PRS FOR MUSIC RESPONSE
to the
Public Consultation on the review of the EU copyright rules

PLEASE IDENTIFY YOURSELF:

Name: PRS for Music

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

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

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- If your organisation is not registered, you have the opportunity to register now. Responses from organisations not registered will be published separately.

If you would like to submit your reply on an anonymous basis please indicate it below by underlining the following answer:

- Yes, I would like to submit my reply on an anonymous basis

TYPE OF RESPONDENT (Please underline the appropriate):

☐ **End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student**) OR Representative of end users/consumers**

→ for the purposes of this questionnaire normally referred to in questions as **"end users/consumers"**

☐ **Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**

→ for the purposes of this questionnaire normally referred to in questions as **"institutional users"**

☐ **Author/Performer OR Representative of authors/performers**

☐ **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"**

☐ **Intermediary/Distributor/Other service provider** (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) **OR Representative of intermediaries/distributors/other service providers**

→ for the purposes of this questionnaire normally referred to in questions as **"service providers"**

☑ **Collective Management Organisation**

☐ **Public authority**

☐ **Member State**

☐ **Other** (Please explain):

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I. Rights and the functioning of the Single Market

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?***

□ YES - 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)

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□ NO

□ NO OPINION

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

□ YES - 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).

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□ NO

□ NO OPINION

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.***

PRS for Music **is licensing 30 major pan-European music services on a multi-territory basis. The market is dynamic with new business models emerging each year, and the licensing models adapt to enable their expansion across Europe.**

PRS for Music offers full EU territory licences to all major online services that request a licence. It is our general policy to license all relevant services on a pan-European basis for the mandates we have, even if the service has only requested a limited number of territories. This ensures that these services can expand in the future and grow their businesses across Europe without need for additional territorial consents.

These licences cover the full range of music business models, including downloads, streaming and cloud services which can be accessed from outside the consumer's country of residence (for instance when on holiday or business and away from home). If there are portability limits on access to the music services, this is not due to the copyright licence but to other factors.

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

There are already many licensed pan-European music services in operation across the EU and measures are already in place to support growth in this market. Licensing solutions are an effective tool for ensuring that future requirements of the market are met, and there is no case for legislation or intervention.

PRS for Music has actively supported specific initiatives that have built and consolidated a constructive framework for licensing.

This includes the Collective Rights Management Directive ('CRM Directive'), which is intended to support and encourage the aggregation of repertoire and set high operational standards for multi-territory licensing of musical works to online music services. There was consensus in Working Group 1 of Licences for Europe on the multi-territorial online licensing of music that music licensing across borders was already happening. To support the multi-territory licensing model, there is an active working group of collective management organisations, music publishers and licensees to develop technical standards for invoicing and to agree processes for resolution of disputes and claims.

As an active member of the Licences for Europe programme we were a leading voice in developing new commitments to support small-scale and small-user licensing. PRS is a member of GESAC which has pledged to issue Best Practice Guidelines for micro-licences.

These examples prove that a digital single market can not only be created in the current copyright framework but already thrives within it.

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)?***

☑ **NO**

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 – Please explain by giving examples

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☐ NO

☐ NO OPINION

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

☑ **YES**

As we noted in response to Questions 3 and 4, music services are already widely available across the EU. The Commission has the opportunity to support initiatives that further growth in the market, support the consumer and the protection of rightholders such as a copyright education campaign. There is no evidence of a need for legislative action to stimulate cross-border availability of music. Any uncertainty over copyright rules, triggered by suggestion of change, could in itself have a chilling effect on licensing and innovation in the market. Non-copyright measures to create the conditions for a functioning digital single market are still essential and these would help digital services reach consumers across borders.

Non-legislative action on copyright is needed in the following areas:

1. **Investment in widespread consumer education on the role of copyright and the relevance of rights to creators.** This would empower consumers as creators in their own right. (See response to Question 79.) Technical consumer-information tools, such as 'Traffic Lights', could assist in consumer awareness of legal online services (See response to Question 76).

2. **Funding and support for copyright tools, such as databases, metadata, identifiers and standards to improve rights identification and management processes across the value chain**. (See response to Question 19.)

3. **Addressing the imbalance in the relationships in the content supply chain created by the broad safe harbours that give immunity from liability to intermediaries and platforms, including hosts, search engines and social media.** Safe harbours increase the cost of enforcement, impact the value of rights and do not, in the end, support the interests of end users (consumers). They have, however, ensured that platforms have no incentive to take out licensing packages to license end-user activity, and no incentive to share responsibility. Ultimately safe harbours expose the consumer to liability and impede the possibility of Business to Business licensing solutions. Therefore, we believe an evaluation of the impact of the E-Commerce Directive (2001/31/EC) on supply and investment in copyright works, is required.

4. **A reinforced framework to tackle infringement, which holds to account all those who benefit, directly and indirectly, through the provision of and access to illegal content**. The *PRS for Music*, Google, Detica data-driven survey 'The Six business models for copyright infringement', published in June 2012, studied the commercial models supporting copyright infringement. The response to this should include 'follow the money' initiatives that encourage payment providers and advertisers to increase their efforts to prevent subscription and advertising funding from supporting the illegal market. Increasing consumer access to licensed content, and reducing access to unlicensed content, will support creators and increase the potential for digital services businesses to achieve their growth potential.

Non-copyright initiatives are needed in the following areas:

The Digital Agenda for Europe has listed a number of non-copyright policy areas where improvements are required to help develop the Digital Single Market. The report 'Progress

towards Digital Europe' published by Enders Analysis in 2013 identified the following as priorities for policy action to foster demand for digital cultural products:

- development of high-speed broadband networks;

- strengthening linguistic and cultural affinities;

- fostering national and cross-border E-Commerce through e-payment systems and harmonised consumer protection regulations;

- VAT harmonisation;

- anti-piracy action; and

- greater interoperability of platforms and devices.

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

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 making available right should and does apply in the country of upload and every country of reception, regardless of whether that country is targeted. Access and reception is at the heart of the right. We think this principle is legally correct and supports the policy objective. We strongly reject the 'country of origin' and 'targeting' criteria on the basis they are unworkable in practice and would impact negatively on licensing models and enforcement.

Reasons not to apply the 'country of origin' model to making available

1. The model for collective licensing of multi-territory online rights set out in Title III of the CRM Directive, which has only just been agreed, is based on the principle of territorial rights. There is no meaning to Title III of the Directive if country of origin' is applied.

2. There are strong practical reasons to reject a 'country of origin' criteria. The Commission identified some of these in the impact assessment for the CRM Directive. It noted on page 46 that: '*identifying the "country of origin" may prove particularly challenging for online services, notably when they operate exclusively online on a MT basis'* and explained in a footnote that *'No technical criteria could be used without risking a degree of arbitrariness: works available for download are stored and mirrored on a myriad of servers located in a variety of locations across the world*.' We agree that the arbitrariness of server location would lead to confusion and complexity. Servers can be difficult to locate, then can easily be moved. Single online restricted acts can take place across multiple servers globally distributed across multiple jurisdictions (e.g. Google Spanner).

3. The arbitrariness of server location would also lead to enforcement problems. It would mean that copyright-infringing businesses could place their servers in jurisdictions with weak copyright law or slow judicial systems. So enforcement would become more difficult for rightholders.

4. A 'country of origin' approach encourages 'forum shopping'. This could impact licensing as well as enforcement.

5. The application of 'country of origin' could have unintended consequences and lead to further fragmentation of music repertoire in CMOs. Rightholders and CMOs might well withdraw rights from other CMOs in order to safeguard a high level of protection for their rights and reduce the impact of forum shopping and the legal uncertainty outlined above.

6. The right of communication to the public under Art. 8 WIPO Copyright Treaty 1996, which the Information Society Directive 2001/29/EC implements, provides for a right that takes place both at the place of transmission and the place of reception. This has been made clear by those who attended the diplomatic conference and by leading academics. See, for example: *The WIPO Treaties 1996*, Reinbothe & von Lewinski, (2002), *The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation*, Ficsor, (2002), *International Copyright and Neighbouring Rights – The Berne Convention and beyond* Ricketson & Ginsburg, 2nd Edition (2006) and *World Copyright Law*, Sterling 3rd Edn. (2008).

7. The making available right is a subset of the communication to the public right. It would be extremely complex, confusing and disruptive if different rules were applied to the making available right as distinct from other types of communication to the public. There were practical reasons why satellite broadcasting was subject to 'country of origin' in Art. 1(2) of Directive 93/83/EC but this model is not and should not be applicable to other technologies.

8. It is important to recognise that there is a distinction between on the one hand the scope of the making available right and the jurisdiction of the national courts to hear an action based on an infringement of that right. The issue of scope arises under Directive 2001/29/EC whereas the issue of jurisdiction is one which arises separately under Council Regulation (EC) No 44/2001.

Reasons not to apply targeting to making available

1. It is often very hard to determine whether a website that is hosting copyright content is 'targeting' a particular country or not. Language is often cited as a test for whether a website is targeted. This is not an easy test to apply for websites in English that can be accessed and used throughout the EU.

2. Targeting is irrelevant to whether a copyright-infringing site is prejudicing the rightholders' rights in a given jurisdiction. Consumers access and download from illegal sites whether or not the site is in a given language or has advertising using a certain currency. Copyright-infringing sites often disseminate illegal content without a sales transaction taking place.

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[1])?***

☑ **YES**

Yes and No.

We do not foresee an impact on the recognition of rights, though note that the De Wolf study outlines some areas of potential impact.

[1] Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.

The remuneration of rights could be affected if licensing is impacted.

The enforcement of rights is likely to be significantly affected by a change to the making available right. It would make it harder for rightholders to enforce their rights. A 'country of origin' approach could undermine future actions such as UK site-blocking cases which have been brought under s. 97A Copyright, Designs and Patents Act 1988 (implementing Article 8(3) Directive 2001/29/EC). It could increase costs of actions and the ability to collect evidence.

1. 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**

Many businesses handle the clearance of multiple rights with ease, online and offline: this has always been routine administration for any copyright business. Therefore, we see no evidence, either now or historically, that the existence of two rights has provided a barrier to the licensing of musical works. However, we recognise the importance of joint licensing and the aggregation of repertoires for streamlined licensing, and we are committed to initiatives which simplify the licensing process, such as the consolidation of front and back office operations between *PRS for Music* and other CMOs.

2. 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**

Hyperlinking may require authorisation, depending on the circumstances. However, the legal framework must protect rightholders, and licensed service providers, by ensuring that their rights can be enforced against those providing hyperlinks to unauthorised content or links which circumvent paywalls or other business protection. In those cases, the authorisation of the rightholder and/or the right to enforce is essential and must be clearly defined.

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**

The copies made in order to view web pages should be subject to the authorisation of the rightholder.

If the copies made for the purpose of enabling individuals to view web-pages did not require the authorisation of the copyright owner, it would enable businesses to monetise unauthorised content and detract from legal offers. It is clear therefore that copies made to enable use of the work by web-browsing have in relation to the service provider (if not the browser) independent economic significance, additional to that derived from the copies made to enable

the transmission of the work, namely the fact that they can be viewed/heard by the visitors to the service provider's web-page. An exception that removes the making of such copies from rightholder authorisation would severely prejudice the legitimate interests of rightholders (and to that extent would be contrary to Art. 5(5) of Directive 2001/29/EC).

The liability also assists in enforcement as the services are then liable for authorising or having secondary liability for the consumer's infringements. This is particularly helpful where the service is located in a jurisdiction with weak copyright law.

3. 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)?***

□ YES – Please explain by giving examples

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□ NO

□ NO OPINION

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.***

Establishing a legal framework which enabled *unlicensed* resale of digital content would have very serious negative consequences on the market, which would undermine the investment in production and marketing of the copyright content by the producer, and by the digital service providers who are investing in cross border services, while harming the creator.

There are fundamental differences in the impact on rightholders of the resale of digital works versus physical. While a physical copy will depreciate in value and quality over time, digital content will remain entirely in the state in which it was originally made available. The exhaustion of rights in physical product should not be extended to the digital framework.

Digital files are made available under licence from the service to the consumer, permitting the consumer to make a copy, perhaps even multiple copies for different devices, depending on the business model. If there were a resale, there is no feasible way of ensuring the reseller destroys the original copy or copies (the forward and delete problem), so in effect the enforcement of the licence to the consumer, or the transfer of the licence from one consumer to another, is in practice impossible. Digital rights management ("DRM") could theoretically achieve this but since music has been sold without DRM for several years, we do not foresee that it could be reintroduced.

In economic terms, reselling digital files would have the same impact as piracy and file-sharing – it would increase uncontrolled, unlicensed and unenforceable distribution of works in the system, with negative impacts on the value of rights of creators.

'Second-hand' digital files are identical to new digital files, the resale of digital files at lower prices could be expected to drive down market prices for new files. Consumer willingness to pay for digital files has already been seriously suppressed by competition with piracy. A low-

price resale market could be expected to drive down prices to a level that would drive many companies out of business.

As note 28 to this question confirms, the decision of the European Court of Justice in *Oracle v. UsedSoft* is not relevant to the legal issues here, because, as the decision makes clear, it was based on the *lex specialis* of the Computer Programs Directive. In all other areas, the provisions of Articles 6 and 8 of the WIPO Copyright Treaty, and the agreed statements concerning Articles 6 and 7, will apply: these were implemented in Article 3 and Recital (29) of Directive 2001/29/EC.

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**

We would not favour an EU registration system because:

-if it introduced formalities for copyright, this would be contrary to international law;

-an EU registry would have no functional benefit for licensing, unless it was dynamic (recording all changes to copyright ownership over time) and linked and integrated to other relevant industry databases;

-it would duplicate current industry investment in voluntary databases, with no added value.

We support the development by industry of a global repertoire database that provides the necessary functionality for rightholders.

We welcome the Commission's focus on copyright tools in this questionnaire, and its recognition of the critical importance of repertoire databases, metadata and standards, to support machine-readable licensing and automated reporting and matching to usage of works ('the answer to the machine is in the machine'). Copyright tools are essential to the efficient and transparent management of rights and for the effective, transparent and accurate reward for rightholders.

We have developed our answer further in response to Q,19.

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

[Open question]

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

We are fully in support of centralised and authoritative repertoire registration to improve the quality of repertoire data because copyright systems depend on good data. But a voluntary industry-led database is preferred because, in order to be useful for licensing of works, a registry/database has to be dynamic, meaning it is continuously updated with new works and changes to ownership of registered works in all territories. The US Copyright Register has none of that functionality and is therefore not used (or capable of being used) for licensing.

The Commission could support and fund industry-led development of a Global Repertoire Database ("GRD") for musical works, and the linked vision of a global recordings database.

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

[Open question]

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B. 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?

In online content markets, identifiers are essential to allow content owners and service providers to identify what content has been sold, streamed or broadcast and for rightholders and CMOs to determine where rights have been used and distribute royalties accordingly.

The management of information is central to some of the objectives and standards of the CRM Directive. Rights management requires an efficient flow of information between users and rightholders. This ensures that music services that use copyright works report that usage and CMOs can pay rightholders when their works are used.

In the online market, the volume of data which must be processed to manage rights is far higher than in the physical market. Over the last four years the volumes of data processed by *PRS for Music* has grown by over 10,000% from 1.17 billion to 124.6 billion per annum. This is only likely to grow further in the coming years. Copyright management is capable of handling the 'big data' requirements but only if a) usage data is provided consistently and accurately and b) the ownership of rights is accurately recorded. Only then can there be fully enabled machine processing of data and rights transactions which can support initiatives such as the Copyright Hub, simplified licensing for small scale users and user-generated Content.

Common standards have been developed over decades (ISWC, ISRC, IPI, DOI etc). The key is to ensure their active adoption across the entire online supply chain, from composers and publishers to labels, broadcasters and online services. Such investments by rightholders cannot be made in isolation or without the clear commitment by service providers to adopt systems.

The European Commission can play a role in facilitating and supporting the wider adoption and use of standards across the supply chain and *PRS for Music* would support and participate in any such initiative.

C. Term of protection – is it appropriate?

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

☑**YES**

There is no evidence or rationale to justify changing a system for musical works that was adopted in 1993, corresponding to international standards, and later adapted and updated in 2011.

II. 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 optional list of copyright exceptions, and the differences between national rules implementing them, do not create difficulties for the use of works in practice, cross-border copyright licensing or the market for copyright works in general.

Copyright owners routinely grant licences covering many jurisdictions, whether it is a group of territories, the entire EU or the world. At no time does the fact that an exception exists in one EU Member State and not in another, or that the application of an exception differs between two Member States, give rise to problems for licensing in practice.

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**

There are no obvious benefits in making some or all of the copyright exceptions mandatory. Further harmonisation would not deliver any tangible benefit to the Digital Single Market, since there are no problems in practice and no evidence in favour of change.

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

There is no need for new limitations or exceptions. We support the economic theory that digital markets reduce transaction costs and that consumer welfare and the efficiency of the market is maximised through a strong copyright framework with fewer exceptions than were appropriate in the analogue environment.

Limitations on rights should only be considered with strong supporting evidence and only if it is clear that licensing is not an appropriate option for clearing rights in the market.

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**

We believe there are no benefits in providing greater flexibility in the application of the EU framework of limitations and exceptions. Indeed it is more likely to create greater uncertainty, which would increase commercial and litigation costs.

The system for interpretation of law through the courts and CJEU has provided a line of cases interpreting the principles of directives. This is sufficient.

Specifically, the introduction of the fair use doctrine mooted by the Commission in the introductory text would not be an appropriate approach to introduce flexibility. There is empirical evidence from the US of the high cost of litigation involving fair use (the American Intellectual Property Association estimated the average cost to defend a copyright case at

$1million per case). The costs mean that only the largest companies are confident to rely on the doctrine, with smaller users and smaller rightholders disadvantaged. Even then, fair use is only workable in the US because of the substantial line of jurisprudence interpreting the concept. There is no case for implementation in the EU; this conclusion is backed up by the analysis in the De Wolf report. Some reform of process and governance in the CJEU could be desirable. We propose that:

(a) IP specialists be appointed to the CJEU to hear IP cases and

(b) the court process be amended to make it easier for third parties to make representations to the court (amicus briefs).

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.

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

☑ **NO**

We do not believe the territoriality of limitations and exceptions constitutes a problem for rightholders, businesses or consumers. In fact consumers benefit from the main public policy exceptions in each territory, while the system allows for specific adaptation of exceptions in national laws in line with national policy.

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?)

[Open question]

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?

☐ YES – Please explain, by Member State, sector, and the type of use in question.

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☐ NO

☐ NO OPINION

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

[Open question]

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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?

[Open question]

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

[Open question]

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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?***

Yes, PRS for Music has licensed institutions so that they can offer their users remote online access to musical works. For example, we have licensed the British Library Sound Archive, the British Film Institute and the Naxos Music Library web service, which makes over a million tracks available to public library users, schools and universities. We also license remote access to broadcasts by students at educational institutions via the Educational Recording Agency.

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

[Open question]

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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?

[Open question]

……

……

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

Licensing is the preferred solution.

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?***

☑ **YES**

Please see answer to Question 32.

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

[Open question]

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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?***

[Open question]

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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?***

Libraries that give access to online collections can do so for an infinite number of works and to an infinite number of users simultaneously. This has a far different impact on the market than traditional lending of single physical copies for finite periods of time to users in person. E-lending will have direct impact on investment and competition in the commercial market for supplying online content to users. Licensing solutions are therefore essential for digital services provided by libraries. In practice, there is no problem in the framework now but there would be if a policy intervention opened up exceptions or limitations to rights.

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?***

□ YES – Please explain why and how it could best be achieved

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□ NO – Please explain

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□ NO OPINION

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)?

□ YES – Please explain

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□ NO – Please explain

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□ NO OPINION

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?***

☑ **NO**

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

[Open question]

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

Licensing mechanisms already exist to enable the licensing of works to schools for illustration for teaching.

In the UK, the Educational Recording Agency, of which PRS is a member, operates an authorised licensing scheme. UK law provides an educational exception which is 'subject to licence', meaning that if rightholders do not operate a licence then the users can rely on the exception (Copyright, Designs and Patents Act 1988, ss. 35 and 36).

Licences and licensing schemes are in principle and practice more flexible, adaptable and also broader than the exception. In other words educational institutions that take out licences get permission for a wide range of uses of material. This is a win-win situation for rightholders and users.

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?

[Open question]

As we have set out above, licensing solutions are already providing access to copyright content for teaching purposes and as such there is no need for new legislation.

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

[Open question]

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?***

□ YES – Please explain

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□ NO

□ NO OPINION

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

[Open question]

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

[Open question]

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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?***

□ YES – Please explain by giving examples

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□ NO

□ NO OPINION

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

[Open question]

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

[Open question]

Do we have some working examples?

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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?***

□ YES – Please explain

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□ NO – Please explain

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□ NO OPINION

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

[Open question]

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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?

[Open question]

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

[Open question]

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

[Open question]

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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?

☑ **YES**

Defining the Issue

PRS for Music actively participated in Working Group 2 of the Licences for Europe discussions which discussed UGC and noted that, despite the best attempts of the Commission, the group was unable to reach an agreement on what constituted user-generated content. In practice UGC is a broad term which can capture a wide variety of activities and uses. For example it can include: (i) content entirely created by users, (ii) content uploaded by users but entirely created by someone else, (iii) content that uses part of an existing work but juxtaposes it with other content and (iv) content that is based on an existing work but does not use any of it wholesale. There may be different problems, challenges and solutions in each of these areas, so a definition is essential in shaping the forthcoming discussion on this issue.

The UGC Market

For the purposes of this consultation, and in advance of establishing an agreed definition for UGC, we set out below some general themes which we have observed in the operation of the current market, which we believe merit further consideration.

Users share and play with pre-existing works because they value them and manufacturers of devices and software, ISPs and UGC websites are building sustainable and highly profitable

business models based on the exchange of UGC. This value must, through licensing solutions, be reflected in the remuneration received by rightholders.

PRS for Music already licenses the communication and distribution activities of some UGC websites. However, there have been challenges in licensing such sites at all, or some sites for full value, because such services often cite the hosting defence in the E-Commerce Directive reduces their liability for copyright. This uncertainty is creating difficulty in licensing what is a clear commercial exploitation of rights both to the detriment of rightholders' livelihoods and consumers. It ultimately creates unnecessary confusion. As we have set out in response to Q.7 we believe the impacts of the hosting defence should be investigated.

The key principle, however, is that creators should be remunerated for the use of their works and licensing models exist or can be adapted to enable this. The Commission's focus only on the remuneration of the end user is just part of the relevant issue.

The Moral Right

Creating new content using pre-existing works involves reproduction, communication and adaptation. Licensing pre-existing works for new purposes is a key, normal part of exploitation for rightholders: books are made into films, music is used for advertising, cartoons are made into soft toys. However, the adaption of pre-existing works in UGC may have an impact on authors' moral rights when the identity of the original author is lost or there is derogatory treatment of a work.

Education

In our response to Q7 of this consultation we raised the issue of consumer awareness and education on copyright. The use of pre-existing works and the creation of new works is a prime area where this would be appropriate, allowing consumers to understand how creators are rewarded, and opening the door to ensuring their works are also respected. Lack of knowledge does not mean that consumers do not care about the rules of the internet. A survey by the World Economic Forum/comScore in November 2013 found that 65% of UK respondents would hate or dislike a stranger re-posting their family photos on social media (http://www3.weforum.org/docs/WEF_RethinkingIntellectualProperty_DigitalAge_Report_2014.pdf). It would be in no-one's interests if the internet became a lawless 'free for all' in which social responsibility and citizenship were absent.

We call on the Commission to establish a common agreement on the definition of UGC; to support creators in developing fair and efficient licensing models that will facilitate the great explosion of re-use of copyright content on the internet; and to improve education and awareness when consumers are using pre-existing works and creating new works.

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?***

☐ YES – Please explain

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☐ NO – Please explain

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☐ NO OPINION

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?***

☑ **YES**

This question only asks about remuneration of the creator of the new work and ignores the remuneration of the original creator of the 'pre-existing work' on which the new work is based or which the new work reuses. Licensing models exist for clearance of rights to use existing works, whether they are music, clips or images, and these enable the original creator to authorise the use of works and to benefit from their use.

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

Our response to Question 58(c) notes certain difficulties in ensuring that UGC services are suitably licensed. One practical solution, alongside consumer education, would be improved notice-and-takedown procedures, so that an author can exercise their moral rights to object to adaptation of their work if it is considered derogatory.

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?***

The current framework allows for the licensing of the right to make publicly available UGC. As such we see no reason for further legislation in this area.

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

The solutions consist of licensing models, improving information and education on the one hand, and promoting responsible practices on the other. See our response to Question 61 of this consultation.

III. 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[2] in the digital environment***?

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

☑ **NO**

There are numerous CJEU decisions interpreting the scope of the exception and the compensation system; there is no need for further legislative clarification. However, there is a need for consistent implementation of the exception.

The implementation of a private copying exception is a benefit to consumers, who are able freely to make copies of copyright works without breaking the law, and to creators who benefit from the compensation paid for those private copies.

There is cross-border distortion when countries such as the UK choose not to implement the exception (thus penalising consumers in the UK) or choose to implement the exception without compensation (thus penalising creators across the EU). A more consistent interpretation, implementation and provision of 'fair compensation' across the EU would minimise these distortions and reduce confusion for consumers.

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?[3]

☑ **NO**

The question invites an opinion about a situation where harm is 'minimal'. Recital 35 of Directive 2001/29/EC states, 'In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.' From a logical perspective, the question therefore tends to lead to the answer 'no'. However, the practical question is whether harm in any given situation is minimal or not. If the exception causes rightholders not to be able to license, then it seems unlikely that the harm is minimal.

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?

[Open question]

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[4]

☐ YES – Please explain

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☐ NO – Please explain

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☐ NO OPINION

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

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

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?

 YES – Please specify the type of transaction and indicate the percentage of the undue payments. Please also indicate how a priori exemption and/or ex post reimbursement schemes could help to remedy the situation.

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 NO – Please explain

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 NO OPINION

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

[Open question]

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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?

[Open question]

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

We refer to the GESAC responses to Q.67-71.

IV. 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?***

The copyright framework has provided a stable basis for the EU's creative industries which has, in turn, allowed the sector to grow and create jobs across the EU. However, as the manner in which rights are exploited is evolving it is pertinent for the EU authorities to investigate whether the current framework is continuing to ensure

individual authors, composers and creators are rewarded adequately whenever and wherever their rights are used. The copyright framework must support a sustainable ecosystem for the creation of, and investment in, new works and in supporting services that supply and distribute new services to consumers.

PRS for Music will not comment on the questions which concern contract but we are aware of Commission work in this area in support of composers, authors and performers.

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

☑NO OPINION

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

[Open question]

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V. 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?

☑ **YES**

The civil enforcement system in the EU should be made more efficient so as to effectively address and deter services that offer infringing material to their users, whether funded by subscription, donation or advertising. These types of services should not be entitled to the immunity from liability offered by the Article 14 hosting defence of the E-Commerce Directive. The Directive was intended to award immunity to particular activities carried out by neutral internet intermediaries and recital 42 of the Directive refers to a protected service as being 'merely technical, automatic and passive'.

As a matter of principle we pick up on the question and its reference to 'with a commercial purposes': **i**t is not just infringements for commercial purposes that require effective enforcement measures. Most infringements have some impact on rightholders and a package of proportionate measures is required in order to deal with the spectrum of wrongdoing.

Notice and take down system

The result of the E-Commerce Directive is that the current system of notice and takedown puts all the resource and financial burdens on rightholders, while services have no incentive to assist in detection of illegal content, even through the technological means are available.

There are technological measures available for service providers to allow them to easily and effectively identify files and infringements, based on prior notifications given to them by rightholders. Many services now employ such measures, but unfortunately most providers still do not adopt this technology or take these steps.

The system of notice and takedown is ineffective to address the problem of illegal content appearing online. In 2013, *PRS for Music* removed access to 2.3 million infringing copies of works made available online. Illegal content spreads very rapidly and popular musical works will generally spread across numerous different online platforms and services within a matter of minutes. An enforcing rightholder must find as many copies of the work as possible and take action in relation to each of those in order to have any positive impact. Even then, it is highly unlikely to fully solve the problem of the work's availability online. In addition to this, once files have been removed, they can quickly re-appear: either being re-uploaded by the same internet user, or by a different user of the same online service, or alternatively by a user of an entirely different online service or platform.

To illustrate the problem, over a 4-month period, *PRS for Music* sent a total of 849 notices to a particular service, Rapidgator.net, in relation to a particular musical work. There must be a limit on the number of times an intermediary can be notified of infringing content whilst still relying on the safe harbour of the Article 14 hosting defence. Once a service reaches the limit, there should be a presumption that the intermediary is no longer 'merely technical, automatic and passive' and therefore unable to rely on the hosting defence. In these circumstances, the onus would pass from the rightholder to the intermediary, to monitor and remove infringements.

We believe that notice and action working practices would greatly benefit if the Commission were to issue non-binding guidelines in relation to the functioning of procedures and the interpretation of Article 14. In our view, the guidelines should cover:

1. clarification that the hosting defence is only available to particular activities which are merely technical, automatic and passive, where carried out by neutral online services, and not to platforms which are designed or optimised to make available or facilitate the making available of illegal content, such as material which infringes copyright;

2. clarification that notice and takedown means 'notice and stay down' and that service providers are required to remove not only an example URL but all instances of the specific infringement or illegal content once they are notified and/or become aware;

3. best-practices for hosting service providers' procedures that deal with illegal content, including (a) a recommendation that service providers' abuse policies and procedures should be easily found, clearly stated, apparent and generally consistent; (b) online takedown tools for speedy removal that are made available and easy to find and use; (c) a recommendation that action in response to notices should be taken in a matter of hours, not days; (d) a recommendation that communications be sent by service providers to notice providers, informing them when action has been taken; and (e) a system of accreditation for reputable notice providers, who would be given priority access to the service provider's platform in order to search for, identify and report illegal content, and for whom expedited action is taken in response to notices. Accreditation should be lost or suspended in cases where notice providers are found to have abused those privileges.

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?

We have experience in enforcing the rights of our members. We believe that the legal framework which establishes the liability of intermediaries has created the wrong balance. It creates incentives for intermediaries to be entirely passive so as to avoid

liability for licensing. They have no incentive to inform their customers and consumers or to help with awareness and education of consumers. The notice and takedown system is placing a burden on rightholders but is not operating to its full benefit. The responsibility of other intermediaries, such as advertising or payment services, must be more clearly defined, perhaps in the form of a joint agreement or MOU to ensure they take an active role in preventing their services being used to support unauthorised and illegal businesses.

Below we list a range of measures that would foster the cooperation with intermediaries:

1. '**Traffic Lights'**: PRS for Music proposes an industry technical solution, providing information on screen during search process, that would give consumers information about illegal sites so that they know whether a site is illegal or legal BEFORE they access it. Information tools should be easy to provide, they are dynamic, and they empower the consumer to make the right choice. EU institutions should actively support non-legislative solutions since they could be implemented relatively fast.
2. Enforcement: Remedies, especially injunctive relief against ISPs and site-blocking orders in particular, are better established in some jurisdictions than others. If there is to be consistent enforcement across the EU, there needs to be a focus on ensuring that action is possible to prevent access to infringing sites anywhere in the EU.. We note some remedies already available and relied by rightholders, such as site-blocking, would be adversely affected if there were any policy changes to rights, in particular a change to territoriality (country of origin) and/or changes to hyper-linking.
4. The E-Commerce Directive has given intermediaries an immunity from responsibility that is harmful to creators. It creates disincentives for intermediaries to assist and co-operate. An evaluation of the impact of the directive is desirable.
4. Other intermediaries, such as advertisers, brands, credit card companies, payment services, can also take action to ensure that they are not supporting illegal sites. c.f. PRS for Music, Google, Detica Data Driven Research 2012 'The six business models of copyright infringement'.

   http://www.prsformusic.com/aboutus/policyandresearch/researchandeconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf

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**

VI. 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**

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, the differences between Member States' legislation are not problematic. The addition of a second, parallel EU copyright title is unnecessary and would create confusion and cost.

We recognise that there may be some theoretical benefits in establishing a European copyright code it is but not clear that it would deliver a single market in practice. The proposal is ambitious and inherently complex and we note that attempts to develop thinking, such as the work undertaken by the Wittem Group, have made no progress in 5 years. A single copyright title would not per se deliver a single market to consumers. The factors that divide markets now, such as language, or inhibit roll out of services, such as payment systems, will continue despite changes to IP and they are the critical challenge for policy makers. Therefore, at a time when the efforts and actions of policy makers both in the UK and across Europe are better focussed on practical solutions, we believe the copyright code is not a priority.

VII. 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.

A secure copyright regime is essential to Europe's economic stability, future growth, and the cultural diversity of the EU. This is because it ensures that creators are paid for the use of their works and incentivises them to free up access to works, which in turn stimulates innovation, investment and ultimately the creation of new works. These have significant consumer welfare benefits.

It is therefore unfortunate that this consultation is based on a misguided assumption that copyright is the problem for the creation of the Digital Single Market. It is not. Nor is it the case that changes to the rights system would be in the interest of consumers or the economic strength of the EU. Any programme which seeks to ensure a copyright framework for digital markets must be based on two primary objectives. First, to facilitate a rights regime which allows consumers to legally access content, when and how they want it. Secondly, and importantly, ensure that rightholders have high protection and are fairly remunerated in a digital market when their works are used and monetised by other providers.

In respect of the first, the current European copyright framework, because it is essentially technology and platform neutral, has proven resilient to the development of digital technology and services. The predictable and stable environment over the last decade has supported a multitude of new broadcasting, online and consumer services which were almost unimaginable when Directive 2001/29/EC was introduced in 2001. Therefore, while there is a case for simplification of licensing, through market-led solutions support by EU and domestic Governments, the copyright framework as a whole has proved it is not a barrier to the growth of service providers or to the European single digital market.

However, we believe there remain significant questions as to whether the current framework is creating sufficient value for rightholders. Real term earnings for music creators in the UK, taking account of inflation, are in decline. While this has much to do with the falling value of physical sales, which is not being replaced by digital, it is also a symptom of a digital ecosystem which allows providers and intermediaries to monetise rights-protected works

without remunerating rightholders. If the EU is to continue to enjoy the benefits, in jobs and economic growth, of a world-leading cultural sector this must be addressed.