Position paper

ETNO response to the Public Consultation on the review of the EU copyright rules

March 2014

Introduction

ETNO, the leading trade association in Brussels for telecoms operators, welcomes the current public consultation on the review of the EU copyright rules and thanks the EU Commission for the opportunity to provide views.

ETNO considers that the dramatic changes brought about by the Internet era may challenge the current regulatory regime for copyright and believes that it is therefore appropriate that the EU Commission questions the adequacy of the current regime in the digital context. Notwithstanding these new challenges, ICT is an enabler of new content distribution mechanisms and services and as such, ETNO members are investing heavily to ensure that the underlying infrastructure is in place to support this innovation. ETNO believes that all players benefitting from the digital environment should contribute to it growth and investment.

As a preliminary consideration, ETNO reaffirms that copyright is fundamental to innovation and copyright owners need to be properly remunerated for their works. As a representative of one of the most innovative industry, ETNO supports a sound regulatory framework for copyright and an appropriate protection mechanism. At the same time, the enormous opportunities and facilities granted by ICT and the Internet in terms of social and economic welfare need to be equally supported, through a regulatory framework that fosters investment and the provision of innovative services. As such, ETNO considers that the forthcoming new European Commission and Parliament terms, and the needed revision of the Digital Agenda objectives (as proposed by the Greek Presidency of the EU in its Program for the semester (the so-called "Mid-term review"), are a unique opportunity to strike a sound balance of equally relevant interests and to establish a legal framework that is fit for purpose in the digital environment.

Below, we provide responses to those questions within the consultation which are of direct relevance to ETNO members.

Q2. [In particular if you are a service provider:] Have you faced problems when seeking to provide online services across borders in the EU?

☐ **YES - Please explain whether such problems, in your experience, are related to copyright or to other issues (e.g. business decisions relating to the cost of providing services across borders, compliance with other laws such as consumer protection)? Please provide examples indicating the Member State, the sector and the type of content concerned (e.g. premium content such as certain films and TV series, audio-visual content in general, music, e-books, magazines, journals and newspapers, games, applications and other software).**

Cross-border availability of content is essential for the development of cross-border services and must be facilitated. This applies to two different situations: 1. when customers have subscribed to online services in the Member State of their residence and want to access these services when travelling temporarily abroad (via roaming, wi-fi connections, fixed access etc) and 2. when customers wish to access content distributed by a foreigner provider in other countries.

The fact that copyright and licensing schemes are nationally based, often with content providers requiring geo-filtering and restrictive licences for national territories, is certainly an obstacle to the achievement of the European single market. Barriers to providing services also exist due to national cultures and languages, the need for the adoption of open standards for content delivery, the cost of compliance with different national consumer laws and fiscal regulations, the costs of providing customer care in several languages, the risk of fraud and non-payments and the diverse economic realities which can have price implications.

National cultures and languages

European content is nationally segmented because content is usually related to national culture and language. This is particularly the case for audio-visual works. Subtitling and dubbing films helps to overcome the associated difficulties but these solutions carry a cost which online distributors are not always ready to support, particularly when the consumer interest is low. Even for marketing and budget reasons, European works are not as attractive as US works outside their country of origin and this is true not only for television programmes but also for most films.

Considering these barriers, distributors will typically not take the risk of financing films produced in other Member States and it is also difficult for those distributors to find interested advertisers. In this context, distributors are legitimately reluctant to undertake the international online provision of national content in other Member States of the EU.

Standards for content delivery

Many standardisations activities are developed in order to enable the provisioning of NGA/NGN services across networks in a multi-carrier environment. Some of these

standards dedicated to future networks could also offer greater facilities for content delivery and the online distribution of audio-visual media services. In particular, ETNO believes that there is a need for Europe to promote open and interoperable standards for IP-based Quality of Service Interconnection (such as IPX).

Standardization is also necessary to achieve convergence in the audio-visual business. Standardization processes should involve all stakeholders in the value chain, from content providers to ISPs and home network technology vendors and including transit network operators.

Industry initiatives should be accompanied by Institutional efforts focused on achieving and ensuring the adoption of open standards for online services. The European Commission should, however, refrain from mandating any standard which has not proven to be widely accepted by the market as mandating standards can hinder innovation. The promotion of standards via bodies such as ETSI could foster the market penetration of standards on a voluntary basis and thereby help to achieve more interoperability.

Consumer protection laws

Notwithstanding the Citizens Rights Directive, to be implemented this summer, the laws regulating consumer contracts are varied across Member States and constitute obvious barriers to cross-border trade.

Personal data protection and privacy

Creating, promoting and adopting a global set of principles based on a harmonised and consistent approach to privacy would benefit users, who should benefit from the same level of protection no matter where they are based nor which and where the provider is, and should ensure that European businesses can compete on the same level playing field with US market leaders. Harmonisation would greatly reduce privacy compliance costs which is an important step for the take-up of new activities in the European Union, such as cloud computing.

On this issue, ETNO welcomes the ambitious plan to revise the European data protection rules.

Tax issues

The current tax system is an obstacle to the development of cross-border content offers as US companies distributing content cross-border may escape EU tax obligations. The changes in the EU VAT rules are an important step in the (right) direction to limit VAT-forum shopping for those players, such as foreign 'Over the Top' players, that are not linked by establishment in a specific EU country.

Security

Some content typologies such as music or editorial works (eg eBooks) require, for their distribution and use by the end-user, the adoption of specific security requirements, for instance DRMs, which are not regulated in the same way in all Member States. A higher harmonisation in this field would help the distribution and use of content across borders.

Collective rights management

The legislation applicable to the royalties that collecting societies collect for the distribution and use of a specific content varies across the EU. Moreover, in the event of cross-border services, it would be necessary to avoid a duplication of the payment obligation due to the collecting society.

Q4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?

[Open question]

High price and the lack of availability of content is the key domestic/national market barrier today in Europe for watching on-demand/online content. Naturally, from this follows that access to on-demand/online content across territories becomes even more cumbersome and restrictive due to territorial copyright restrictions, licensing conduct, geo-blocking, price discrimination, hold-back practices and windowing[1].

For ETNO, transparency in the process of establishing "who owns what rights" is key, as is the identification of the collection society(ies) or the rights-holders which are competent to grant a license. In particular, collecting societies must improve their processes and content distributors should not be responsible for verification.

This lack of clarity is amplified by the cross-border scale of the business. Developing cross-border services requires that providers repeat costly and time consuming negotiations to clear rights with collecting societies in each Member State where the service will be made available.

In relation to on-line music content, ETNO hopes that the future Directive on Collective Rights Management will help to solve some of the relevant problems such as a lack of transparency, excessive transaction costs in the negotiation and implementation of license agreements with collecting societies, lack of clarity on rights' ownership and the complexity of rights management. However, as important as the Directive will be, the implementation of its provisions by Member States will be key. Therefore, ETNO calls on the Commission to closely monitor the different national transposition processes to ensure that the principles of transparency, accountability and governance set by the Directive are fully embedded into future national laws governing collecting societies.

As regards the introduction of pan-European licenses for audio-visual works covering the entire EU footprint, ETNO questions whether it would be an appropriate solution because it would most likely not suit the reality of the market. In addition, pan-European licensing would impose on distributors the clearance of very expensive rights available in 28 Member States with no guarantee of a return on investment in each of them (return from consumers' subscriptions, advertising, etc). This would rather tend to favour large players that are already established in the market or those which have the economic capacity to bear the related investments.

[1] A recent study (Ericsson ConsumerLab TV & Media) highlights that amongst the top national barriers to watch on-demand TV/Video content are: the price for on-demand TV/Video is too expensive; poor selection of available on-demand TV/Video (titles being not relevant or too old); the on-demand TV/Video content is not available on main TV screen; accessing and watching on-demand TV/Video content takes too long and is cumbersome

The revision of the EU licensing schemes should therefore consider the current market structure in order not to grant competitive advantages to selected players.

Further, ETNO recommends that a review of the release windows system is carried out at EU level in order to grant innovative uses of the rights and a wider distribution of digital works. This would also help reducing digital piracy, which is mainly due to the lack of legal offer. In addition, hold-back and exclusivity clauses should be put in the spotlight with a view to identifying barriers and addressing any problems.

Q7. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?

☒ YES – Please explain

Before assessing the need for further measures, a comment on the justification for additional measures is required. ETNO offers four distinct reasons that justify further interventions:

- Any would-be improvement of cross-border availability of content services must start with the assessment of national content availability and in particular the availability of digital on-demand/on-line content, since this is a prerequisite for effective cross-border content dissemination and also is an existing policy imperative for the Digital Single Market. In other words, an EU-wide synchronized DVD release schedule is neither relevant nor a sufficient ambition of the EU Digital Agenda and the EU Digital Single Market.
- From a territorial/Member State perspective, increased availability of digital on-demand/online content is also relevant to narrow down the national cultural gap in terms of access to physical content in urban vs. rural areas, since access to cultural outlets, such as cinemas, theatres and opera houses is significantly more limited in rural areas. Not only will increased digital creative content availability of on-demand/on-line distribution increase the opportunities for rural European regions to enjoy culture and hereby foster cultural inclusion but furthermore it will increase the opportunity to spread cultural diversity across the EU frontier.
- From a consumer point of view, accessing culture and entertainment via physical and/or appointment based methods comes with following short comings:
    - the physical availability is restricted to certain locations, to certain days, certain times of the day and the amount of available seats, which limits consumption opportunities,
    - physical screen limitations (number of screens per theatre/city) restrict the range of titles available at any given time, which excludes non-block-buster types of films, such as independent creations, regional and local productions which limits cultural diversity.
- Given the socio-economic effects described in section one, ETNO would argue that it is in the public interest to balance the self-interest of creative sectors with the aim of promoting open and competitive markets in digital

on-demand/on-line content. The review of the copyright system should aim to increase the availability of more legitimate pan-European digital content services, in ways and at prices which are appealing to consumers and to decrease digital cultural exclusion.

What should the interventions aim to achieve?

According to a recent World Economic Forum Publication[2], expanding access to content means offering *"a wide range of means for the public to reach content, enabled by the Internet and other technologies, maximizing societal and economic benefit"*. The need to increase the availability of content is also acknowledged by leading insiders of the creative industry, according to which "*Audience wants the freedom…they want control….give consumers what they want, when they want it and in the format they want it and at reasonable price.."*[3]

ETNO believes that the availability of on-demand/on-line digital content for territorial and cross-border dissemination can be increased by addressing the complete absence of legal digital alternatives in the first release window, limiting the length of exclusive first release windows and prohibiting the use of exclusive windows for films with less than 100 copies (the number is relative to size of the home cinema market) in the theatres.[4] In addition, one could look at:

- Assuring technology neutral public funding schemes of European audiovisual productions, allowing digital first windows to emerge e.g. prohibit digital on-demand/on-line discrimination.
- Regulating the growing practice of Hold Back Practices, as some distributors can obtain from rights-holders the holding back of VOD rights during the whole TV exploitation. Holdback periods are currently not regulated and hence depend on contractual negotiations which have important drawbacks for VOD aggregators, as it hollows out the breadth and depth of a VOD content library.
- Introducing a harmonized VAT-rate for audio-visual and other creative services and products across the EU frontiers. This VAT rate should apply regardless of the distribution channel or platform used to distribute digital or physical content.
- Increasing market efficiency to clear European works more effectively across EU/EES territories by decreasing search, matching and clearing transaction costs e.g. via a registry, data base or similar.

Q8. Is the scope of the "making available" right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?

☐ NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach[5])

[2] January 2014 "Norms and Values in Digital Media: Rethinking Intellectual Property in the Digital Age", page 6.
[3] Kevin Spacey
[4] http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm#/
[5] The objective of implementing a "country of origin" approach is to localise the copyright relevant act that must be licenced in a single Member State (the "country of origin", which could be for example the Member State in

Since some ETNO members report issues in this area, a clarification of scope would be welcome.

Q10. [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?

☐ **YES – Please explain what type of measures would be needed in order to address such problems (e.g. facilitation of joint licences when the rights are in different hands, legislation to achieve the "bundling of rights")**

The application of two rights for one act of exploitation may create problems with regards to the distribution of content by providers. In the past, both rights (the right of reproduction and the right of making available) which are necessary for the online and mobile exploitation of music were granted by the respective collecting societies in Europe. As a result of the EU Recommendation of 2005, Anglo-American music publishers withdrew their right of reproduction from the collective management by collecting societies. The right of making available for the respective musical works remained within collective management. Therefore, the situation now is that both licensing systems - collective rights management and single licensing - apply for one musical work used in one economic process. The aim of facilitating the licensing process for the content provider through collective rights management is jeopardised. Although rights managers, such as CELAS for the EMI Publishing repertoire, are licensing the corresponding making available right, for the Anglo-American EMI Publishing Repertoire the situation for content provider remains difficult. For the right of making available, CELAS is acting not in its own name but in the name of PRS and GEMA as a representative. If there is a dispute regarding the ownership of the rights, the content provider would have difficulties to ask for indemnification as it is unclear who should be addressed. The issue increases as most of the musical works have so called split copyrights, which means that part of the works are owned by various rights-holders.

To solve this problem, it should be clarified that the right of making available and the corresponding reproduction right necessary for one economic process may not be split and represented by different rights-holders. Therefore, the making available right should always cover the right of reproduction as far as the right of making available cannot be used without the right of reproduction. To offer content to users via online and mobile platforms, the reproduction on the server of the service provider is a necessary condition for the making available of such content.

Generally speaking, it is fundamental to simplify the IPR clearing regime for the distribution of digital works on online platforms and align it to the regimes applicable to all platforms in order to grant technological neutrality.

---

which the content is uploaded or where the service provider is established), regardless of in how many Member States the work can be accessed or received. Such an approach has already been introduced at EU level with regard to broadcasting by satellite (see Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission).

Q11. 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 rightsholder?

☒ **NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it does not amount to an act of communication to the public – or to a new public, or because it should be covered by a copyright exception)**

A hyperlink provision facilitates access to a work that has already been published on a specific website. Linking is in the essence of the Internet and it is impossible to conceive the functioning of the Internet without links. This should not be understood as a new publication or as a duplication of a work except if a protection measure has been bypassed in order to provide the link. As such, ETNO sees no requirement for a licence in this situation and we note that the recent ECJ ruling in the Svensson[6] case reflects this viewpoint. On the contrary, if the provision of a link were subject to authorization of rights-holders, the way in which the Internet works today would simply collapse as it will be impossible to include any link in a web page due to potential copyright infringement.

Q12. 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 rightsholder?

☒ **NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it is or should be covered by a copyright exception)**

Web-browsing creates temporary copies that are covered by the exception established in Article 5 (1) of Directive 2001/29/EC and do not constitute an infringement of copyright. For example, when viewing film trailers, the streaming process needs a temporary, ephemeral duplication by buffering in the cache, however this process is taking place automatically and the copy is also automatically deleted, without any human intervention, after a certain time. To change this understanding would mean that those who merely browse the Internet, without downloading anything, are likely unintentionally to incur a civil liability. As the UK Supreme Court[7] referring the question to the ECJ has already rightly noted, it would be an unacceptable result to consider millions of ordinary Internet users to be copyright infringers by merely accessing a web-page containing copyright material. This should also not be the intention of the European legislator.

Everyday interactions of users with digital technology give rise to multiple temporary digital reproductions of fragments of content. These are essential to the functioning of digital technologies, devices, networks, etc. According to the UK Supreme Court and some academics, requiring permission from a newspaper

[6] Judgment in Case C-466/12, Nils Svensson and Others v Retriever Sverige AB
[7] UK Supreme Court: PRCA v The Newspaper Licensing Agency Limited [2013] UKSC 18

licensing agency for such uses would break down the Internet and "*would make infringers of many millions of ordinary users of the internet across the EU*".

Q16. What would be the possible advantages of such a system [a registration system at EU level to help in the identification and licensing of works and other subject matter]?

[Open question]

A content registration system would lead to legal certainty for digital content distributors. Much more simplicity and less administrative costs would be a positive result.

Q17. What would be the possible disadvantages of such a system?

[Open question]

Possible disadvantages would include the costs of such a sophisticated system. Who has to bear such costs? Also, procedural issues, such as jurisdiction and/or dispute resolution systems, should be considered as well as the interplay with collecting societies and the legal status of, and supervision on, their activities

Q19. 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?

[Open question]

In consideration of the existence of many different national and/or private databases, in general ETNO believes that the creation of a global repertoire would facilitate the identification of works and their related rights, with positive consequences for the acquisition process of rights.

Q21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?
YES – Please explain by referring to specific cases

Cross border Services (e.g. Cloud Storages) demand a harmonised pan-European legal framework. This applies from a content licensing perspective as well as from a consumer perspective.

It is important that the same legal framework exists in order to ensure that a service, which is legal in one Member State can also be offered in another Member State. For all providers of cross border services, the same legal and competitive environment has to be established.

Example: According to Article 5, Section II b of the Directive 2001/29/EC, natural persons have the right to make reproductions of works on any media for private use and for ends that are neither directly nor indirectly commercial on condition that the rights-holder receives fair compensation and under the precondition that no copy

protection measures have been removed or altered. This limitation and exception is not mandatory for Member States. The German legislator implemented this limitation into German law (Section 53 of the German Copyright Act). Therefore, in Germany the reproduction of works, e.g. by transferring a music file from a CD on a Computer or on online cloud storages by an end user for private use is possible without the consent of the rights-holder. In the United Kingdom Article 5, Section II b of the Directive has not been implemented into national law. A comparable copyright exception does not exist with the consequence that end-users are not allowed to make copies even for their own and immediate family's use on different media without the consent of the rights-holder. This may lead to the situation where a provider of an online storage service could liable for copyright infringement in the UK under the Copyright, Designs and Patent Act 1988 whereas the same service and the same provider would not infringe any copyright in a Member State, where Article 5, Section II b of the Directive 2001/29/EC has been implemented into national law, e.g. in Germany. This makes it difficult to offer a cross-border online storage service.

In some other Member States e.g. Belgium, there is no legal certainty that the private copy exception covers copies made and stored out of the customer's premises and this even if all other legal criteria are met. This uncertainty hinders the development of new services.

In Italy, the decree of the Ministry of Culture on the determination of the private copy levy, adopted in 2009, is currently under revision (the decree was also challenged before the administrative court following an appeal presented by several operators). In this framework, the society for authors and publishers recently presented a proposal to update the tariffs, with the aim of increasing the levies applied to those devices that are most marketed such as smartphones, tablets, etc. and to decrease the ones applied to the devices that are registering a sales decrease on the market. In particular, it proposes to increase the level of tariffs and to extend its application to products that should be excluded due to their specific characteristics (some devices are not used for reproduction purposes), or because the private copy levy is already managed through DRMs and/or other technological protection measures. Moreover, the proposed tariffs refer to a hypothetical "European average", whose level seems not to be consistent with the figures available. Concerns have also been raised on the methodological side, since the determination of the levy is left to a consultative committee and a technical commission, where the ICT industry, differently from the right-holders and the collecting societies sector, is not represented. This means there is no full representation of all the stakeholders and interests involved and risks to produce an unbalanced outcome. An EU harmonised procedure and homogeneous criteria is needed, so as to determine a consistent and harmonized level of tariffs, levied on the same products, throughout the EU.

It would therefore be important, in those countries where the private copy regime is applied, to grant a full harmonisation of the applicable regime, specifically in relation to the criteria for the determination of the tariffs, the fair compensation principle, the double compensation, etc. Moreover, ETNO believes that revenue from private copy levies should be used to develop new business models.

Q24. Is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?
YES – Please explain why

See Question 21. We should avoid a fragmentation of the legal framework. In addition, the door should be kept open for future exceptions that may be necessary as technology develops.

Q26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

YES – Please explain why and specify which exceptions you are referring to

NO – Please explain why and specify which exceptions you are referring to

NO OPINION

The realisation of a true single market is hampered by the existence, in Member States, of different regimes for limitations and exceptions, rendering it almost impossible for distributors to have a full knowledge of the legislation in place and therefore whether a content/product can be legitimately distributed in a country and under which conditions. An increased harmonisation of the limitations and exceptions throughout Europe would be necessary, although taking into account national specificities. It should be done taking into account the need not to hamper the development of innovative services and the need to facilitate, in the digital age, the widest possible diffusion of digital works for the benefit of consumers. The private copy levy regime is one of the most evident examples of fragmentation: not only is this exception is not provided for by all Member States (eg in UK it does not exist under current legislation), but also the conditions for its application vary significantly (for example the requirement for its application, the devices targeted by the rule and the fair compensation amount). It would therefore be important, in those countries where the private copy regime is applied, to grant a full harmonisation of the applicable regime, specifically in relation to the criteria for the determination of the tariffs, the fair compensation principle, the double compensation, etc.

Q27. 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?)
[Open question]

ETNO recognizes the importance for rights-holders to be compensated for their works and believes that the concept of 'fair compensation' should be addressed at EU level. A uniform approach is necessary to allow for the efficient implementation of the Copyright Directive in the age of cloud computing. As possible solution is rights clearance and payment in the Member State where the service is operated under the precondition that a) a harmonized appropriate tariff for all the other Member States exist and b) the possibility exists to clear the rights for all territories. In addition, double payment should be avoided.

Q58. (a) [In particular if you are an end user/consumer:] Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?

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

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

YES – Please explain by giving examples

A differentiation must be made amongst two cases: 1. the case of a private user that does a mash-up of works of unknown owners and diffuses them through online services, and 2. the case where the owner of a mashed-up work is known and its work is used for the development of different services.

In the first case, when a service providers allows its clients to upload a specific content, for instance through a chat or a community, be the content his/her own content or that of a unknown third party content subsequently re-used, the provider cannot be considered liable for this content according to the basic principles of the e-Commerce Directive, which recognise that the providers cannot have any visibility nor knowledge (and therefore no responsibility) over the content uploaded by its clients. In these cases, the client is usually required to view and accept the terms and conditions of the service provider, assuming all responsibility for the content uploaded.

In the second case, the rights to distribute the content must be exercised only when the rights-holder has granted specific authorisation. This can have, de facto, significant negative effects on the development of innovative services by professionals.

ETNO asks the European Commission to consider the difference between a private and non-commercial usage and a commercial usage of user-generated content.

Professional commercial usage (such as TV spots including music etc.) must be fully licensed including adaptation rights et al.

***Q64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[8] in the digital environment*?**
YES – Please explain

[8] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

Diverging national systems target different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, some Member States continue to allow the indiscriminate application of private copy levies to transactions irrespective of the person to whom the product is sold (e.g. private person or business). In that context, not all Member States have ex-ante exemption and/or ex-post reimbursement schemes which could remedy these situations and reduce the number of undue payments.

The scope, application and level of copyright levies continue to increase rapidly and vary substantially between Member States. More in particular, increases of the fair compensation amount for products such as smartphones, tablets and computers raise questions of proportionality and efficiency, in consideration of the severe negative effects they may have on the market and on consumers at a time when, instead, Member States should be fostering Internet usage.

Industry faces a fragmented market with substantial legal and financial uncertainties. An obligation for Member States to file with the Commission all their copyright levies and the publication by the Commission of exhaustive up-to-date data would greatly increase industry visibility and reduce legal uncertainty.

Clarification on the scope is also needed regarding the exclusion of illegal copies, user-generated-content, professional use, public domain, and all other elements which should not fall within the scope of the exception.

Regarding compensation for acts of private copying, it has to be unambiguously confirmed that compensation for private copying is exclusively targeted to private copy (and must not be extended to professional use) and is based on harm and therefore should only exist if there is a proven substantial harm to right holders. Also the term "harm" must be more precisely defined. Similarly, it should be clarified that the levy should not be requested when devices and equipment are used for the private copying of content that has already legally bought by the user/consumer. In this case, the copyrights have been already paid for by the distributor/audio-visual service provider according to specific distribution agreements. Should a levy be imposed, a double payment of the same content would occur, creating an additional and unreasonable burden on one industry.

In the absence of such clarifications on the scope and the application of the exception, the levy system is clearly out of control as historic definitions allow unlimited claims from collecting societies leading to an unreasonable and unjustified accumulation of levies for consumers and industry.

Finally as noted by Towse*: "…copyright levy… has been almost universally opposed by economists on the grounds that its remuneration to creators bears no resemblance to the market value of the works and therefore could not act as a valid incentive to creators"*.[9] This observation points to a failure or a broken concept in the current copyright system that fails to deliver on key policy objectives. Instead of allowing rights-holders to stimulate investment in intellectual property, the current application of private copy

[9] Ruth Towse, "what we know, what we don't know and what policy makers would like us to know about the economics of copyright" Review of Economic Research on Copyright Issues, 2011, vol. 8(2), pp.101-120.

levies risks introducing a narrow privilege and economic support for a specific industry.

Q65. 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?[10]
NO – Please explain

No. In the case where a service has been licensed by rights-holders, ETNO believes that imposing private copy levies would hinder development of the digital distribution economy, even more so if the harm is minimal.

Q66. 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?

[Open question]

The extension of the current levy system – which was conceived within the analogue world - to the online environment needs to be properly assessed, in order not to hamper the development of innovative technologies and services. The Vitorino report clearly indicates that attempts to broaden the interpretation of the private copying exception are not only to the detriment of rights-holders and legal offers based on license agreements, but are also legally questionable and should not be supported.

Cloud computing allows easier access to digital content for consumers and provides artists with new distribution models. In the digital era, consumers need to be able to access digital content from several connected devices at all times and from anywhere. European consumers and Internet users would be the first victims of the imposition of levies on cloud services since prices would most certainly raise because of levies. Also, companies of all sizes, which are increasingly using cloud services, could also face this consequence.

One of the main advantages of cloud services is their global nature; therefore imposing territorial/national levy systems on global services is unfeasible, especially considering the principles of the Single Market. Imposing levies on cloud services would also have negative impact on European cloud service providers, as the obligation to pay levies added to new administrative burden would significantly limit their competitiveness in the global market. The negative impact on new business models would be immediate, as levies would raise prices and thus limit the attractiveness, competitiveness and future development of business models based on new technologies.

[10] This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

Moreover in the digital world, often rights-holders receive compensation for licensed content including subsequent copies in the framework of licensing contracts between rights-holders and users. In these cases, applying the copyright levy system to cloud services would result in an unjustified triple payment by consumers (for the licensed content, for the connected device, and for the cloud service).

It should also be noted that private copying levies are currently applied to devices which contain a storage capacity, as it was assumed that since devices with a storage capacity can be used to copy protected content they should all be subject to levies. In the case of access-based cloud services, storage capacity in the device is not needed and applying levies on them is thus incorrect.

Q67. Would you see an added value in making levies visible on the invoices for products subject to levies?[11]
YES – Please explain

Visibility of the levy in the invoice of those products that are subject to levies would bring increased transparency and awareness among customers even if this could also increase the risk of "copyright levies shopping" between Member States. ETNO believes that the burden of providing information should be borne by those who benefit from the revenues of the levies. In case the European Commission decides otherwise, we believe that proportionality requires that the costs are borne by rights-holders. Distributors should not have to pay copyright levies and bear the financial burden of informing end-users.

Q71. If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?

[Open question]

ETNO recommends keeping the liability with manufacturers and/or importers because manufacturers market shares are more concentrated and consistent across Member States than relevant retail market shares therefore better equipped to come up with an efficient common pan-European technical solution to collect levies. In addition, keeping liability with manufacturers/importers is also supported by collecting societies[12] and at the same time not advocated by any leading European ICT companies.

A specific problem under German law is the system under which the respective tariffs are determined. Under the current system, it can take years before a certain tariff is finally fixed. Therefore, a fixed process for tariffs which determines the scope of application and precise amounts would lead to more clarity.

[11] This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

[12] http://www.gesac.org/eng/positions/PrivateCopying/download/PRIVATECOPYINGEN_20130908_Private%20Copying%20remuneration.pdf

As mentioned earlier, in Italy the decree of the Ministry of Culture on the determination of the private copy levy, adopted in 2009, is currently under revision (the decree was also challenged before the administrative court following an appeal presented by several operators). In this framework, the society for authors and publishers recently presented a proposal to update the tariffs, with the aim of increasing the levies applied to those devices that are most marketed such as smartphones, tablets, etc. and to decrease the ones applied to the devices that are registering a sales decrease on the market. In particular, it proposes to increase the level of tariffs and to extend its application to products that should be excluded due to their specific characteristics (some devices are not used for reproduction purposes), or because the private copy levy is already managed through DRMs and/or other technological protection measures. Moreover, the proposed tariffs refer to a hypothetical "European average", whose level seems not to be consistent with the figures available. Concerns have also been raised on the methodological side, since the determination of the levy is left to a consultative committee and a technical commission, where the ICT industry, differently from the right-holders and the collecting societies sector, is not represented. This means there is no full representation of all the stakeholders and interests involved and risks to produce an unbalanced outcome. An EU harmonised procedure and homogeneous criteria is needed, so as to determine a consistent and harmonised level of tariffs, levied on the same products, throughout the EU.

Q75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?

☐ **YES – Please explain**

☐ **NO – Please explain**

The current civil enforcement framework at European level remains sound and is based on principles that are still relevant today as confirmed by the recent European Court of Justice Decisions. The European Court of Justice has given important and useful indications in two well-known cases (Promusicae[13] and Tele2[14]), asking Member States and their respective authorities to take measures that, while balancing both rights, should respect the principle of proportionality. The European Court of Justice Decisions imply also that Internet service providers cannot assume the responsibility of balancing rights and becoming controllers of the Internet. As a consequence, ETNO believes that the enforcement framework, completed by the ECJ ruling, achieves the right balance between copyright and the right to privacy and protection of personal data.

The balance with fundamental rights should include rights such as the presumption of innocence, right to a fair trial and the confidentiality of communications. In addition and since the SABAM case[15], the European Court of Justice has also considered the right to conduct business as a fundamental right that should be taken into consideration during the overall balancing process. The Advocate General

[13] C-275/06 - Promusicae
[14] Case C-557/07 – Tele 2
[15] Case C-70/10 – SABAM

Villalon in his opinions delivered with regard to cases Case C-70/10 and C-314/12 has touched on a further important element, which is a necessary concrete legal basis in case the enforcement measure is restricting fundamental rights. And in a recent judgment in Germany (21.11.2013 OLG Hamburg 5 U 68/10), it was confirmed that any measure imposing blocking or filtering mechanisms on an access provider in Germany must be based on a law defining in detail how the access to the infringing content should be impeded.

Q76. 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?

[Open question]

ETNO would like to highlight that Internet intermediaries have always worked in collaboration with judicial authorities, who play a crucial role in ensuring citizens and businesses the right to a fair trial. Enforcement of Intellectual Property Rights should not be seen as the sole solution against copyright infringement - increasing the availability and affordability of the legal content offer is also key.

ETNO believes that efficient copyright enforcement in the digital industry needs an approach involving all Internet players in the value chain. The current approach, which is mainly focused on Internet service providers working in collaboration with judicial authorities has a limited reach.

Q80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

The current enforcement system, under the Intellectual Property Rights Enforcement Directive (IPRED), has played and continues to play a crucial role in providing rights-holders with a high level of intellectual property right protection. This legal text is based upon principles that remain valid today and that should be maintained. Any future eventual revision should be coherent with the current intermediary liability regime. In addition, any reinforcement of the contribution of intermediaries in the fight against illegal file sharing must remain compliant with the right to a presumption of innocence, the right to a fair trial, the right to privacy and the right to the confidentiality of communications.

The enforcement of intellectual property rights should not be seen as the sole solution. A more holistic view is necessary, focusing on how to increase offers and the consumption of legal content. Enforcement should not become a tool to protect businesses from competition and allow players to keep outdated business models limiting the potential that new technologies may have. The policy debate should also be grounded on reliable and objective data about the cost/benefit of copyright enforcement within legal proceedings.

As mentioned earlier, ETNO believes that a rethinking of the release windows mechanisms is necessary. In a recent study published by Spotify, one of the questions was examining the impact of holdout strategies on sales and illegal torrent volumes. The result was that *"artists who delayed their release on Spotify suffered higher levels of piracy than those who did not"*. (Spotify report: Adventures in the Netherlands: Spotify, Piracy and the new Dutch experience). The availability of the most recent content from legal sources online would therefore be a very effective tool to reduce copyright infringements.