7 February 2014

Attn: DG Internal Market and Services (markt-copyright-consultation@ec.europa.eu)

Re: Public Consultation on the Review of the EU Copyright Rules

PLEASE IDENTIFY YOURSELF:

Name: Independent Film & Television Alliance (IFTA)

Register ID number 359167112876-43

TYPE OF RESPONDENT: (Please underline the appropriate):

- ☐ **Publisher/Producer/Broadcaster OR Representative of publishers/producers/broadcasters**

→ the two above categories are, for the purposes of this questionnaire, normally referred to in questions as **"right holders"**

I. Introduction

The Independent Film & Television Alliance (IFTA) welcomes the opportunity to provide comments to the European Commission (the "Commission") in response to its Public Consultation on the Review of the EU Copyright Rules.

Based in Los Angeles, IFTA is the global trade association of the independent motion picture and television industry. Our non-profit organization represents more than 150 Member Companies in 23 countries consisting of the world's foremost independent production and distribution companies, the majority of which are small to medium-sized businesses that include sales agents, television companies and institutions engaged in film finance. Roughly one-third of IFTA Member companies are established in European countries.[i]

The IFTA Membership participates in the financing, production and international sales of quality European audiovisual content and relies heavily on Europe as a major marketplace to conduct business, including co-production. For more than 30 years, IFTA Members have produced, distributed and financed many of the world's most prominent films, several of which have been recognized by major awards around the globe, including the César Awards, Oscars®, and the European Film Awards. Among recent winners are *The Artist* (Wild Bunch, uMedia), *The Ghost Writer* (Summit), *The King's Speech* (UK Film Council), *Melancholia* (Nordisk Film), *Of Gods and Men* (Wild Bunch), and *Slumdog Millionaire* (Pathé International). Collectively, IFTA Members produce more than 400 independent films and countless hours of television programming each year and generate more than $4 billion in sales revenues annually.

The independent sector of the film and television industry relies on license fees resulting from copyright ownership. Unlike the larger studios, IFTA Members regularly secure financing and distribution for each project on a country-by-country basis by means of licensing deals with local distributors. After assessing the value of a project, local distributors enter into license agreements with the producer that provide minimum license fees (known as 'minimum guarantees') to be paid in order to secure exclusive distribution rights to a project before production. Once enough minimum guarantees are secured through local distributors, those license agreements are collateralized by financial institutions which loan production funds to support the project. In exchange, these financial institutions typically retain the underlying copyright assignment of an audiovisual work until the production loan is repaid in full.

The lifeblood of independent producers and distributors everywhere in the world is their intellectual property rights and their ability to secure financing to produce the film, to license exclusively for worldwide distribution, and to protect and enforce the exclusive rights to their works. We urge the Commission therefore to consider the unique business and financing models of independent film producers when reviewing the EU copyright rules, along with the results of the Commission's year-long "Licenses for Europe" stakeholder dialogue in 2013, in which IFTA actively participated and important evidence was provided on the state of the marketplace.

IFTA joins other rightholders and their representative organisations, including the International Federation of Film Producers Associations (FIAPF) and the International Video Federation (IVF), in opposing any proposed legislation or regulatory measures that would

alter the current EU copyright rules. In that regard, below please find answers to the relevant questions in the Commission's Public Consultation.

II. Rights and the functioning of the Single Market

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

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

1. *[In particular if you are an end user/consumer:]* ***Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?***

☑ **NO**

Specific evidence produced by both content owners/licensors and licensees (e.g. online platforms, traditional broadcasters) during the Commission's year-long "Licenses for Europe" stakeholder dialogue in 2013 has not corroborated the assumption that consumers do not have legitimate options to access and view content across Europe. In fact, options for consumers to access audiovisual works online have never been more plentiful throughout the EU.[ii] The findings from "Licenses for Europe" clearly demonstrated that there is not – at this point – a critical mass of consumer demand for cross-border access to content. Absent significant consumer demand, it is not commercially viable for the private sector to marshall the investment capital and to take the economic risks to provide such pan-EU services. It is important to note that the EU copyright *acquis* does not prevent multi-territorial licensing and such licenses may emerge as and when distributors are in a position to guarantee effective and sustainable exploitation (and financial compensation) throughout an expanded geographic area.

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

☑ **NO**

There are no issues that prevent rightholders from licensing rights to online services on a multi-territory basis. The fact is that most online content services cater to nationally and/or linguistically specific audiences owing to the localised nature of demand for content in the EU and, in particular, the consumers' preference for viewing versions dubbed in the local language. As evidenced during the "Licences for Europe" stakeholder dialogue process, those aggregators and platforms that provide content services in more than one EU country tend to have created localized services in each country, each with their own local branding, locally-tailored search and recommendation profiles and marketing strategies designed to respond to the cultural preferences of local audiences. On this basis, rights are acquired separately for the different territories in which they are operational and their menu of titles may differ substantially between the various national services. This practice enables the online content services to control their costs by tailoring content acquisition and storage to a culturally-specific demand by a particular national audience.

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

As part of its information gathering during the "Licenses for Europe" stakeholder dialogue, IFTA consulted its Members on the current licensing practice in the EU marketplace.

IFTA Members reported that requests for multi-territory licenses are extremely rare, except in the case of recognized regional territory groups with common languages (Benelux, Scandinavia, etc.). The most prevalent licensing model throughout the content industry is one where all rights are licensed exclusively to various local distributors who will then maximize distribution tailored to the market they service, bearing in mind the local culture and movie consumption preferences. This model benefits consumers by providing the most options for legitimate access and viewing of content. Through such maximized exploitation by each licensed distributor (or sub-distributor), consumers benefit and each distributor is incentivized to service its licensed territory effectively.

The nature of European film project financing, and in particular its organic linkage to territorially-exclusive rights licensing (pre-sales of rights against financing), makes it difficult for new and recent films to be exploited in a multi-territory structure (or sometimes on a non-exclusive basis) without causing detriment to the fine-tuned economic engine of new film production. Additionally, the low demand for multi-territory licenses in audiovisual reflects the fact that there is currently no critical mass of EU consumers to drive such a change in an economically sustainable form. Available data show local audiences generally have a strong preference for local fare and for big 'tentpole' international films.[iii] To the extent that they are interested in European content from other countries, local consumers are also more responsive when such content is packaged and marketed specifically for their national market by local distributors who will have acquired relevant territorial rights.

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

N/A

5. *[In particular if you are a right holder or a collective management organisation:]* ***Are there reasons why, even in cases where you hold all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on a service provider (in order, for instance, to ensure that access to certain content is not possible in certain European countries)?***

☑ **YES**

There are valid reasons for rightholders to impose territorial restrictions on service providers, even in cases the rightholder controls all the necessary rights for all the territories in question. Producers and distributors of audiovisual content fully negotiate territorial limitations to protect the exclusivity of the distributor in the geographic area where the distributor is best able to maximize exploitation of the content by marketing and selling to local consumers. This exclusivity and the minimum guarantees distributors pay to producers to obtain such exclusivity form the foundation of production financing, in Europe, and throughout the world.

Territorial delineation in the exploitation of rights is intimately linked to the financing of new popular European content and stimulates its circulation across borders. The film *The Wind That Shakes The Barley*, (Cannes Palme d'Or 2006) by the celebrated British director Ken Loach is widely regarded as a successful example of a European film which was both artistically and economically successful. The making of the film, at a budget of just over €6m, was made possible through a dynamic collaboration between production and distribution companies in Italy, Spain, France, Germany and the UK. In the process, each local distributor was able to afford the risk of advancing money toward the budget of the film, secure in the knowledge that they would each have the exclusive exploitation rights in all media in their respective countries. These arrangements ensure that distributors can afford to take the upstream risk of participating in a film's financing. In this instance, as in many others, the territorial apportionment of rights actually stimulates the dissemination of the film amongst audiences in several EU countries, rather than constituting a barrier to it.

6. *[In particular if you are e.g. a broadcaster or a service provider:]* ***Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?***

☑ **YES**

There are valid reasons for rightholders and service providers to impose territorial restrictions on service recipients, even in cases where the service provider has acquired all the necessary rights for all the territories in question. Most importantly is to achieve the shared goal of wide and effective distribution. The producer and distributor carefully negotiate the grant of rights and authorized uses, including the manner in which the consumer (service recipient) may access, store, or view content. The authorized uses by consumers may be restricted for content protection. Upholding the distributor's exclusivity protects the investment he has to make, at a high risk, in order to bring the film to the attention of its potential audience and distribute as widely as possible. It is an essential an incentive to maximize the film's exposure and availability to consumers. Coordination of exclusive licenses used to finance production is a standard operating procedure for the independent film industry and protects the investment in the production. This approach ultimately supports the quality and diversity of choice available to consumers by aiding the economic sustainability of the sector, from distributors to broadcasters and other platforms.

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

☑ **NO**

No measures of a legislative or regulatory nature are necessary to increase the cross-border availability of content services in the Single Market. Market-led developments and private commercial negotiations between producers and distributors will adapt if and when a critical mass of consumer demand for cross-border access to content becomes evident.

The EU copyright framework does not prohibit multi-territory licensing and as such, it is fit for purpose and not in need of review. Actual obstacles to multi-territory licensing, other than

the cultural and economic factors discussed above, relate to the transactional costs involved in the requirement that the service providers comply with multiple local regulatory requirements such as, VAT, content regulation and consumer protection. Additionally, some Member States have yet to develop a broadband infrastructure capable of supporting effective access to auiovisual media services by consumers. As with any other business, the expected revenue must justify incurring the cost of multi-territorial compliance – currently it does not.

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

[The definition of the rights involved in digital transmissions]

1. The act of "making available"

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

☑ **YES**

The scope of the "making available" right in cross-border situations is sufficiently clear. The definition of "making available" as laid out in the EU Copyright Directive[iv] (referred to as the "Directive" throughout this submission) is in line with the language in the WIPO Copyright Treaty (WCT)[v] and WIPO Performances and Phonograms Treaty (WPPT)[vi] which gave birth to the right-of-making-available in international law. The Directive is sufficiently clear to have allowed for effective implementation and interpretation of this right in EU Member States. Recent CJEU case law has also clarified the application of this important exclusive right, which plays a pivotal role in content protection and exploitation, representing a key incentive for innovation and the growth in online services across the EU.

Any attempt to provide a more detailed definition in the Directive may lead to restrictive interpretations. In its actual application, the right-of-making available is both concerned with the act of uplink and the relevant use by the individual consumer at a time and place chosen by him/her. These two actions are joint requisites in order for the interactive features of the right to be appropriately covered and enable rightholders and their licensees to utilise it for both licensing and anti-infringement purposes.

IFTA is unconvinced that any further clarification on the scope of the right-of-making-available would help enforcement. Test cases in the past few years have demonstrated the efficacy of the use of Article 8(3) of the Directive, which enables rights holders to apply fora local court order to require relevant local intermediaries to sever access to websites offering unauthorised content online.

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief)?***

☑ **YES**

A clarification of the territorial scope of the "making available" right is not necessary for its implementation and use in the practice of content licensing in the EU market.

The "making available" right is defined in international law as an exclusive right, which entails for the beneficiary that it is made up of the right to authorise or prohibit the use of a work. Nothing should be done legislatively to amend these dispositions. The possibility for rights holders to prohibit use empowers them to make choices based on their discernment of what are the best environments/platforms in which to allow for the exploitation of their works. This allows independent film companies to maximise the exposure of their product to the consumer market whilst also making sure that the content can be made safe from potential infringement.

Attempts to clarify the territorial delineation of the "making available" right, in the Directive itself, would be harmful and would result in effects which may contradict the EU Charter (Article 17(2) which confers on intellectual property the status of a fundamental right). Producers and distributors negotiate the terms of access by consumers along with the grant of rights.

IFTA believes the right as defined in the Directive supports dynamic development in the online content sector, and contractual practice has adjusted pragmatically since its introduction in the Directive. A healthy corpus of case law has developed around the implementation of Article 8(3) of the Directive (e.g. court injunctions under Article 97(A) of the UK CDPA[vii]), helping to make the enforcement of its provisions a strategic tool for producers and distributors to protect their business models and combat extra-territorial piracy from rogue websites based outside the EU or in a Member State other than that where the illegally obtained content is first made available. Injunctive relief granted by the courts has successfully encouraged the participation and cooperation of intermediaries in the fight against this form of piracy, where the use of the intermediaries' service by the infringing website can be evidenced.

2. Two rights involved in a single act of exploitation

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

☑ **NO**

Producers regularly bundle licensed rights to permit distribution to maximize exploitation of the rights so as to aggregate all rights relevant to the unencumbered distribution and exploitation of the finished work. In effect, current licensing practice, under normal circumstances, ensures that there is no separate ownership or control of the two rights involved in the act of "making available" to the public.

Both rights are necessary for online content assets to be protected and exploited effectively, thereby providing the necessary incentive for new innovative business models to develop. Any legislative intervention which would result in curtailing the scope of these two necessarily combined rights would risk weakening such incentives and may be incompatible with the EU's international legal obligations under WCT, the TRIPs Agreement and the Berne Convention, which make any changes to such rights subject to the three step test. Any limitation to the exercise of these rights would be highly likely to conflict with the normal exploitation of content on online platforms.

3. Linking and browsing

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

☑ **YES**

Hyperlinks are an important component in accessing online content. This is a complex area, justifying a case-by-case approach and progressive clarification through jurisprudence. CJEU case law in this area has proven helpful in answering questions arising in each specific case as to whether or not linking or indexing and similar editorial options are tantamount to an act of communication to the public. Each specific situation raises the issue of what the effect of the linking function may be in enabling access to content and in the case of illegally uploaded content, its role in displacing licensed content. In view of the complexities, IFTA sees no locus for legislative intervention, as any codified rules will still need to be interpreted through the courts and new statutes would soon become redundant and out of date.

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

☑ **YES**

Making available only allows reproduction and access and no copy should be retained by a consumer without authorization by the rights holder. Jurisprudence has already helped to clarify the issue. The exception for certain types of temporary copies as defined under Article 5(1) of the Directive makes good sense in order to prevent certain basic universal features of the online space falling unnecessarily under copyright protection. The exception should be interpreted restrictively by the courts, however, so as to prevent operators of pirate sites from sheltering their infringing activities under this exception. The determination of the source of the material being thus temporarily reproduced should obviously be a key determinant in establishing whether or not the Article 5(1) exception applies or whether the case constitutes an infringement.

4. Download to own digital content

13. *[In particular if you are an end user/consumer:]* ***Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?***

☑ **NO**

This question is misleading since it could imply that contracts restricting the resale of digital files are incompatible with EU Law. This is emphatically not the case. Article 3(3) of the Directive provides for the non-exhaustion of the rights of communication and making available. This is also fleshed out under Recital (29), which clarifies that "*the question of exhaustion does not arise in the case of services and on-line services in particular*". The Recital further states that "*Unlike CD-ROM or CD-I, where the intellectual property in incorporated in a material medium, namely an item of goods, every on-line service in in fact an act which should be subject to authorisation where the copyright or related right so provides*."

Current licensing practice based on contractual freedom enables consumers to choose the services from which they wish to purchase audiovisual content, in full cognizance of the terms of the transaction. These may, for instance, include the option to make several copies of the content across several devices, including portable ones.

14. *[In particular if you are a right holder or a service provider:]* ***What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.***

The download to own business model is considered highly strategic for the future of the European content industry. Retention of a digital copy of content is one of the options consumers desire, and for the producer, this option is can be an important additional source of revenue from the digital marketplace.

Under Article 3(3) of the Directive, intangible copies are not subject to EU-wide exhaustion and each use must therefore trigger the exclusive right of the rightholder to authorise or prohibit. Emergent download to own models demonstrate the focus of the industry on meeting the consumer's legitimate demand for flexibility of use within those parameters. Some of these models authorise – on an individual license basis – multiple copies (e.g. Blu-ray/DVD triple-play) and access from/by different devices within, say, the family circle. Developments in the private sector licensing models will ensure that consumer demand is met in this respect, without the need for enabling legislation. IFTA believes that the Directive is fit for purpose in its current form. Any attempt to weaken Article 3(3) may damage a key economic incentive for the growth of new audiovisual online services and platforms.

C. Registration of works and other subject matter – is it a good idea?

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

☑ **NO**

Voluntary registration of works aids the management of content online and the protection of legitimate licenses. However, there is not a justification for the creation of a registration system at the EU level.

The audiovisual sector has of its own accord made substantial progress towards a workable registration systems over the past few years. International initiatives such as ISAN (International Standard Audiovisual Number – an ISO standard)[viii] and EIDR (Entertainment Identifier Registry)[ix] are complemented by local initiatives, the Linked Content Coalition (a pan-European initiative originated in the publishing industry), and the UK's Digital Content Exchange, which seeks to make small-scale licensing more effective through the creation of a central information clearinghouse on works.

The effective identification and registration of works lies in voluntary, transparent and open-ended systems fostered by the relevant copyright sectors themselves working in a collaborative framework based on trial and error.

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

IFTA does not see any advantage in a mandatory and centrally-managed registration system at the EU level.

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

A mandatory registration system at the EU level would be a barrier for many copyright owners who rely on the notion that copyright protection is afforded to those that meet the minimum legal requirements of originality and fixation, not to those that "register". Disadvantages include erroneous and out of date entries, along with the risk that such a system would act as a substitute for legitimate methods to demonstrate copyright ownership. There could also be mass confusion as to what registration means and if there are any legal presumptions of ownership as a result of registration.

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

All such systems should operate on a strict voluntary basis, with no penalisation of those rights holders who choose not to register their works. The only incentives should arise from the efficiency of these initiatives and their ability to entice licensors to register works on the basis that they would see this as an expedient and efficient way of complementing the management and exploitation of their back-catalogues.

D. How to improve the use and interoperability of identifiers

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

The role of the EU should be to continue to facilitate discussions and encourage marketplace solutions to interoperability of rights ownership and permissions databases, such as ISAN and EIDR. IFTA does not believe the case has been made for any further EU intervention in this space.

E. Term of protection – is it appropriate?

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

☑ **YES**

The current terms of copyright protection are appropriate in the digital environment. The idea that the digital environment justifies a shorter copyright term is based on the naïve assumption that the cost of investment in producing content is somehow drastically lower when that content is distributed digitally. That is not the case. Online distribution carries the same costs as other distribution platforms in terms of production of content along with dubbing, captioning and marketing. Additionally, encoding to the standard demanded by the aggregator or platform is a new cost which was not present in the analogue distribution era - often this additional cost is borne by the producer or distributor. Only the ability to exclusively exploit the fruits of their labour during the term of protection by copyright will incentivize producers and their distributors to continue to invest in the production of audiovisual content.

III. Limitations and exceptions in the Single Market

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

☑ **NO**

The current approach, as laid out in Article 5 of the Directive enables the right degree of harmonisation whilst also maintaining necessary Member States' sovereignty over aspects of their cultural, educational and other public policy areas. The approach has fostered sufficient legal convergence between Member States' legal systems while retaining the flexibility needed to accommodate cultural, social and political differences. The original Article 5 is the product of years of in-depth debate between legislators to determine the right balance between direct harmonisation and subsidiarity. It is clear that exceptions and limitations are not an area of copyright law which lends itself to mandatory harmonisation. IFTA believes Article 5 strikes the right balance and is fit for purpose for the digital age.

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

☑ **NO**

As stated above, flexibility is key in the matter of exceptions and limitations to copyright protection. Various cultural and societal contexts at the national level militate against a mandatory approach at the EU level, over and above the degree of harmonisation already effected.

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

☑ **NO**

There is no self-evident case for new exceptions being introduced at EU-level. Nor is there a case for removal of the existing list as set in Article 5 of the Directive. The system has proven its adaptability and flexibility in the EU context of 28 Member States and a large variety of approaches to public policy and societal priorities. Case law at the CJEU and national level has helped clarify where necessary the boundaries between these exceptions/limitations and the application of exclusive rights.

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

☑ **NO**

As stated above, the requisite flexibility – as intended by the Directive in its original form – already exists. This is demonstrated by the robust dynamism or areas such as online learning, academia and scientific research, buoyed in part by the availability of relevant exceptions and limitations. These developments have taken place in parallel with the growth of online services based on the application of exclusive rights.

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

N/A – See above reply

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

☑ **NO**

The question seems to contain an underlying bias, i.e., the idea that territoriality should no longer be a factor in the application/exercise of a limitation or exception to exclusive rights. As stated above, Article 5 of the Directive on limitations and exceptions to copyright leaves considerable flexibility to Member States in recognition of the need for subsidiarity in this area, owing to inevitable societal and cultural differences and attendant differences in how the

public interest is attended to in different national legislatures. This flexibility is helped, not hindered by the territoriality principle.

27. In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of "fair compensation" be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)

Articles 5(2)(b), 5(2)(c) and 5(2)(e) of the Directive establish the legal principles governing fair compensation in relation to the exercise of exceptions and limitations in the same article. Making changes to this legal structure would entail far-reaching changes to the EU copyright *acquis*. To IFTA's knowledge, there is no impact assessment nor evidence supporting the need for cross-border exceptions and limitations or change to the financial compensation standards established at a national level.

A. Access to content in libraries and archives

1. Preservation and archiving

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

N/A

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

N/A

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

N/A

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

N/A

2. Off-premises access to library collections

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

N/A

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

N/A

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

N/A

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

N/A

3. E – lending

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

N/A

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

N/A

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

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

N/A

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

N/A

4. Mass digitisation

40. *[In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management organisation:]* ***Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?***

N/A

41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?

N/A

B. Teaching

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

C. Research

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

N/A

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

N/A

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

N/A

D. Disabilities

50. (a)** [In particular if you are a person with a disability or an organisation representing persons with disabilities:] **Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception?
(b)** [In particular if you are an organisation providing services for persons with disabilities:] **Have you experienced problems when distributing/communicating works published in special formats across the EU?
(c)** [In particular if you are a right holder:] **Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?

IFTA supports the need to provide practical solutions to facilitate access to audiovisual content by users with disabilities. Special subtitling and audio description tools are increasingly made available. The Directive contains several provisions relevant to promoting access to users with disabilities; for example, Article 5(3)(b) allows for different kinds of uses and illustrates that the flexible approach taken by the Directive can be adapted to the various categories of copyright works, forms of distribution, and especially to the particular needs of

disabled persons and their individual disability. Any new separate mandatory provision, for example providing for an obligation to make available content in a particular format, would be incompatible with technological developments over time. It would also be ill-adapted to meeting the current and future needs of individual disabled users. In general, individual and flexible contractual solutions are best suited to achieve the objective of better accessibility of audiovisual content for users with disabilities.

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

In general, individual and flexible contractual solutions are best suited to achieve the objective of better accessibility of audiovisual content for users with disabilities.

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

IFTA supports the need to provide practical solutions to facilitate access to audiovisual content by users with disabilities. Special subtitling and audio description tools are increasingly made available. The Directive contains several provisions relevant to promoting access to users with disabilities; for example, Article 5(3)(b) allows for different kinds of uses and illustrates that the flexible approach taken by the Directive can be adapted to the various categories of copyright works, forms of distribution, and especially to the particular needs of disabled persons and their individual disability. Any new separate mandatory provision, for example providing for an obligation to make available content in a particular format, would be incompatible with technological developments over time. It would also be ill-adapted to meeting the current and future needs of individual disabled users. In general, individual and flexible contractual solutions are best suited to achieve the objective of better accessibility of audiovisual content for users with disabilities.

E. Text and data mining

53. (a)** [In particular if you are an end user/consumer or an institutional user:] **Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?
(b)** [In particular if you are a service provider:] **Have you experienced obstacles, linked to copyright, when providing services based on text or data mining methods, including across borders?
(c) [In particular if you are a right holder:] ***Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?***

N/A

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

N/A

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

N/A

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

N/A

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

N/A

F. User-generated content

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

☑ **NO**

No new exception is needed to cover user-generated content, in particular non-commercial activities by individuals, and no legislative change is needed. Discussions within the "Licences for Europe" stakeholder dialogue confirmed that user-generated content services are thriving under the flexibility offered by the EU copyright *acquis*. The existing legal framework was shown to provide effective solutions for the user-case scenarios that were presented to the Working Group, and there is an increasing number of licensing schemes and agreements.[x]

59. (a)** [In particular if you are an end user/consumer or a right holder:] **Have you experienced problems when trying to ensure that the work you have created (on the basis of pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context?
(b)** [In particular if you are a service provider:] **Do you provide possibilities for users that are publishing/disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?

N/A

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

N/A

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

N/A

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

There is no need for further legislation in this area. Copyright is the driving force behind innovation and the EU copyright *acquis* provides a sufficient degree of flexibility for a wide range of technological and marketplace developments to meet consumer demands.

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

Copyright is the driving force behind innovation and the EU copyright *acquis* provides a sufficient degree of flexibility for a wide range of technological and marketplace developments to meet consumer demands.

IV. Private copying and reprography

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

☑ **NO**

Articles 5(2)(b), 5(5) and 6(4) of the Directive and relevant Recitals already provide a solid interpretive framework for the application of these exceptions. Digital technologies increasingly support business models that allow producers and distributors to make available and distribute content to consumers on demand. Therefore, private commercial negotiations and licensing with distributors is the preferred method for producers to be compensated in the digital environment. IFTA Members generally favour face to face negotiations in determining the compensation for use of their exclusive rights. Private copying and compulsory licensing and compensation should be a last resort approach in ensuring the producers are fairly compensated for all uses of their content.

The exception in EU law permitting private copy should be applied only in specific cases where there is no practical possibility for market-led solutions to prevail. The 2013 report by Antonio Vittorino on this particular issue illuminated the primacy of licensing based on contractual freedom and the use of exclusive rights. The Padawan case[xi] before the CJEU also provides clarification to the effect that copies made available through normal licensing do not give rise to levies.

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

☑ **NO**

It would be both contradictory and destructive to apply levies where direct licensing to individual consumers is fully possible. The sustainable growth of online audiovisual content services rests largely on the possibility to offer the consumer a variety of pricing points and

options through licensed uses, both enabled and protected by technology. These business models make full use of the range of Digital Rights Management technologies to offer a wide array of content on a secure basis and an increasing range of options for the consumer, including streaming, download to own (for permanent use), download to rent (for limited use), over-the-top access to purchased content via the Internet/cloud-based services through Internet-connected devices, etc. Inasmuch as the function of private copy is to empower the consumer to make a single copy for his/her personal use, the need for private copy levies is obviated once these technology-enabled business models are able to offer flexible access options direct to the consumer through a great diversity of licensing architectures, including options to make and use a copy of the work within contractually-defined boundaries.

Furthermore, income from levies does not provide producers with the capital to finance production in the same manner that license fees do, since levies are worked out on the basis which bears little or no direct relation to the real market value of each film and income from levies are often not received for several years following the exploitation of the content's primary license.

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

As discussed above, private copy dispositions and attendant levies are not a necessity in the context of the growth of online services which will enable individual access to a work through direct licensing, with options to view or copy the content within contractually defined parameters of use. This model allows for both an optimisation of consumer choice/flexibility of use and value-based pricing which help make the services economically sustainable.

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

☑ **NO**

IFTA does not see added value in making levies visible on the invoices for products subject to levies. Such disposition may create confusion in the individual consumer, who may erroneously conclude that the presence of a levy would excuse him/her from limiting copying to its defined legal boundaries.

68. Have you experienced a situation where a cross-border transaction resulted in undue levy payments, or duplicate payments of the same levy, or other obstacles to the free movement of goods or services?

N/A

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

N/A

70. Where such undue payments arise, what percentage of trade do they affect? To what extent could a priori exemptions and/or ex post reimbursement schemes existing in some Member States help to remedy the situation?

N/A

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

N/A

V. Fair remuneration of authors and performers

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

Film and audiovisual content industries in the EU Member States have well developed and efficient mechanisms already in place to ensure the fair remuneration of talent participating in the making of an audiovisual work. Whether based on the application of neighbouring rights and/or agreements based on collective bargaining, these systems generally ensure that authors and performers will a) receive upfront payment for their work on the film (e.g. salaries and/or advance on further payments) and b) receive further payments based on the economic exploitation of the finished work. These may, for instance, be in the form of residual payments (e.g. a pre-established rate based on initial salary for each sale to each media and/or territory), and/or royalties (e.g. payment calculated as a percentage of net revenues after distribution costs and commissions), etc. Note that whilst these creative contributors are invariably always remunerated upfront, this is not generally the case with the producer, who invests time and economic resources upfront and at risk, in the hope of remunerating him/herself from revenue streams.

In the audiovisual sector, under normal circumstances, the producer centralises all the rights which come in to the making of a work. This organisational model is not the product of ideology, but a pragmatic adjustment to the nature of film as containing a great many different rights, from music synchronisation to performance rights and from rights in underlying works (e.g. a theatrical play, a novel), to trademarks in objects captured in the film. The aggregation of these IP rights under the control of the producer (or her successor in the chain of title) enables efficient and expedient transactions with distributors, broadcasters, online services and other outlets. The future competitiveness of works produced in the EU would be negatively affected by any attempt to tamper with these fine-tuned industrial practices by dis-aggregating the control and management of the IP components in a film. In particular, imposing an obligation on distributors to administer online rights (making available) separately from other bundles of rights, would necessarily add to transaction costs in distribution, without increasing the benefit already accruing to authors and performers. The risk also exists that –under this model – authors and performers would be paid twice for the same uses, an effect which would be neither fair nor effective.

IFTA is concerned that this question, as framed, fails to encompass the more strategic issue of the overall relationship between rights and revenues in the audiovisual content sector.

Whereas the issue of the remuneration of authors and performers is undoubtedly important, they are not the only contributors to a finished film. Numerous talented and skilled individuals intervene in the making of a film. Considerable resources are spent upstream of production, in the process of creative development, budgeting and production planning. Most of these activities are undertaken by the producer and his/her collaborators and are not remunerated. In order to take into account those costs, what the audiovisual sector requires is not a technical/administrative model for returning revenues to specific sub-groups of contributors, but a larger model for return on investment. This model needs to take into account the high costs of producing any audiovisual work to a professional standard and the attendant need to maintain an economic system that returns sufficient revenue to enable Europe's production SMEs to channel new resources into the industry's creative R&D.

For robust return on investment to develop, one key strategic requirement in the future will be to create an economic environment for online services to evolve from being a modest source of ancillary revenue, to being able to assume risk and contribute upfront to the costs of developing and producing new content. The imposition of more complex, fragmented and (therefore) costly arrangements governing the redistribution of revenue from the exploitation of content on these platforms will only hinder this necessary evolution. The net result would be a loss of competitiveness for all but the more high-profile EU content.

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

☑ **NO**

There is no need for EU level action to prohibit certain clauses in contracts. Existing arrangements (collective and/or contractual) governing terms of employment and remuneration of creative contributors in the EU audiovisual industries are the product of long-term trial-and-error; they evolved from the ongoing dialogue and negotiation between the various parties concerned. Legislative intervention would be disruptive and inefficient: there are no one-size-fits-all formulae and whilst arrangements vary between Member States, these variations have not hindered cross-border joint ventures, as evidence by the large number of EU films and television series co-produced between two or more Member States.

It is difficult to see what competitive benefit could conceivably accrue from the imposition of a right to remuneration and the extension of collective management to online on-demand uses, when this type of use can be managed far less onerously through existing industry practice and in full compliance with contractual arrangements (underpinned by collective bargaining and/or regulation) governing redistribution to all relevant creative contributors.

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

N/A

VI. Respect for rights

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

☑ **NO**

The EU Enforcement Directive[xii] is fit for purpose in its current form, bearing in mind the particular limitations of what civil enforcement measures can help bring into effect as part of legal deployment against infringement. Infringements committed with a commercial purpose require criminal remedies and *ex officio* enforcement by government authorities. Civil remedies in the form of individual lawsuits are expensive, scarcely affordable by most independent producers, and judgements (if any) are difficult to enforce effectively; and most importantly, civil enforcement shifts the burden of enforcement away from the criminal public domain into the private sphere where most independents cannot adequately protect their rights.

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

Yes, the current legal framework is clear enough to allow for sufficient involvement of intermediaries in inhibiting online copyright infringements with a commercial purpose. The involvement of intermediaries is a pivotal development in the advancement of lawful dissemination of content over the Internet. Article 8(3) of the Directive has proven its usefulness and efficiency as a pragmatic measure designed to ensure that intermediaries play their full-part in anti-infringement without having to be held liable for the particular infringement.

Regrettably this important disposition of the directive has not been correctly implemented in some Member States, with the result that some jurisdictions still require that intermediaries be proven liable for infringement before injunctive relief is granted. This creates an unnecessary hurdle and defeats the intended efficiency of Article 8(3).

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

☑ **YES**

The right to property is amongst the fundamental rights which need to be taken into account in assessing whether or not the right balance is achieved. The CJEU has made clear that in ruling on this issue (e.g. Constantin Vega vs Kino[xiii]), courts in the Member States shall use the proportionality test, taking into account the rights of all concerned.

VII. A single EU Copyright Title

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

☑ **NO**

The EU should not pursue the establishment of a single EU Copyright Title at this time. It is not clear that any such unified approach would produce the desired outcome as a means of establishing a consistent framework for rights and exceptions to copyright across the EU or a single framework for enforcement.

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

No. EU and international law provide Member States with sufficient flexibility which is particularly important in view of the different legal systems and traditions of the 28 Member States. Such an endeavour would likely take several years, if not decades to achieve, if at all possible.

VIII. Other issues

80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

With respect to this Public Consultation and any other matters related to the EU legal framework for copyright, IFTA strongly urges the Commission to carefully review and consider all of the evidence submitted by stakeholders and to exercise caution before seeking legislative answers to markets and technologies that are in the midst of rapid change.

IFTA would like to express its sincere interest in being part of private industry and European Commission discussions with regard to any further consideration of the EU copyright rules.

Thank you for your time and support of the intellectual property industries.

Respectfully submitted on 7th February, 2014

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[i] A list of IFTA Member Companies is available online at: www.ifta-online.org.
[ii] European Audiovisual Observatory, *Press release - More than 3,000 on-demand services in Europe*, 16 May 2013, http://www.obs.coe.int/press/individual-press-releases/2013.
[iii] http://www.obs.coe.int/search?p_p_id=coesearch_WAR_coesearchportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_i
[iv] 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.
[v] http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html
[vi] http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html
[vii] http://www.bailii.org/ew/cases/EWHC/Ch/2013/3479.html
[viii] www.isan.org
[ix] www.eidr.org
[x] E.g. EGEDA's VeoClips, http://www.egeda.es/documentos/NOTASPRENSA/2013/NP_ACUERDO_EGEDA_YOUTUBE.pdf.
[xi] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0467:EN:NOT
[xii] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
[xiii] http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-11/cp130149en.pdf