christophe Geiger, Professor of Law, Director General of the Center for International Intellectual Property Studies (CEIPI), christophe.geiger@ceipi.edu
Franciska Schönherr, Researcher in the Research Department of CEIPI, franciska.schonherr@ceipi.edu

164 - Office for Harmonization in the Internal Market (Trade Marks and Designs), Observatory, Terms of Reference for Frequently Asked Questions of Consumers in relation to Copyright, 2015, paragraph 1.

OBJECTIVES OF THE NATIONAL REPORTS

- The **final objective** of the FAQ project is the creation of a c**opyright guide for consumers** (the Guide). The Guide will provide 'answers to the most frequently asked questions average consumers have in relation to copyright for all twenty-eight EU Member States.' It will 'provide consumer friendly information about what is legal and what is not as far as the usage of copyright and related rights protected content on the internet is concerned[164].' As to the contents of the FAQs, representatives of consumers and the civil society developed 15 consumer questions in the framework of stakeholder meetings. Answers and further information provided by national experts in the national reports will serve as a basis for the Copyright Guide.

- As an **intermediate step,** a summary report, synthesising the results of the 28 national reports, will be drawn up. That summary report will highlight **differences between national laws.**

- Therefore, the 15 consumer questions have been broken down to the legal issues behind them. This will help better identify differences and explain them in a simple way.

INSTRUCTIONS FOR ANSWERING THE QUESTIONS WITH THE HELP OF THE TEMPLATE

General

The scope project is limited to **copyright**. In some questions other intellectual property rights could be envisaged. However, the purpose of your replies is to provide guidance to consumers as far as copyright is concerned.

Structure of the questions and answers

- **Categories and sub-questions:** in the template, the questions formulated by consumers are broken down to the legal issues behind them. This will allow us to identify some of the differences between national systems. In most cases, we identified two broader categories per question. Per category, we ask you to answer various sub-questions. These sub-questions often correspond to the different intellectual steps necessary in order to give a (legal) answer to the consumers' questions. However, they are always phrased in easy terms; the main objective being to make copyright law more understandable and accessible to consumers. For the sake of uniformity, sub-questions are presented in the form of a table.

- **Consumer Questions:** we will also ask you to give a brief and clear answer to the 15 questions as raised by consumers — based on the answers you gave to the sub-questions. **Please always give an answer in simple words. Your answer should provide the consumer with the tools to determine what is lawful in a specific situation.**

- To ensure full coherence between the national language and English, please provide the main 15 consumer questions translated into your national language.

- **Your *national* expertise**

  - Please answer all questions against the background of your jurisdiction (this will allow us to identify differing solutions and approaches).

  - If a (sub-)question is inapplicable against the background of your jurisdiction, please indicate it and explain why.

  - If a term or notion is inexistent in or inadequate against the background of your jurisdiction, please indicate it and explain why.

FORM AND STYLE OF YOUR REPORT

- **Required information:** please add information where indicated [*in square brackets and in italics*]. Please write your answers and comments in the right-hand column of the tables and in the light-orange boxes below Consumer Questions.

- **Length:** in the final national report, the answer to each consumer question, including all sub-questions in the table, should be no longer than **one page**. Please respect the maximum number of pages.

- **Level of detail:** please keep your answers simple. No in-depth doctrinal discussion of the questions is required. Answers should be practical and be given with the consumer/end user in mind. If possible, references to case-law and/or legislation should be made in the footnotes only. This will allow for a more fluent text.

BIBLIOGRAPHY

- Please provide a bibliography of the sources you used and referred to in your report. Please list all literature, case-law, legislation and other sources you cited in your footnotes.

- For the sake of a more uniform presentation, please use the Oxford University Standard for Citation of Legal Authorities (Oscola) style in the English version of your report.

TEMPLATE

CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

National report on consumer FAQs on copyright

[Member State]

Expert: [Name of expert]

[Affiliation of expert]

CONTENTS

QUESTIONS AND ANSWERS

Consumer Question 1:

What does copyright and related rights mean and cover, and is it the same all over the world?

International conventions and harmonisation at EU level have brought the copyright traditions of the Member States closer together. However, certain conceptual and substantive differences remain. Rights that fall under the denomination of 'copyright' or 'author's rights' and 'neighbouring rights' and the underlying rationale for granting protection should be outlined briefly.

a. Background: 'copyright' and 'related rights' and different 'copyright' traditions in the world

b. Sub-questions

Theme/Category	Sub-question	Answer
'Copyright' and 'related rights'	1. Is there a difference between 'copyright' and 'related rights'? (yes/no)	1. [...]
	2. YES: What is the difference between 'copyright' and 'related rights'?	2. [...]
	3. NO: What does 'copyright' mean?	3. [...]
	4. What are the different rights covered by 'copyright'?	4. [...]
	5. What are the different rights covered by 'related rights'?	5. [...]
	6. Does the author have both, non-pecuniary (i.e. moral) and pecuniary rights? (yes/no)	6. [...]
'Copyright' traditions	1. Does your system belong to one of the main copyright traditions (i.e. common law copyright or civil law author's rights)?	1. [...]
	2. Does your system present features of both main copyright traditions?	2. [...]
	3. What rationale underlies your copyright system?	3. [...]
	4. Please provide useful links for consumers, if possible.	4. [...]

c. Answer to Consumer Question 1

[Your simple answer here]

Answer to Consumer Question 1 in national language (if different)

[Consumer Question 1]:

[...]

[Your simple answer here]

Consumer Question 2:

Who owns copyright and how does copyright benefit creators, rights holders, consumers, society, economy and culture as a whole?

a. Background: 'copyright' and 'related rights' and different 'copyright' traditions in the world

Questions of authorship and ownership are still largely a matter of national law. However, in the borderless online environment, knowing 'who owns copyright' is important for consumers both when they want to lawfully use a work and when they become creators themselves. Indeed, users' online behaviour suggests that the legitimacy of copyright in the public opinion has been going through a crisis. Beyond national borders, the question of how copyright benefits creators, rights holders, consumers, society, economy and culture as a whole is at the centre of any copyright debate and reform.

b. Sub-questions

Theme/Category	Sub-question	Answer
Authorship and ownership	1. Who 'owns' copyright and who is considered as the 'author' in the case of:	1.
	• a. joint/collaborative works?	• a. [...]
	• b. collective works?	• b. [...]
	• c. audiovisual works?	• c. [...]
	• d. works created in the framework of an employment contract?	• d. [...]
	2. Can ownership be transferred? (yes/no)	2. [...]
	3. What are the most common ways of transferring ownership?	3. [...]
	4. What does 'public domain' mean?	4. [...]
	5. Can an author dedicate his or her work to the public domain?	5. [...]
Copyright and the balance of interests	1. Does your system belong to one of the main copyright traditions (i.e. common law copyright or civil law author's rights)?	1. [...]
	2 What does 'balance of interests' in copyright law mean?	2. [...]
	3. Can the 'balance of interests' be defined in an objective way? (yes/no)	3. [...]
	4. Has the copyright tradition of your Member State followed a specific approach to the balance of interests? (yes/no)	4. [...]
	Which one?	•
	Has that traditional approach been challenged (or is it still being challenged)?	•
	5. Please provide examples for legal mechanisms that make sure that copyright benefits the different stakeholders involved.	5. [...]
	6. Please provide useful links for consumers, if possible.	6. [...]

Answer to Consumer Question 2

[Your simple answer here]

Answer to Consumer Question 2 in national language (if different)

[Consumer Question 2]:

[...]

[Your simple answer here]

Consumer Question 3:

Do I automatically get copyright protection, for example, if I take a photograph with my phone, or do I have to register my work to get protection?

a. Background: 'works' protected by copyright and copyright formalities

International treaties oblige Member States to grant protection for a minimum number of categories of subject matter. EU law has brought about some clarity regarding the threshold of protection. However, conditions under which a creation is considered a 'work' still vary. Despite the general prohibition of formalities, optional registration systems may be available to creators.

b. Sub-questions

Theme/Category	Sub-question	Answer
Subject matter and threshold of protection	1. What subject matter may be protected by copyright?	1. [...]
	2. What subject matter may be protected by related rights?	2. [...]
	3. Is there a closed or open list of protectable subject matter?	3. [...]
	4. Is there a requirement of 'originality' or alike?	4. [...]
	5. Who decides if a work is 'original'?	5. [...]
	Are there any objective criteria?	•
	6. When is a photograph 'original'?	6. [...]
Copyright formalities	1. Are works protected by copyright automatically in your legislation? (yes/no)	1. [...]
	At what moment does protection arise?	•
	2. Are there any optional registration systems in your country? (yes/no)	2. [...]
	Which body administers them?	•
	3. How could consumer-creators register their work? (online?)	3. [...]
	4. Please provide useful links for consumers, if possible.	4. [...]

Answer to Consumer Question 3

[Your simple answer here]

Answer to Consumer Question 3 in national language (if different)

[Consumer Question 3]:

[...]

[Your simple answer here]

Consumer Question 4:

What is copyright infringement? Can I get in trouble for copyright infringement? What if I wasn't aware that I infringed something protected by copyright?

a. Copyright infringement and enforcement of copyright

Digital technologies and the online environment have made it easier for consumers to use and disseminate works, and not always in a lawful way. As a response, some rights holders are trying to enforce their rights against infringers, including individual end-users. On the consumers' side, there is often uncertainty as to what behaviour actually constitutes infringement, and as to what the possible consequences of their actions are.

b. Sub-questions

Theme/Category	Sub-question	Answer
Copyright infringement	1. What rights can be 'infringed' by an end-user?	1. [...]
	2. How can an end-user infringe these rights?	2. [...]
	3. Can there be 'copying' that does not amount to infringement? (yes/no)	3. [...]
	Please provide examples	•
Enforcement of copyright	1. What civil remedies against end-users are available in your jurisdiction?	1.
	Coercive remedies (permanent and/or temporary, e.g. injunctions, seizures)	•
	Monetary remedies (e.g. damages)	•
	2. Do intent, knowledge and/or negligence play a role with regard to the respective sanctions?	2.
	Coercive remedies	•
	Monetary remedies	•
	3. Does knowledge play a role in the principle of liability itself (and not just the sanctions)?	3. [...]
	4. Are there any criminal sanctions against end-users in your jurisdiction?	4. [...]
	5. What could be possible defences for the individual alleged infringer?	5. [...]
	6. Please provide useful links for consumers, if possible.	6. [...]

Answer to Consumer Question 4

[Your simple answer here]

Answer to Consumer Question 4 in national language (if different)

[Consumer Question 4]:

[...]

[Your simple answer here]

165 - See the wording of Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p. 10-19.

Consumer Question 5:

Under which conditions can I use a work protected by copyright created by another? I was told that using works created by others is simply a quote and thus is always allowed.

a. Background: lawful uses of works protected by copyright — with or without authorisation

Uses of works still protected by copyright do not necessarily amount to copyright infringement: the rights holder may authorise uses of his or her work in the framework of copyright contracts. Moreover, most jurisdictions allow certain uses without the explicit authorisation by the rights holder. Commonly, these uses are said to fall under 'exceptions and limitations' to copyright[165].

b. Sub-questions

Theme/Category	Sub-question	Answer
Lawful uses with authorisation **(copyright contracts)**	1. How can rights holders authorise end-users to lawfully use their works?	1. [...]
	2. Please give examples for lawful authorised online uses.	2. [...]
	3. Are 'open content licences' regulated by law or case-law in your system?	3. [...]
	4. Please provide useful links for consumers, if possible.	4. [...]
	Please provide examples	•
Lawful uses without authorisation **(example of quotations)**	1. Does your jurisdiction allow (end-users) certain uses without explicit authorisation of the rights holder? (yes/no)	1. [...]
	2. Is there an open or closed list of 'exceptions and limitations'?	2. [...]
	3. Do judges have flexibility/leeway when applying 'exceptions and limitations'?	3. [...]
	4. Have judges used external limits to copyright (e.g. fundamental rights, competition law, consumer law) to allow certain uses?	4. [...]
	5. Is there a specific or a more general exception or defence for quotations?	5. [...]
	6. What are the qualitative and quantitative criteria to assess whether the use of an excerpt of a work is a quotation?	6. [...]
	7. Must the name of the author and/or the source always be indicated? (yes/no)	7. [...]
	If not, provide examples.	•
	8. What can the end-user do if the name of the author is unknown or cannot easily be found out?	8. [...]
	9. Please provide useful links for consumers, if possible.	9. [...]

Answer to Consumer Question 5

[Your simple answer here]

Answer to Consumer Question 5 in national language (if different)

[Consumer Question 5]:

[...]

[Your simple answer here]

166 - Notion used by Gervais, D., 'The tangled web of UGC: making copyright sense of user-generated content', *Vanderbilt Journal of Entertainment and Technology Law*, Vol. 11, No 4, Vanderbilt University Law School, Nashville, pp. 841, 858, 865 and 869.

167 - Terminology as in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19.

Consumer Question 6:

Am I allowed to use music protected by copyright as a soundtrack for a home video that I made and want to upload on a video platform?

a. Background: user-generated content — rights affected and possible exceptions

Question 6 relates to the issue of so-called user-generated content (UGC) or 'user-derived content[166] ': internet users use pre-existing works and add to them substantially, with the aim of uploading the 'content' to a website. It is often not clear to users whether they may do so without infringing copyright.

b. Sub-questions

Theme/Category	Sub-question	Answer
Rights that may be affected by user-generated content (UGC)	1. When an end-user uses music protected by copyright as a soundtrack for a home video to be uploaded on a video platform, which acts could possibly affect:	1. [...]
	• the right to reproduction?	• [...]
	• the right to adaptation?	• [...]
	• the right of communication to the public[167]?	• [...]
	• any other right?	• [...]
	2. Could any moral right(s) be affected? (yes/no)	2. [...]
	Which ones?	• [...]
Possible exceptions or defences for UGC	1. Is there any exception or limitation that would allow an impact on:	1. [...]
	• the right to reproduction?	• [...]
	• the right of communication to the public?	• [...]
	• any other right?	• [...]
	2. Could the different copyright-relevant acts be allowed on the basis of any other justification?	2. [...]
	3. In your jurisdiction, is there a discussion about exempting transformative UGC from copyright infringement? (yes/no)	3. [...]
	4. Please name some of the proposals.	4. [...]
	5. Please provide useful links for consumers, if possible.	5. [...]

Answer to Consumer Question 6

[Your simple answer here]

Answer to Consumer Question 6 in national language (if different)

[Consumer Question 6]:

[...]

[Your simple answer here]

Consumer Question 7:

Am I allowed to give a copy of a work protected by copyright to a family member or a friend?

a. Background: right to reproduction, right to distribution, private copying

Exclusive rights do not give rights holders absolute control over each and every copy made of their work. Notably, most jurisdictions allow private copying if a certain number of conditions are fulfilled. However, the scope of the exception and the understanding of what qualifies as 'private' vary.

b. Sub-questions

Theme/Category	Sub-question	Answer
Rights that may be affected by user-generated content (UGC)	1. When an end-user makes a copy of a protected work and gives it to a family member or friend, what acts could affect:	1.
	• any other right?	• [...]
	• the right to adaptation?	• [...]
	2. If no act of reproduction takes place and the end-user gives his or her own copy to a family member or friend, would the situation be different? (yes/no)	2. [...]
	Is there a separate distribution right in your jurisdiction? (yes/no)	• [...]
	Would it be affected if the owner of a copy of a work gave the latter to a family member or a friend? Why (not)?	• [...]
	Is exhaustion of right relevant here in the abovementioned situations?	• [...]
Possible exceptions or defences for UGC	1. Is there an exception or alike to the right of reproduction for private copying? (yes/no)	1. [...]
	2. To what circle does 'private' copying extend — e.g. are friends and family members covered?	2. [...]
	3. Does the private copying exception allow making a copy for a third party (such as a family member or a friend)? (yes/no)	3. [...]
	4. What other conditions have to be fulfilled for private copying to be lawful?	4. [...]
	5. Are there any other situations in which an end-user would be allowed to give a copy of a protected work to a family member or friend?	5. [...]
	6. Please provide useful links for consumers, if possible.	6. [...]

Answer to Consumer Question 7

[Your simple answer here]

Answer to Consumer Question 7 in national language (if different)

[Consumer Question 7]:

[...]

[Your simple answer here]

168 - Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p. 10-19.

Consumer Question 8:

AAm I allowed to download a work protected by copyright from the internet and does it matter which technology is used and whether I download only parts of the work?

a. Background: scope of the exclusive right to reproduction

At EU level, the right of reproduction has been broadly defined as 'the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part[168].' In certain cases, an act of reproduction will not amount to copyright infringement.

b. Sub-questions

Theme/Category	Sub-question	Answer
Scope of the exclusive right to reproduction	1. Does downloading a work from the internet constitute an act of reproduction? (yes/no)	1. [...]
	2. Does it matter by what means, or by means of which technology a work protected by copyright is downloaded? (yes/no)	2. [...]
	3. What are the criteria to establish that a reproduction is 'in part'?	3. [...]
	4. When would a certain amount of a work 'copied' not constitute a 'part' and thus not be liable to entail copyright infringement?	4. [...]
	5. Is there a difference as to different types of works?	5. [...]
Possible defences	1. Are there any circumstances in which end-users could lawfully download a work from the internet? (yes/no)	1. [...]
	2. Could a download be lawful in the framework of a licensing agreement?	2. [...]
	Please provide some examples.	• [...]
	3. Could the private copying exception or any other exception or limitation be applicable?	3. [...]
	Under what conditions (e.g. legality of the source copy)?	• [...]
	4. Are there any other circumstances in which end-users could lawfully download a work from the internet?	4. [...]
	5. Please provide useful links for consumers, if possible.	5. [...]

Answer to Consumer Question 8

[Your simple answer here]

Answer to Consumer Question 8 in national language (if different)

[Consumer Question 8]:

[...]

[Your simple answer here]

Consumer Question 9:

I tried to copy a movie from a DVD to my computer, but could not do it because of something called 'Technical Protection Measures'. What is that and am I allowed to get around them in order to make private copies?

a. Background: Technical Protection Measures (TPM) and their relation to lawful uses of works

The relation between lawful uses of works and TPM is often a source of uncertainty to consumers. More clarity about what is allowed and to whom they could turn in order to get lawful access appears necessary.

b. Sub-questions

Theme/Category	Sub-question	Answer
Protection against the circumvention of TPM	1. Please give an easy definition of TPM.	1. [...]
	2. Please provide some examples for TPM.	2. [...]
	3. Are rights holders protected against the circumvention of TPM? (yes/no)	3. [...]
	4. Where are the relevant provisions laid down in your jurisdiction?	4. [...]
TPM and lawful uses of works	1. Are there any exceptions to the protection against the circumvention of TPM?	1. [...]
	What are the conditions for these exceptions to apply?	• [...]
	2. Is the copying of a film from a DVD to a personal computer by an end-user covered by a private copying exception or any other exception?	2. [...]
	3. Does the consumer risk any sanctions if he or she circumvents TPM in an unlawful way? (yes/no)	3. [...]
	Which ones?	• [...]
	4. What mechanisms/enforcement possibilities do end-users have in the event of lawful use?	4. [...]
	What body/institution is responsible for granting access to a work?	• [...]
	5. Please provide useful links for consumers, if possible.	5. [...]

Answer to Consumer Question 9

[Your simple answer here]

Answer to Consumer Question 9 in national language (if different)

[Consumer Question 9]:

[...]

[Your simple answer here]

Consumer Question 10:

What are copyright levies?

a. Background: remuneration systems in the EU

Not all EU Member States have a system of copyright levies. Different mechanisms ensure that authors are compensated for private copying.

b. Sub-questions

Theme/Category	Sub-question	Answer
Remuneration systems in the EU	1. Does your jurisdiction have a system of copyright levies? (yes/no)	1. [...]
	2. YES: For what uses is the levy thought to compensate?	2. [...] • [...]
	On what devices is a levy due?	• [...]
	How is the amount of levies calculated?	• [...]
	Who pays the levy?	• [...]
	Who administers copyright levies?	• [...]
	Who benefits from the levy?	• [...]
	How are revenues divided?	• [...]
	3. If NOT, what other mechanisms ensure that authors (or rights holders) receive compensation when end-users use their work for private purposes?	3. [...]
	4. In your Member State, is there a discussion about reforming the current remuneration system in view of private copying? (yes/no)	4. [...]
	Please give a short overview of content and status of the reform plans (three sentences max.)	•
	5. Please provide useful links for consumers, if possible.	5. [...]

Answer to Consumer Question 10

[Your simple answer here]

Answer to Consumer Question 10 in national language (if different)

[Consumer Question 10]:

[...]

[Your simple answer here]

Consumer Question 11:

Am I infringing copyright if I watch a movie by streaming it instead of downloading it from the internet?

a. Background: streaming and copyright

The question whether downloading a work from the internet constitutes an act of reproduction was addressed above (see Consumer Question 8). During the process of streaming, no fixed copy or file is created on the user's computer. There is great uncertainty among consumers about whether the transient display of an audiovisual work may amount to copyright infringement. It should be clarified if streaming can involve an act of — even temporary — reproduction, and if yes, if such reproduction could be justified.

b. Sub-questions

Theme/Category	Sub-question	Answer
Streaming and the right to reproduction	1. Does streaming involve an act of reproduction?	1. [...]
	If yes, what part of the streaming process amounts to an act of reproduction?	• [...]
	2. Has the question whether streaming involves an act of reproduction been settled in your jurisdiction? (yes/no)	2. [...]
Possible exemptions	If streaming involves an act of reproduction:	1. [...]
	1. Could it be lawful in the framework of a licensing agreement?	1. [...]
	Please provide examples	• [...]
	2. Could it be lawful on the basis of an exception or limitation?	2. [...]
	Which one(s)?	• [...]
	Are there any further conditions for the exception(s) to apply?	• [...]
	3. Are there any other situations in which streaming could be lawful?	3. [...]
	4. Please provide useful links for consumers, if possible.	4. [...]

Answer to Consumer Question 11

[Your simple answer here]

Answer to Consumer Question 11 in national language (if different)

[Consumer Question 11]:

[...]

[Your simple answer here]

169 - See, e.g. Case C 466/12, *Svensson and others* [2014] Case C 348/13, *BestWater International GmbH*, Order of the Court [2014].

Consumer Question 12:

If copyright-protected works are included into my posts automatically by social media platforms, am I responsible for this and is this a copyright infringement? What if I link to them or embed them in my own website or blog?

a. Background: social media, the right to communication to the public and linking

Use of works protected by copyright on social media platforms causes much uncertainty among consumers. While certain activities may qualify as acts of communication to the public, others do not. Despite some clarifications brought about by the Court of Justice of the European Union (CJEU)[169], the question of lawfulness of linking remains controversial. In addition, solutions regarding liability for copyright infringement on social media platforms vary.

b. Sub-questions

Theme/Category	Sub-question	Answer
Uploading, linking and embedding and the right to communication to the public	1. Does the uploading of a work to a social media post constitute:	1. [...]
	• a reproduction and/or	• [...]
	• a communication to the public?	• [...]
	2. Are there situations in which the uploading to a social media website of works protected by copyright could be lawful?	2. [...]
	Please give examples	• [...]
	3. If a work has been made available by the rights holder on another website, is an end-user free to include it in a post?	3. [...]
	4. Does linking constitute an act of communication to the public?	4. [...]
	5. Does embedding constitute an act of communication to the public?	5. [...]
Liability of users and of online intermediaries	1. If uploading takes place 'automatically', could the holder of the social media account (the consumer) be held responsible?	1. [...]
	2. In the event of litigation, who would have the burden of proof?	2. [...]
	3. How could the end-user show that he or she is not responsible for the copyright infringement?	3. [...]
	4. Is the question of (secondary) liability of online intermediaries a settled one in your jurisdiction? (yes/no)	4. [...]
	5. Has the question been settled with regard to social media specifically? (yes/no)	5. [...]
	6. What are the criteria to assess whether an online intermediary can be held liable?	6. [...]
	7. Please provide useful links for consumers, if possible.	7. [...]

Answer to Consumer Question 12

[Your simple answer here]

Answer to Consumer Question 12 in national language (if different)

[Consumer Question 12]:

[…]

[Your simple answer here]

Consumer Question 13:

When I create a work and upload it online, terms and conditions of many sites ask for me to transfer my copyright to the site. Does that mean I lose all those rights in them for the future?

a. Background: transfers of rights: formal requirements and limitations

Copyright contracts remain a matter of national law. Rules regarding formal requirements of transfers and permissibility of waivers vary. In order not to be in the weaker position, consumer-creators need to know how much control they may retain over their works.

b. Sub-questions

Theme/Category	Sub-question	Answer
Transfers of rights: formal requirements	1. Can the author of a work transfer the rights in his or her work? (yes/no)	1. [...]
	2. What different (basic) forms of 'transfer' are there?	2. [...]
	3. Are there any requirements relating to the formalities of transfers of rights?	3. [...]
	4. Are there any formal requirements for online copyright contracts involving consumer-creators?	4. [...]
Transfers of rights: limitations	1. If uploading takes place 'automatically', could the holder of the social media account (the consumer) be held responsible?	1. [...]
	2. Are there constraints relating to:	2. [...]
	• future uses?	• [...]
	• uses through different media?	• [...]
	• the term of the grant?	• [...]
	• the possible termination of the grant?	• [...]
	• remuneration of the author?	• [...]
	• any other issue? (please specify)	• [...]
	3. Can an author (completely) waive his or her moral rights relating to the work? (yes/no)	3. [...]
	What constraints are there in relation to moral rights?	• [...]
	4. If the terms of an agreement go beyond what is allowed (by law), would the agreement be entirely invalid?	4. [...]
	What remedies does the consumer-creator have?	• [...]
	5. Please provide useful links for consumers, if possible.	5. [...]

Answer to Consumer Question 13

[Your simple answer here]

Answer to Consumer Question 13 in national language (if different)

[Consumer Question 13]:

[…]

[Your simple answer here]

170 - Andrade N. N. G. de, 'Striking a balance between property and personality: the case of the avatars', *Journal of Virtual Worlds Research*, Vol. 1, No 3, [S.l.], January 2009.

Consumer Question 14:

My avatar is based on my favourite movie star, cartoon character or sports club. Can I get in trouble for infringement of copyright or any other legislation because of this?

a. Background: virtual worlds and copyright and other immaterial rights

An 'example of new online collaborative environments, virtual worlds emerge as context for creation, allowing for users to undertake a digital alter-ego and become artists, creators and authors[170].' Users may draw inspiration from different sources to create an avatar. Uncertainty relates to whether copyright or other rights could be affected, and whether use of protected material could be justified.

b. Sub-questions

Theme/Category	Sub-question	Answer
Avatars, copyright and other immaterial rights	1. Can avatars be protected by copyright?	1. [...]
	2. Is this a settled question in your jurisdiction? (yes/no)	2. [...]
	3. Could the image of film stars, a cartoon character, or a sports club be protected by copyright?	3. [...]
	4. Could the image of film stars, a cartoon character, or a sports club be protected by any other IP rights?	4. [...]
	5. Could the image of film stars, a cartoon character, or a sports club be protected by any other rights?	5. [...]
Possible justification of the use of protected elements	1. Could the use of elements protected by copyright for the creation of an avatar by an end-user be justified? (yes/no)	1. [...]
	On what basis?	• [...]
	2. Could the use of elements protected by other IP rights for the creation of an avatar by an end-user be justified? (yes/no)	2. [...]
	On what basis?	• [...]
	3. Could the use of elements protected by other rights for the creation of an avatar by an end-user be justified? (yes/no)	3. [...]
	On what basis?	• [...]
	4. Please provide useful links for consumers, if possible.	4. [...]

Answer to Consumer Question 14

[Your simple answer here]

Answer to Consumer Question 14 in national language (if different)

[Consumer Question 14]:

[…]

[Your simple answer here]

171 - The optional exception for private copying is laid down in Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p. 10-19.

172 - Case C 435/12, *ACI Adam BV and others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* [2014], para. 31.

Consumer Question 15:

How do I know whether a work is offered legally or illegally online?

a. Background: certainty about the legality of the source copy

According to case-law of the CJEU, only copies made from lawful sources may be exempted from infringement under the private copying exception[171]. It is precluded that '[...] copyright holders [must] tolerate infringements of their rights which may accompany the making of private copies[172].' How can end-users be sure that the source copy is lawful?

b. Sub-questions

Theme/Category	Sub-question	Answer
Certainty about the legality of the source copy	1. What indicators or elements suggest that the source copy is non-infringing?	1. [...]
	2. Is there any case-law on when a source is to be considered lawful? (yes/no)	2. [...]
	YES: please briefly state the essential and provide references	• [...]
	3. Does your system add any other requirements (e.g. a requirement that the source be 'manifestly' unlawful)?	3. [...]
	4. How should the consumer behave in the case of doubt?	4. [...]
	5. Please provide useful links for consumers, if possible. (e.g. Do you know of any websites or databases where works can be accessed legally?)	5. [...]

Answer to Consumer Question 15

[Your simple answer here]

Answer to Consumer Question 15 in national language (if different)

[Consumer Question 15]:

[...]

[Your simple answer here]

BIBLIOGRAPHY

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CONSUMERS' FREQUENTLY ASKED QUESTIONS (FAQS) ON COPYRIGHT

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