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, we deal with issues of this kind. Many websites provide services only in some of the Member States, or their services are available only outside of the EU's borders. The practices of licence granting used by collecting societies are pointed out to be the source of problems, because they often grant licences which are restricted only to one of the Member States territory, although the licence allows for accessing the global repertoire. However, it should not be prematurely assumed that this is the only problem. Internet service providers who acquire licence for all EU's territory will be tempted to discriminate against customers in the scope of prices, e.g. according to the criterion of nationality or place of residence. Even if such licences were granted, there would remain a risk that customers would be forced to accept "effective technological protection measures" (DRM) or other technologies which would prevent them from accessing such services while abroad or sharing works obtained from those websites with family and friends (both locally and abroad).

2. *[In particular if you are a service provider:]* ***Have you faced problems when seeking to provide online services across borders in the EU?***
The Modern Poland Foundation maintains a digital library which contains literary works and pictures existing in the public domain. Sometimes we experience problems in determining whether a particular work has entered the public domain, as the law of Poland provides for various starting points of a 70-year monopoly, depending on circumstances which are difficult to be clearly determined in some cases. This means we not only have to establish facts from the distant past, but also determine what was the law in that period of time. For example, under the Polish law, if the exclusive rights belong to someone else than the author by the act of law, the 70-year monopoly is counted from the work's publication date instead of the author's death. In order to establish whether the rights have been assigned by the law to someone else than the author, the work's legal status as of the time it was created has to be determined.
The Member States have various rules regarding the method of determining the starting point of the expiration of copyright monopoly period. They also differ as to the understanding of the amount of creative contribution necessary for the work to be protected, they have different exclusions from protection, as well as various scopes of users' freedoms (e.g. the right to quote, educational exception etc.). Hence, there is a possibility that a work which was entered into the public domain in one of the Member States is still protected in another one. This fact seriously impedes maintaining a digital library due to arising legal risk.

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.***
The Modern Poland Foundation is not a collecting society, but we are the holders of various types of copyright. Each work for which we hold copyright is made available under

licence of Creative Commons Attribution Share Alike 3.0 PL (CC-BY-SA). Free licences such as CC BY-SA are by definition multi-territorial. We also maintain a digital library containing works from public domain, which may be accessed without granting a licence as they no longer constitute the subject-matter of the copyright law. Therefore, we would like to draw your attention to the fact that the number of inquiries concerning licence granting may be a misleading criterion. It does not include sharing which takes place when public licences as Creative Commons are used, or sharing works existing in the public domain, however problems related to territorial fragmentation of copyright law exist also in this area (see answer to question 2).

4. ***If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?***
In our opinion there is a need for harmonised rules which would allow for simple determination whether the work is in a public domain or not; and if it is protected, whether it can be made available in various countries without the need to verify the scope of user's freedoms in each country separately.
If worldwide/pan-European licensing mechanisms were introduced (both due to intervention of a legislator/regulator or by the parties themselves), a special attention should be paid to avoiding practices that could be used by the service providers to limit users' freedom of sharing works obtained from those websites.
In case of implementation of all solutions aimed at enabling easier access to the content outside of the borders of the EU Member States, a special care should be taken not to inadvertently impede the access to free licences. Free licences enabled the emergence of a rich ecosystem of communities and contents which they created, out of which Wikipedia is the best known. Therefore, in our opinion a rule should be implemented in which legislation of Member States would not prevent the owners of works from granting free licences to content (free licences allow for free copying and distributing the works as well as derivative works without restrictions like e.g. prohibition of commercial use) which would optimise the use of works and solve problems connected with the territorial scope of law. In particular, it regards issues such as statutory limitation of maximum period of licence duration, fees on using works obligatorily settled via collecting societies, and other limitations of freedom to dispose of the works by rightholders.

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)?***
The Modern Poland Foundation does not impose any territorial restrictions on the use of works to which it holds rights. We think that any such restrictions should be analysed with regard to conformity with the competition law. Pursuant to the established case-law regarding protection of competition, copyright protection in itself does not justify such practices if they constitute an infringement of the protection of competition right.

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)?***
The Modern Poland Foundation does not impose any territorial restrictions on the use of works to which it holds rights. We think that any such restrictions should be analysed with regard to conformity with the competition law. Pursuant to the established case-law regarding protection of competition, copyright protection in itself does not justify such practices if they constitute an infringement of the protection of competition right.
We believe that if worldwide/pan-European licensing mechanisms were introduced (both due to intervention of a legislator/regulator and by the parties themselves), a special attention should be paid to avoiding practices that could be used by service providers to limit users' freedom of sharing works obtained from those websites.

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?***
We believe that apart from a thorough harmonisation of copyright law, there is also a need for other protection measures (both legislative and non-legislative), which would ensure safeguarding of users' rights to participate in and share culture without restrictions based on criteria as nationality or place of residence. We also think that creation of the Single Market is a necessary condition allowing for effective competition of EU culture industries on the global arena.
In our opinion, introduction of pan-European licences itself will not ease the risk of access restrictions based on criterion of nationality or place of residence.

8. ***Is the scope of the "making available" right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?***
Distinguishing a separate right of "communicating to the public their works in such a manner that the outsiders have access to them in any time and place" ignores the fact that making available on the Internet actually means that the works are copied (reproduced) from one computer to another. This takes place also when such technologies as "streaming" are used, because the data displayed on the user's computer has to be copied on it, even if the copy is a temporary file.
Similarly, the metaphor of "targeting" assumes the existence of artificial barriers which are unknown to the Internet – such as e.g. nationality, territory, etc. Regardless of the above, imposing on the users an obligation to verify the law of each country to which they disseminate the works or to which those works might reach would lead to a serious limitation of their ability to participate in the worldwide culture exchange. The user should be assured that he only has to comply with one set of rules, and the law of his place of residence seems the most natural choice. Importantly, those rules must be simple and easy to follow for everyone, because each citizen of EU may be also a user who

disseminates content on the Internet. Every day, millions of EU citizens disseminate another person's works or derivative works on the Internet, and such rules should be created especially with regard to them. Otherwise, legal barriers will be created on the road to participation in culture exchange, and only entities with specific financial and organisational potential will be able to overcome them. Thus, they will become not only intermediaries but also supervisors in this exchange, which in our opinion should be avoided.

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)?***

We are not aware of any such risks, but we believe they are possible, since the Member States differ among themselves as far as the rules mentioned in the question are concerned. It would be best to solve this problem by a harmonised preordaining which EU state's law is applied to the authorship, the effectiveness of transfer, etc. (i.e. harmonisation of private international law, which in spite of recent actions in this scope still raises doubts as to governing law in cases concerning copyright).

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?***

Yes. Distinguishing a separate right of "communicating to the public their works in such a manner that the outsiders have access to them in any time and place" ignores the fact that making available on the Internet actually means that the works are copied (reproduced) from one computer to another. This takes place also when such technologies as "streaming" are used, because the data presented on the user's computer has to be copied on it, even if the copy is a temporary file.

Similarly, the metaphor of "targeting" assumes the existence of artificial barriers which are unknown to the Internet – such as e.g. nationality, territory, etc. Regardless of the above, imposing on the users an obligation to verify the law of each country to which they disseminate the works or to which those works might reach would lead to a serious limitation of their ability to participate in the worldwide culture exchange. The user should be assured that he only has to comply with one set of rules, and the law of his place of residence seems the most natural choice. Importantly, those rules must be simple and easy to follow for everyone, because each citizen of EU may be also the user who disseminates content on the Internet. Every day, millions of EU citizens disseminate another person's works or derivative works on the Internet, and such rules should be created especially with regard to them. Otherwise, legal barriers will be created on the road to participation in culture exchange, and only entities with specific financial and organisational potential will be able to overcome them. Thus, they will become not only intermediaries but also supervisors in this exchange, which in our opinion should be avoided.

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?***
No. Linking should never depend upon anyone's consent. Links (i.e. "references") are the basis of WWW network functioning. The network is constituted by interlinked documents. Without links we cannot speak of the Internet. Links enable the basic functionality of the network, i.e. allowing navigation between linked documents. The idea to prohibit sharing links to the materials to which we do not hold copyright (e.g. to the webpage of a newspaper or a YouTube film) is absurd, surprising and ill-conceived. Unfortunately, there are already such tendencies. In Poland, in the court decision of 2004, linking was considered as distributing (in the context of protection of image), while in summer this year first judgement was issued ordering the payment of damages and compensation for sharing a link to a YouTube song on Facebook. At the same time, many, if not all Internet users are linking repeatedly every day. In our opinion, providing a source of information does not equal with distributing a work, and the risk of legal liability arising from providing the source of information violates the fundamental freedom of speech.

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?***
No. Using the Internet resources should never depend upon anyone's consent. Dissemination of works published on the Internet which takes place during browsing is subject to similar argumentation and conclusions as already presented in the answer to question 11. This is a technical process necessary to enable using those works – no data will be displayed to the user unless it is stored in the computer's memory or on the hard disc drive, at least temporarily. To make this dissemination dependent upon authorised parties' consent de facto means that all users' freedoms such as fair use, etc. are "annulled". Dissemination of this type is currently explicitly permitted pursuant to Article 5.1. of the Directive 2001/29. In case there are any doubts as to the fact browsing the Internet falls under the scope of this provision, it should be explicitly indicated in the Directive if there are amendments to be introduced to it.

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)?***
There are two possible types of restrictions regarding the resale of a work: contractual and technological (DRM). Standard contract forms expressed as "an offer one cannot refuse", which prohibit distribution of purchased works raise doubts whether such contractual prohibitions are lawful, since the law allows for such redistribution (e.g. as in the case of fair use in Poland). The users who do not want to breach the contract will refrain from actions which are covered by their statutory freedoms and accept such contracts, provisions of which often are not subject to any negotiations.
The question of technological measures preventing redistribution looks similar. Such works may be technically assigned to a specific device or software, and any attempts to

circumvent those restrictions aimed at enforcing user's freedoms (such as fair use) is prohibited pursuant to provisions on effective technological protection measures of the Directive 2001/29.
For example, according to the regulations of website ibuk.pl of a large Polish publisher PWN, "the Service User is not entitled to: dissemination or marketing of the downloaded Publications in whole or in parts, interfere with the content, distribution, reproducing the Publications, removing signage and technical protection or any commercial use of the Publications." The website ibuk.pl also uses technical protection, and the regulations prohibit "any attempts to disable protection, decode its content, etc."
Therefore, in our opinion, those both types of restrictions should be eliminated. It specifically relates to the prohibition to circumvent DRM technology, if the objective of such practice is a lawful use of the work.

14. *[In particular if you are a right holder or a service provider:]* ***What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.***
The idea of "resale" of works in a digital form contains a misleading assumption that data is subject to ownership right. In order to enable a "digital resale", such ownership would have to be introduced, at least in terms of a legal analogy. This would entail (as shown by the judgement of the European Union Court of Justice in the case UsedSoft vs. Oracle) an obligation of reselling user to delete the resold work, and such an obligation would have to be restricted by legal sanctions or enforced by technological measures. This implies tracking, monitoring and searching the PCs of users as well as other media.
Resale and other redistribution of tangible copies is natural and should not be subject to monopoly (hence the exhaustion of copyright which already exists in the law). Digital copies should not, however, be subject to restrictions resulting from attempts to transfer the resale right from analogue to digital world. The law should simply prohibit any actions aimed at restricting or monitoring use of the digital copies of works as long as the user is involved in a non-commercial sharing.

15. ***Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?***
No. In our opinion registration of works is not a good solution, especially if it differentiates the protection of registered and non-registered authors or if protection is dependent upon registration.

16. ***What would be the possible advantages of such a system?***
The advantage of works registration system would be simplification of the process of finding rightholders and acquiring licences. From the perspective of citizens' rights protection we consider those advantages as minor in comparison with the disadvantages of this system, especially if it would differentiate the protection of registered and non-registered authors or if protection would be dependent upon registration.
We consider private initiatives of works registration to be a good idea, but they can receive government's support only if it is actually proved that private entities are not

managing those systems correctly. Government's intervention seems for example justified in relation to promoting open standards of interoperability of those registers, open (free) access to their content and openness of organisations or consortia managing those registers. All government interventions should take into consideration existing mechanisms, such as e.g. Creative Commons licensing system, where granting licence to the work may be accompanied by metadata which facilitates licence information processing by ICT systems.
We think, however, that there is a need for a registration system of users who want to use a work but cannot identify or contact an authorised party in order to acquire licence. Such a system would allow a more effective use of such procedures as limitation of actions of authorised parties or compulsory licences, though it would also require mechanisms preventing from misuse (public accessibility, openness of data formats and interfaces). Such a system would allow to *ex post* establish what the economic life of a work is and adjust protection to this timeframe, without coming into conflict with such obligations as the Berne Convention (a work submitted for registration in relation to which an authorised party does not take specific actions to extend its protection would still be protected, but e.g. subject to limitation of actions, compulsory licence, or extended fair use).

17. ***What would be the possible disadvantages of such a system?***
Basic disadvantages are lack of conformity with the Berne Convention, increasing the intermediaries' role and weakening the author's position.
Prohibition on introducing formalities as a condition of protection is rather categorically expressed in the Berne Convention. Moreover, introducing registration as a condition of works protection may turn out to bring only apparent advantage. Whether it would as a result extend a real public domain depends on the exact functioning of the registration system. Preventing such misuse as registering another person's works or appropriation of works which are already in the public domain, would require an expensive mechanism of verification. As the experience with patent system shows, even patent office experts are often unable to detect any attempts to acquire patent for solutions which are not considered as inventions or do not meet patentability criteria. Registration as a condition of legal protection would significantly limit the effectiveness of free licences. Lack of registration would result in ineffectiveness of licences granted by the author, and thus also licences containing the copyleft clause. Even if the author granting such a licence registered his work, the authors of subsequent adaptations would have to make further registrations to meet the commitments of copyleft and ensure continued effectiveness of this clause. In our opinion, it is neither practical nor necessary.
Given the high probability of such risks, we object to implementation of works registration system in which registration would constitute a condition of copyright protection, unless exclusion from protection would mean an explicit prohibition of appropriation similar to copyleft clause used in licences such as GNU GPL.

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

In our opinion, one should be very careful while considering the restrictions on protection (i.e. possibilities for enforcing protection) of non-registered works as an incentive for registration, as this would lead to an emergence of two classes of rightholders. We would like to draw your attention to the fact that, specifically, restrictions on protection of non-registered works should not let anyone "appropriate" such works (non-registered works should be under statutory protection against being appropriated as in "copyleft" clause existing for example in a GPL licence). Registration system should be created in such a manner that participation in it is an incentive in itself without a simultaneous deterioration of legal situation of the unregistered parties.

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?***

We notice the purpose of creating such solutions by government authorities, but only when the interested entities are not able to come out with an open standard solution (a universal availability of complete specifications without restrictions on freedom to use resulting e.g. from exclusive rights or unjustified technical issues) if the data bases are not available under free licences, as well as if those standards and data bases are not managed by open organisations or consortia. All such systems should be voluntary, and legal status as well as protection of the authorised parties not participating in those systems should not be decreased.

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

No. Periods of protection are not adequate in a digital environment and should be shortened. In our opinion, the binding period of author's economic rights should be linked to the period of actual economic exploitation of a work, which nowadays means, according to various sources, from 3 to maximum 20 years since the publication date (and not since the author's death). Too long a period of the so called copyright protection negatively impacts not only the number of works available on the market, but also limits the potential for a creative reuse of existing works. This also leads to serious problems with digitisation as well as digital libraries and archives functioning, which currently publish mostly works from the public domain due to practical problems connected with negotiating licences on works covered with monopoly.

Very long periods of protection currently also impede using the public domain. The longer the time that has passed since the author's death, the more difficult it is to determine the actual circumstances relevant for counting the period of expiring/negotiating the licence (was the author's creative contribution exclusive? did another entity acquire rights by the act of law? did the author waive rights before his death and are they as a result included in the estate? etc.). The user who determines facts incorrectly bears the risk of civil and criminal liability, and as a result the direct effect of the current system is limiting the tendency for making available the old, but not yet ancient works (so called "20th century gap" in digital archives).

We believe it is very necessary to shorten the periods of protection along with introduction of a procedure which would speed up the transfer into the public domain of the works which are "abandoned" by the authorised parties, or not used in a commercial way. Returning to 50 years p.m.a. period (the Berne Convention) is the first step, but at the same time specific mechanisms should be introduced under the convention, such as limitation of actions or compulsory licences, as well as the process of renegotiations of international agreements aimed at shortening the duration of exclusive rights to a justified and reasonable period.

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?***
Yes. Voluntary implementation of individual freedoms of the users resulting from the Directive 2001/29 is the source of many problems, especially in case of using the works on the Internet. The fundamental problem, however, is the general idea of those freedoms as adopted in the Directive. The Directive favours beneficiaries of intellectual monopolies and treats the monopolies as a rule. Author's economic rights as proposed in the Directive are not merely a mechanism stimulating production of intellectual goods applied only when such stimulation is necessary (when production of goods actually could not take place without monopoly's guarantee).
As a result of this weird concept, user's freedoms are understood solely as "exceptions" and "restrictions" of monopoly. Exceptions, in principle, are not subject to extensive interpretation, and the Community legislator also decided to add to the Directive a "three-step test" which is often used for such interpretation of freedoms, which makes them practically useless. Apart from making users' freedoms mandatory there is also a need for a complex reconstruction of the system ensuring those freedoms.
It should start with a return to the original idea of copyright (author's economic right) as a mechanism stimulating production through established by the government monopoly (privilege) granted only in exceptional cases and within a limited scope. Such a monopoly cannot run counter to users' freedoms which should be founded on solid legal grounds. Copyright should be balanced with human rights, as shown by the European Court of Human Rights in Ashby case. The human rights themselves constitute the source of users' freedoms and the Directive should be compliant with this status quo.
There is a need for introduction of a general definition of users' freedoms accompanied with a list of sample freedoms, which by an act of law would be considered as compliant with this definition. A significant criterion in the context of a general definition should be a non-commercial use of original works and their adaptations. Such construction of users' freedoms should be mandatory for all Member States. It should be implemented in a unified form, but the Member States should be able to extend it unilaterally by adding to their laws new examples of situations falling within the scope of the open norm.

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?***
Yes. All of the currently existing users' freedoms in the Directive 2001/29 should be mandatory and harmonised. There is also a need for mandatory implementation of the

open norm, accompanied with the already existing list in the Directive 2001/29 as an example of a situation completing this open norm.

23. ***Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.***
All of the already existing users' freedoms in the Directive 2001/29 should be upheld, and the Member States should not have the freedom to restrict them below this minimum. But given many situations that occurred after implementing the Directive, this list currently constitutes only a starting point for the construction of user's freedoms adjusted to the current reality. As part of mandatory freedoms, Member States should ensure freedom of non-commercial exchange of works and their adaptations. The Member States should also be allowed to introduce other user's freedoms than those included in the Directive.
However, there is a need for harmonisation apart from completing the user's freedoms list. Namely, it should be ensured that those freedoms can be exercised regardless of the type of work (the subject-matter of related rights, sui generis right) and regardless of the technology type (e.g. whether the work is fixed on a tangible medium or not). The law should not allow for contractual restrictions on users' freedoms or use of technological measures to this end (users should have the right to circumvent such contractual and technological restrictions). The user's legal status should not be taken into account as a criterion allowing for taking action within the scope of defined freedom; it should be rather linked to specific types of activities.

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?***
Yes. There is a need for more flexibility, as the development of information and communication technologies constantly expands the possible scope of user's freedom.

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.***
The way to make copyright more flexible is an open definition of user's freedoms accompanied with a list of example freedoms such as those already mentioned in the Directive 2001/29. Introduction of an open norm and the list should be mandatory for the Member States (as a harmonised minimum), but they should keep the freedom of introducing additional freedoms (i.e. explicit indication in the national law that a specific action outside of pan-European list is included within the open norm).

26. ***Does the territoriality of limitations and exceptions, in your experience, constitute a problem?***
Territorial fragmentation of user's freedoms in the area of European Union remains to be a problem. Licensors often use contracts which restrict user's freedom below the

minimum, resulting from provisions of the national acts. Users who conduct activity reaching outside the borders of one Member State are not certain whether actions permitted under their national laws are also permitted in other countries, and which law they should apply (the question of the law applicable in relation to copyright is very often more problematic than it appears). The solution to the problem (at the EU level) is a complete harmonisation of users' freedoms in a manner specified in the answers to previous questions. Further works on harmonisation at the global level should also be conducted, but until then actions aimed at facilitating the use of free licences should be undertaken.

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?)***
In our opinion, the idea of a compensation fee as some kind of exchange for user's rights should be reconsidered. To our best knowledge, there is no evidence that using the works without fees inevitably generates losses to the rightholder. On the other hand, there is research which shows that some forms of using works may trigger a revenue increase due to new forms of exploitation. (see: John Houghton and Nicholas Gruen, "Excepting the Future" and "Exceptional Industries", 2012, http://digital.org.au/sites/digital.org.au/files/documents/Excepting%20Future%20-%20Lateral%20Economics%20Report%20%28Sept%202012%29.pdf, http://digital.org.au/sites/digital.org.au/files/documents/Exceptional%20Industries%20-%20Lateral%20Economics%20Report%20%28Sept%202012%29.pdf; Felix Oberholzer-Gee, Koleman Strumpf "File-Sharing and Copyright" http://musicbusinessresearch.files.wordpress.com/2010/06/paper-felix-oberholzer-gee.pdf)
Therefore, we think that the Member States should not be allowed to introduce compensation systems without evidence of losses which are allegedly incurred by the authors. Prior to a potential introduction of such a system it should be also examined whether such proved loss could be compensated for in another manner. Moreover, if a complete harmonisation of users' freedoms takes place, there should not be problems with cross-border compensation.

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, problems do occur. The right to copy, even if it is only for the purpose of preservation and archiving does not result directly from the Directive 2001/29, but sometimes its incompliance with this Directive is mentioned.
Some rightholders question the legality of such actions as incompliant with the three-step test. Practical aspect of copying (digitisation) for the purpose of preservation and

archiving is further restricted, because some argue that such copies cannot be used in parallel with non-digital articles, and that such copies may be available only via dedicated terminals on the premises of establishments preparing such copies or even that such copies cannot be made available at all (if a tangible copy still exists).
Further problems stems from the fact that many data bases with digitised works are obtained by libraries and similar institutions under licences which prohibit copying and even downloading except for temporary storage. Digital Restrictions Management is a technology used to prevent attempts of copying, even if such contracts are not imposed or if they can be questioned as invalid. While public libraries are often entitled to prepare obligatory tangible copies of the works, it is not the case with digitised materials.

29. ***If there are problems, how would they best be solved?***
An open norm, i.e. a definition of user's freedom formulated by general terms is the preferred solution. In order to help courts in interpretation of such open norm, it should be completed with a list of mandatory provisions indicated as examples meeting the requirements of an open norm.
Users should have the freedom of copying if such copying is made in order to exercise any of the allowed freedoms, for example when the library buys works to make them available.
Such freedom with regard to works which are available on the market may be implemented under the current regime for public lending right. Alternatively, it could be solved through compulsory licences if a rightholder refuses to grant licence but cannot prove that the work is currently available on the market. The public lending right has, however, a greater potential of enabling the libraries to perform their original objective which is assuring a level playing field for those citizens who cannot afford the access to works on the commercial market. Access to works which are not available on the market should be allowed without the need to acquire rights and the obligation to pay any remuneration.

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?***
An open norm, i.e. a definition of user's freedom formulated by general terms is the preferred solution. In order to help courts in interpretation of such open norm, it should be completed with a list of mandatory provisions indicated as examples meeting the requirements of an open norm.
Users should have the freedom of copying if such copying is made in order to exercise any of the allowed freedoms, for example when the library buys works to make them available.
Such freedom with regard to works which are available on the market may be implemented under the current regime for public lending right. Alternatively, it could be solved through compulsory licences if a rightholder refuses to grant licence but cannot prove that the work is currently available on the market. The public lending right has, however, a greater potential of enabling the libraries to perform their original objective

which is assuring a level playing field for those citizens who cannot afford the access to works on the commercial market. Access to works which are not available on the market should be allowed without the need to acquire rights and the obligation to pay any remuneration.
Users should have the freedom of copy if such copying is made in order to effect any of the allowed freedoms, for example when the library buys works to make them available.
Such freedom in relation to works which are on the market may be introduced through implementing the current regime regarding right for public lending. Alternatively, it could be solved through compulsory licences if a rightholder refuses to grant licence but cannot prove that the work is currently available on the market. Right for public lending has, however, greater potential of enabling the libraries to perform their original mission which is assuring a level playing field for those citizens who cannot afford the access works on the commercial market. Using works which are not available on the market should be allowed without the need to acquire rights and the obligation to pay any remunerations.

31. ***If your view is that a different solution is needed, what would it be?***
n/a
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?***
Pursuant to the current Polish implementation of the The Directive 2001/29, the situation described in the question requires that the university/library hold the licence. The authorised party's consent is not required if the access is possible only via dedicated terminals on the premises of an establishment. According to some interpretations, restricting to terminals should not be applicable in relation to e-learning, because it is covered by a separate, broader provision allowing for educational use without the consent of rightholder, but it is not possible to clearly distinguish between those two cases. For this reason many institutions refrain from allowing access to their collections via Internet, even if such access is limited only to some categories of users (e.g.: holders of a valid student account), without an explicit consent of the authorised party.
Some institutions attempt to obtain the consent of the authorised parties, but they often offer licences restricted to a specific territory and/or category of users, without possibilities to negotiate. It happens that licensors with an established position on the

market want to renegotiate the rates of licence fees each year, which is the reason why institutions are not able to maintain their collections over a longer period of time.

33. ***If there are problems, how would they best be solved?***
The idea that access to culture via libraries may be subject to negotiations with the authorised parties must be reconsidered. They should not be able to control whether the society can read and what it can read, and the libraries' role is assuring a level playing field for those who cannot afford the access to culture via market channels. Those citizens should be able to take advantage of the full potential provided by information technologies through unlimited access to libraries' collections via Internet.

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?***
The best solution is to extend the scope of user's freedoms with regard to the status currently regulated in Directive 2001/29. It should be explicitly indicated that on-line access via libraries is possible without the necessity to ask for the authorised parties' consent. This is possible under the current EU legislation by implementing the institution of public lending right, which on the one hand requires that the authors are rewarded, and on the other hand allows for introduction of mechanisms verifying whether such remuneration is due and in what amount. Introduction of such verifying mechanisms should be the obligation of the Member States.

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

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. The Modern Poland Foundation maintains a free (as in freedom) online library Wolne Lektury which makes classical literary works available in Polish and other languages. This website is very popular: millions of pupils, students and teachers use it to satisfy their educational needs. Unfortunately, the 20th century literary canon is not available due to restrictions connected with copyright. Acquiring licence which would allow everyone for free and unlimited use of the works published on the website Wolne Lektury is a long, expensive and uneasy process. In most cases acquiring such a free licence is impossible because it turns out that a work is orphaned, too many parties are rightholders, or due to former commitments of the rightholders. This also applies to situations in which the

country is the rightholder, as in the case of Janusz Korczak's works, a great Polish writer and pedagogue. However, even if the process of licensing was easier, this is just not a real solution for people and institutions who deal with hundreds of thousands of works, due to transaction costs alone. We are not aware of any Polish library which would offer online access to works protected by copyright, which is another reason proving that licensing mechanisms fail.

37. ***If there are problems, how would they best be solved?***
We call for solutions relating to regulations, not licensing, in a form of extended freedoms that would allow for making the works available and be used for educational, scientific and non-market purposes. Such freedom should be explicitly provided for as part of the open norm we proposed in the answer to question 21.

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?***
Access via Internet is not only a substitute of accessing tangible copies. More and more users do not use the works which are unavailable online and are limited only to using what they can find freely available on the Internet. At the same time, users apply their "offline" habits and activities to the online world, trying to take the most of the information technologies potential. A person indeed defines themselves with various cultural artefacts. In the "real" world communicating such self-definition was often impossible or made possible only by indirect reference to artefacts. On the Internet, users can directly show works which define them to their friends by sharing digital copies. Many users do so by sharing whole collections of works defining their identity: this shows who they are, what they think and how they communicate. We believe that people have justified needs to be defined in this way in digital environment; however during such activity it often turns out that part or all of their collection was removed by service providers due to copyright infringement.
Possession and many ways of sharing "analogue" collections currently do not require anyone's consent. Meanwhile, pursuant to the current Polish implementation of Directive 2001/29 making available digital collection requires acquiring a licence. Authorisation is not required only if collection is maintained by a library, archive or school, and the access is made possible only via dedicated terminals on the premises of such establishments. In accordance with some interpretations, limiting to terminals should not be applied in relation to e-learning, because it falls within the scope of a wider provision which allows for educational use without the consent of rightholder. However, it is not possible to distinguish those two cases in practice. For this reason, many institutions refrain from allowing access to their collections via Internet, even if such access is limited to certain categories of users (e.g. holders of a valid student account) without an explicit consent of holders of copyright.
Discrimination by law of the digital collections against analogue collections must be reconsidered. Rightholders should not be able to control whether the society can read and what it can read. The access to digital collections assures a level playing field for those

who cannot afford the access to culture via market channels. Those citizens should be able to take advantage of the total potential provided by information technologies by unlimited access to libraries' collections via the Internet.

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

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?***
We believe that using works with the purpose of satisfying social needs should not constitute the subject-matter of contracts. Such use should be excluded from the scope of intellectual monopoly. There are at least two reasons for this. The first one results from the underlying idea of copyright which is to grant private parties a monopoly designed as a motivational tool. Such monopoly is aimed at reinforcing culture production and thus satisfying public interest of culture possession. When a monopoly fails as a tool to achieve this goal, it should be limited adequately. The second reason is the fact that contractual solutions like MoU do not bring about any significant change in overall situation where (mass) digitisation is a risky and expensive undertaking, especially when it comes to the case of establishing who the authorised party is.
Therefore we believe that mass digitisation projects launched in the public interest should be free from copyright restrictions. This may be ensured by extension of users' rights already specified in The Directive 2001/29, or in the worst case, by allowing users to acquire compulsory licences from rightholders.
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)?***
Freedom of digitisation guaranteed by the statute should include all types of works. It should be especially avoided to differentiate freedoms and users' rights using the type of work as a criterion, because nowadays many works are entered into data bases and "bundled" with software or other multimedia products. As a result, the scope of rights which the user may exercise in relation to such products is reduced to the most limited element of such a product.

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?***

[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?***

Pursuant to the current Polish implementation of Directive 2001/29, there is no legal certainty whether it is possible to use works for the purpose of teaching in other way than by using authorised tangible copies where the teaching takes place. Despite the fact that educational institutions are authorised to use the published works for educational purposes, they are authorised only to copy "excerpts" of works, and the access via Internet is doubtful, taking into consideration the limitation to "dedicated terminals located on the premises of those establishments", which in Poland is also applied with regard to schools. Despite the fact that levies cover all kinds of copying (fees are charged on the purchase of media, technical equipment or photocopying services without verifying whether they are used for private purposes) it is often mentioned that copying within educational institutions contradicts the three-step test.

For this reason, many educational institutions do not engage in any activities except for traditional teaching on the premises, or they attempt to acquire the licence. As a result, they encounter transaction costs or other obstacles, such as those we already described in relation to libraries, which make the whole process pointless. On the other hand, many teachers who want to make their classes more attractive and prepare students to use information technologies operate in the grey zone as they use materials obtained privately or try to extract materials licensed to the school, without noticing contractual or technical restrictions.

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

The best solution for this problem is extension of users' freedoms currently specified in Directive 2001/29. Everyone should be able to upload an original work or its adaptation on the Internet for educational purposes without restrictions to "dedicated terminals on the premises of such establishments".

All the Member States should be obliged to implement this solution in a unified form. It should not be limited to any specific type of work, but can explicitly include all of them, as well as software and data bases (because many educational materials are made in a form of multimedia products).

Freedom of teaching should not be bound to any specific institutions; everyone should be able to use works protected by copyright as long as it does not exceed the scope of educational purpose.

Any licence clauses which contradict the above freedom should be made invalid, and the users should have the right to circumvent technical protection used to unable access to educational materials protected by copyright.

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

In Poland, except for a narrow implementation of educational freedoms, the only mechanism is licensing (both individual and collective). Unfortunately, licences fail to solve the problem, as they are often presented in a take-it-or-leave-it manner, with clauses that

restrict the use of works beyond the scope allowed for by the provisions of law. Restrictions are also imposed in a form of "effective technological protection measures" (DRM) or other technical tools, which, for instance, bundle a work with specific equipment or software.

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?***

User's freedoms should not be constituted as restrictions and exceptions of intellectual monopoly. Intellectual monopolies should not be treated as a standard. Unfortunately, this is the construction currently adopted in Directive 2001/29. The Directive favours beneficiaries of intellectual monopolies. Author's economic rights as proposed by the Directive are not only a mechanism stimulating production of intellectual goods applied only when such stimulation is necessary (when production of goods actually could not happen without the monopoly's guarantee).

As a result of this weird concept, user's freedoms are understood solely as "exceptions" and "restrictions" of monopoly. Exceptions, in principle, are not subject to extensive interpretation, and the Community legislator also decided to add to the Directive a "three-step test" often used for such interpretation of the freedoms, which makes them practically useless. Apart from making users' freedoms mandatory there is also a need for a complex reconstruction of the system ensuring those freedoms.

It should start with a return to the original idea of copyright (author's economic right) as a mechanism stimulating production through a monopoly (privilege) established by the government and granted only in exceptional cases and within a limited scope. Such a monopoly cannot run counter to users' freedoms which should be founded on solid legal grounds. Copyright should be balanced with human rights, as shown by the European Court of Human Rights in Ashby case. The human rights themselves constitute the source of users' freedoms and the Directive should be compliant with this status quo.

There is a need for introduction of a general definition of users' freedoms accompanied with a list of sample freedoms, which by an act of law would be considered as compliant with this definition. A significant criterion in the context of a general definition should be non-commercial use of original works and their adaptations. Such construction of users' freedoms should be mandatory for all the Member States. It should be implemented in a unified form, but the Member States should be able to extend it unilaterally by adding to their laws new situations falling within the scope of the open norm.

The above solution should not be limited to any specific type of work, but can explicitly include all types of works, including software and data bases (because many educational materials are prepared in a form of multimedia products).

Freedom of teaching should not be bound to any specific institutions; everyone should be able to use works protected by copyright as long as it does not exceed the scope of educational purpose.

Any licence clauses which contradict the above freedom should be made invalid, and the users should have the right to circumvent technical protection used to unable access to educational materials protected by copyright.

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

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?***
Despite the fact that Polish implementation of Directive 2001/29 allows educational institutions for using published works for the purpose of unauthorised research, such use is often impossible for various reasons.
The scope of this implementation is limited to educational and scientific institutions, hence it leaves non-institutional and private (including commercial) research in the grey area (also institutions and entities participating in the research without such status, as e.g. entrepreneurs). Moreover, a large number of data and scientific publications which might be used for further research is often included in data bases which are under restrictive licence conditions. For example: licences require that the works are made available only within the scope of specific networks or software. Text and data mining is often explicitly prohibited in licences or permitted only to a limited extent. Technological protection measures (DRM) are often used for further restrictions of user's chances to take advantage of the freedoms he is entitled to.
Many publishers of science require that the authors transfer their rights and do not give them (authors) a grant-back, or grant licence under very negative conditions (e.g. without consent to publish in repositories functioning on an open access basis). This in turn leads to double payments with the taxpayers money – first for the research and publishing, then for the access to results via libraries.

48. ***If there are problems, how would they best be solved?***
User's freedoms should not be constituted as restrictions and exceptions of intellectual monopoly. Intellectual monopolies should not be treated as a rule. Unfortunately, this is the construction currently adopted in Directive 2001/29. The Directive favours beneficiaries of intellectual monopolies. Author's economic rights as proposed by the Directive are not only a mechanism stimulating production of intellectual goods applied only when such stimulation is necessary (when production of goods actually could not happen without the monopoly's guarantee).
As a result of this weird concept, user's freedoms are understood solely as "exceptions" and "restrictions" of monopoly. Exceptions, in principle, are not subject to extensive interpretation, and the Community legislator also decided to add to the Directive a "three-step test" often used for such interpretation of the freedoms, which makes them practically useless. Apart from making users' freedoms mandatory there is also a need for a complex reconstruction of the system ensuring those freedoms.

It should start with a return to the original idea of copyright (author's economic right) as a mechanism stimulating production through established by the government monopoly (privilege) granted only in exceptional cases and within a limited scope. Such a monopoly cannot run counter to users' freedoms which should be founded on solid legal grounds. Copyright should be balanced with human rights, as shown by the European Court of Human Rights in the Ashby case. The human rights themselves constitute the source of users' freedoms and the Directive should be compliant with this status quo.
There is a need for introduction of a general definition of users' freedoms accompanied with a list of sample freedoms, which by an act of law would be considered as compliant with this definition. A significant criterion in the context of a general definition should be non-commercial use of original works and their adaptations. Such construction of users' freedoms should be mandatory for all the Member States. It should be implemented in a unified form, but the Member States should be able to extend it unilaterally by adding to their laws new examples of situations falling within the scope of the open norm.
The above solution should not be limited to any specific type of work, but can explicitly include all of them, as well as software and data bases (because many educational materials are made in a form of multimedia products).
Freedom of teaching should not be bound to any specific institutions; everyone should be able to use works protected by copyright as long as it does not exceed the scope of educational purpose.
Any licence clauses which contradict the above freedom should be made invalid, and the users should have the right to circumvent technical protection used to unable access to educational materials protected by copyright.

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

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?***
n/a

51. ***If there are problems, what could be done to improve accessibility?***
n/a

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

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?***
Copyright law does not forbid reading (getting knowledge of the contents) another person's works. "Text and data mining" is a weird expression which conceals the fact that it refers to reading. However, the reading is not performed by a human but by a machine which facilitates the process of getting the knowledge of the texts and data which no one would be able to process independently. Therefore, this activity should not be forbidden; it should not be the subject-matter of intellectual monopoly, as it is a straight way to controlling what content is read and for what purpose.
Still, many licences explicitly prohibit machine-analysed data, or restrict such activities. In connection with the vague scope of scientific research freedom (as explained above) many scientists move to the grey zone when they try to perform machine analysis of archives (which often contain orphan works or works with unclear copyright status). Hence, many research projects are reduced due to limitation of research only to resources with a clear legal status (e.g. CC licences) or to activities outside of the scope of authorship monopoly, which obviously affects the quality of results of such research.

54. ***If there are problems, how would they best be solved?***
User's freedoms should not be constituted as restrictions and exceptions of intellectual monopoly. Intellectual monopolies should not be treated as a rule. Unfortunately, this is the construction currently adopted in Directive 2001/29. The Directive favours beneficiaries of intellectual monopolies. Author's economic rights as proposed by the Directive are not only a mechanism stimulating production of intellectual goods applied only when such stimulation is necessary (when production of goods actually could not happen without monopoly's guarantee).
As a result of this weird concept, user's freedoms are understood solely as "exceptions" and "restrictions" of monopoly. Exceptions, in principle, are not subject to extensive interpretation, and the Community legislator also decided to add to the Directive a "three-step test" often used for such interpretation of the freedoms, which makes them practically useless. Apart from introduction of an mandatory character of users' freedoms there is also a need for a complex conversion of the system ensuring those freedoms.
It should start with a return to the original idea of copyright (economic) as a mechanism stimulating production through established by the government monopoly (privilege) granted only in special cases and within a limited scope. Such a monopoly cannot

contradict with users' freedoms which should be based on a solid legal grounds. Copyright should be balanced with human rights, as shown by the European Court of Human Rights in the Ashby's case. The human rights themselves constitute the source of users' freedoms and the Directive should be agreed with this status quo.
A general definition of users' freedoms should be introduced along with a list of exemplary freedoms, which by the act of law are considered as falling under this definition. A significant criterion in the context of a general definition should be non-commercial use of original works and their adaptations. Moreover, it should include an explicitly expressed freedom, granted to everyone, to use works in a digital form for educational purposes without limits, both in relation to original works and their adaptations. Such construction of users' freedoms should be mandatory for all the Member States. It should be implemented in a unified form, but the Member States should be able to extend it unilaterally by adding to the acts further situations completing the scope of an open norm.
The above solution should not be limited to any specific type of works, but should explicitly include all types of works, as well as software and data bases (because many educational materials are made in a form of multimedia products).
Freedom of scientific research should not be assigned to any specific institutions; everyone should be able to use works protected by copyright as long as it does not exceed the scope of educational purpose.
Any licence provisions that contradict the above freedom should be made invalid, and the users should have the right to circumvent technical protection used to unable access to educational materials protected by copyright.

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?***
User's freedoms should not be constituted as restrictions and exceptions of intellectual monopoly. Intellectual monopolies should not be treated as a rule. Unfortunately, this is the construction currently adopted in the Directive 2001/29. The Directive favours beneficiaries of intellectual monopolies. Author's economic rights as proposed by the Directive are not only a mechanism stimulating production of intellectual goods applied only when such stimulation is necessary (when production of goods actually could not happen without monopoly's guarantee).
As a result of this weird concept, user's freedoms are understood solely as "exceptions" and "restrictions" of monopoly. Exceptions, in principle, are not subject to extensive interpretation, and the Community legislator also decided to add to the Directive a "three-step test" which is often used for such interpretation of the freedoms, which makes them practically useless. Apart from making users' freedoms mandatory there is also a need for a complex reconstruction of the system ensuring those freedoms.
It should start with a return to the original idea of copyright (author's economic right) as a mechanism stimulating production through established by the government monopoly (privilege) granted only in exceptional cases and within a limited scope. Such a monopoly cannot run counter to users' freedoms which should be founded on solid legal grounds. Copyright should be balanced with human rights, as shown by the European Court of

Human Rights in Ashby case. The human rights themselves constitute the source of users' freedoms and the Directive should be compliant with this status quo.
There is a need for introduction of a general definition of users' freedoms accompanied with a list of example freedoms, which by the act of law would be considered as compliant with this definition. A significant criterion in the context of a general definition should be non-commercial use of original works and their adaptations. Such construction of users' freedoms should be mandatory for all the Member States. It should be implemented in a unified form, but the Member States should be able to extend it unilaterally by adding to their laws new situations falling within the scope of the open norm.
The above solution should not be limited to any specific type of work, but can explicitly include all of types of works, including software and data bases (because many educational materials are made in a form of multimedia products).
Freedom of teaching should not be bound to any specific institutions; everyone should be able to use works protected by copyright as long as it does not exceed the scope of educational purpose.
Any licence clauses which contradict the above freedom should be made invalid, and the users should have the right to circumvent technical protection used to unable access to educational materials protected by copyright.

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

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

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?***
"User-generated content" is another weird phrase suggesting that "users" create something else than works, creation of which is reserved for "creators". Meanwhile, the division into "creators" and "users" is incompliant with the actual state of affairs. Everyone may create a work and each of those works is (should be) equally protected by copyright.
Contemporary culture is to a large extent based on using pre-existing works or incorporating them to its own creativity. Authors realise to what extent our consciousness is shaped by works existing in public circulation and how important it is to show them in a new, critical perspective. An example of such work was famous Mona Lisa with moustache by Marcel Duchamp or repainted portraits of Marilyn Monroe by Andy Warhol. A similar

activity is sampling, i.e. creation of new musical works by combining fragments of different works. In such cases copyright law requires a consent of all parties authorised to the original works. Of course, original authors may be reluctant when faced with such "critical perspective" and decide not to give consent or make it dependent on a high remuneration. Such consent is necessary for distributing derivative works i.e. works which were created on the basis of an original work – including translations, film and comics adaptations, as well as very popular modifications and mash-ups of pictures and songs (a very popular Polish website "Demotywatory" shows how creative this activity may become). Another issue is connected with the fact that various provisions relating to this area in various EU countries impede distribution of such works on the Internet.
Users of information and communication technologies who simultaneously create works have a significant problem due to the fact their activities are often considered as instances of copyright infringement or at least put in the grey zone of legal uncertainty. For example, we ourselves were suspected of radical infringement of fair use, when Google Inc. removed a file containing Nina Paley's speech from YouTube after German organisation Gema reported it. Nina Paley was a keynote speaker during CopyCamp conference devoted to the subject of copyright.
The speech contained short quotes from films illustrating the problem… of fair use and because of those quotes the access to the file was blocked. We could not see Gema's communication with Google, however, from our point of view Google's decision was based on incorrect report or even could have been performed automatically by ContentID system.

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?***
There is evidence supporting the fact that many Internet users are completely unable to determine the legal status of materials available online. They cannot distinguish "authorised" websites from "unauthorised" ones. Many users base their opinions on false believes instead of provisions of law, e.g. by believing that legality is connected with streaming (in contrast to downloading) or with payments (in contrast to free services). Since even a basic identification (legality of a source) is too difficult to be established by the Internet users, it seems completely pointless to assume that any kind of identification system used by rightholders/licensees may fulfil objectives for which it is created. Such systems as e.g. Free Software licences are successful only within professional and advanced communities, where consciousness of intellectual monopolies is higher. Therefore, we believe that the solution should be regulatory, not licensing one. Users should be granted freedoms adjusted to their common, natural social behaviours on the network.

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?***
Intermediaries such as content publishing platforms are more and more often using automatic content removal mechanisms against content that was for particular reasons considered undesirable. Such mechanisms often take reports from copyright holders as their basis, and function automatically regardless of the validity of the report (e.g. without verification whether the reporting person actually holds full rights to the content) and without determining whether the use of such content infringes the prevailing law or not (e.g. regardless of whether the particular work falls within the right to parody or other permissions for fair use). An example of such mechanism is ContentID implemented by Google on YouTube.com website. The users who want to make profits from remixing are therefore discriminated against by the automated mechanisms such as ContentID, however, formally speaking they may use the counter-notice mechanism (not all the Member States use it). Removing their remixes due to an arbitrary decision of a machine in connection with authorised parties' claims to remixed musical works obviously deprives them of the possibility to earn. Saving those materials does not improve their situation as well, because ContentID does not allow remixes' authors to earn money from remixes, it only enables sharing profits between service provider (Google as the administrator of YouTube) and the author of original work (the person who claims rights to the original and reported this fact in ContentID system).

61. ***If there are problems, how would they best be solved?***
The solution to this problem is, as postulated earlier, including non-commercial use of another person's works and their adaptations (creativity which uses another person's creativity) within the scope of user's freedom guaranteed by the statute.

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 list of user's freedoms which already exists in Directive 2001/29 should be mandatory and extended as to explicitly encompass non-market sharing of works and their adaptations. Such a list should be completed with an open norm defining users' freedoms through general criteria.

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

64. ***In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions1 in the digital environment?***
The scope of user's freedom should not depend on the type of work (the subject-matter of related rights) or on technology (whether it is fixed in a tangible medium or not). Such

freedoms should not be subject to contractual restrictions, and the users should be able to legally circumvent technological protection measures preventing them from acting within the scope of statutory freedom. The type of work, and not the user's legal status should be the criterion analysed while determining if specific action falls within the limits of granted freedom. All use of the works and their adaptations for non-commercial purpose should be permitted.

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?***

Fees on blank media, levies, etc. (hereinafter referred to as "fees") like any other tax mechanism (or similar to a tax mechanism) have many drawbacks. Nowadays in Poland, such a system exists in relation to blank media and copying equipment, as well as photocopying services. Money is collected and distributed by authorised collecting societies. This process is controlled by the government authorities only remotely. Unfortunately, as practice has shown, such control should be increased, as some of those collecting societies are not able to distribute money among all the rightholders. For instance, it is uncertain whether and to what extent distribution should be based on statistics, and who is to decide what statistical methods should be used for data gathering, analysis and calculation.

What is more important, there is no clearly formulated connection in the provisions of law between those fees and user's freedom. An issue often brought up in debates is that copying gives rise to piracy. As many users are unaware of the fees, it contributes to a false belief that each copy of a work generates a loss to rightholder. While in fact, each copy equals another fee which benefits the author or publisher.

Generally speaking, a connection made between copying and losses has no grounds at all. Those fees are based on an assumption that each use of work inflicts losses to the rightholder. This unproven assumption leads to conclusion that every time when provisions allow the users for unlicensed use of a work or use without a direct fee, there should be a solution ensuring the remuneration is paid. However, such conclusion should not be accepted without criticism.

The Member States should have the possibility to introduce mechanisms of loss compensation only if it is proved that a loss was incurred by the authors and it cannot be compensated for by different means. Profits gained through such compensation mechanisms should be weighted against the costs, hence if the research shows only minimal loss, the Member States should not be allowed to introduce those mechanisms, because the costs thereof would exceed the losses (if any).

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?***

The question of how and on what the levies will be charged is crucial. More important though is the question who, and how exactly, will share those fees and what the costs of

this system will be. However, even more important is the question what the society will receive in return for introduction of such a system. In our opinion, the key issue is freedom of non-commercial use of works and their adaptations, which should be explicitly guaranteed, even more if the current fee systems were to be further developed.

67. ***Would you see an added value in making levies visible on the invoices for products subject to levies?***
There is a low social awareness of the fact that the prices of many articles, media and services already contain fees that reach collecting societies which then divide them between authorised parties. Many do not know that their procedure of copying works has already been paid for in this sense. Such people are vulnerable to propaganda that claims that copying generates losses to the authorised parties. All ways of informing society about the manner in which fees systems function is a good idea, however, one should not focus solely on the fact that goods and services already contain the fees. The citizens should be informed about the manner in which their money is collected and divided, as well as what the costs of functioning of such a system are. Such information, even if partially available in due collecting societies' reports, does not always reach the general public.

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?***
Bearing in mind the "low social awareness of the fact that the prices of many articles, media and services already contain fees that reach collecting societies which then divide them among authorised parties," it becomes clear that such situations may be very difficult to realise, because of the lack of direct indications that levies are already included in the price of a specific product or service.

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.).***
So far there was no evidence that any such fee is owing, i.e. due.

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

71. ***If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?***
We strongly disagree with the statement that rightholders incur losses when their works are copied by certain categories of users without their consent; we consider compensation for such imaginary losses as unnecessary. At the same time we believe it is reasonable to

demand that the entrepreneurs who earn by using cultural works (or other protected by copyright subject-matter) share their profits with authors – for example through a system of fees. Introduction of such a system on the Internet requires great caution to avoid invasion of privacy or double payments. It seems that the best solution would be a flat fee for Internet service which would be distributed between authors (for example by collecting societies). Functioning of levies in Poland shows that the organisations authorised to charge have problems with distributing money to the rightholders. Complicated and expensive statistical analyses are performed without any clear results. It is then necessary for such a system to include clear and explicit rules of financial means distribution. An example of such model is Philippe Aigrain's Creative Contribution. It should be highlighted that double payments of fees on works the authors have already been paid for in a form of flat fee should not take place. For this reason, any payment system can be accepted only under condition that it entails legislation of non-commercial use of works by individuals. From citizens' perspective, the main problem of the fees system is the question of what they will get in return? An important argument backing up such solution is the question of privacy: only a flat fee combined with legalising decentralised communication like P2P can stop the process of obtaining more and more detailed users' data by third parties. Such a system will strengthen social bonds, raise the level of participation in cultural life and enable the citizens of Europe to take full advantage of their cultural heritage.

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 basic mechanism provided for in copyright law is contract and each alternative mechanism (such as levies) should be introduced only if there is obvious evidence that the contracts fail. In our opinion, it is necessary to scrutinise the economic reasons underlying the process of creation and distribution of culture, because nowadays it is often mistakenly assumed that each use of works should be paid for. Research has shown that the authors' rights are not infringed (or that public interest gains) even in situations when using works is not subject to fees. An example would be the question of public lending rights which negatively affect the possibilities of buying new books by the libraries. Such matters should be systematically analysed further, before any legislative actions are taken to reinforce intellectual monopolies.

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

Yes, there is a need to prevent contracts that unable users to enjoy their freedoms guaranteed by provisions of law implementing Directive 2001/29, because licences often try to enforce such prohibitions. The author should at the same time have full freedom to make available his/her works in a greater scope than statutory users' freedoms ensure, including granting free licences. In particular, it is necessary to ensure a right to waive economic rights and transfer a work into the public domain.

Regardless of the above, it is also necessary to prohibit using technological protection measures aimed at preventing the user from enjoying his statutory freedoms, or limiting those freedoms.

74. ***If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?***
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75. ***Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?***
More and more often there emerge companies whose business model is based on a mass submission of motions on behalf of authors, publishers or producers for prosecuting illegal distribution of works on the Internet. Police and prosecution undertake actions aimed at establishing users' identity. A company which is the aggrieved party obtains access to such data which is used for settlement agreement. Next, it offers to withdraw the motion for prosecution once the user pays certain amount of money in return. Many users agree to this, even if the charges have no grounds whatsoever, and the agreement does not necessarily lead to discontinuation of penal proceeding. This business is based on mass submission and taking advantage of user's lack of legal knowledge, who after being faced with the risk of serious civil and criminal sanctions feel motivated to sign the settlement.
The companies that make profits on copyright that they hold are trying to increase their control over the copyright use on the Internet by pushing legislation ordering the Internet providers to disclose their customers' data (such provisions were found in the famed ACTA agreement).
Procedures introduced by social networking services are also troublesome as they do not give any chances for defence to the party accused of distributing works which infringe copyright. Such works are censored by the website once someone reports a suspicion. The user has no possibility or only slight chances to prove that he did not infringe another person's copyright. If such cases occurred in the real world, the decision would be made by the court, and not by private entrepreneur. Sometimes such procedures are applied to blocking content which is undesirable by some institutions, while the copyright is used only as an excuse.

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?

This question cannot be answered before reaching a precise definition of an "intermediary" who would be subject to the system being proposed. Many different intermediaries are active at many different network levels. They play various roles and have various scopes of control over data. The starting point and general rule should be focusing on the means which was received by actual perpetrator.

Regulations (responsibility regimes, or other regulations) which would allow the intermediaries to extend control (power) over parties to electronic communication should not be prematurely introduced. Such system introduced in the e-commerce Directive lead to implementation of notice and takedown mechanisms, which sometimes result in pathological situations like private censorship or lack of sufficient control granted by national courts.

In a democratic society, infringements should be prosecuted and eliminated on the basis of judicial decisions; the courts should in particular determine whether the infringement actually took place and what sanctions should be applied. Such decisions should be subject to appeals. The intermediaries' role (if private entities may play any role whatsoever) should be taking action after court's adjudication and only within the scope specified by this adjudication. In our opinion, it would be a good idea to take advantage of positive experiences of Canadian "notice and notice" system, where an intermediary plays only a role of a messenger between the authorised party and the user accused of copyright infringement. Simultaneously, it is important that the introduction of such a system does not enable or encourage intermediaries to collect users' data as it would lead to invasion of privacy.

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?***

Copyright infringement is restricted by civil and criminal sanctions, but only the former type is regulated by EU. We cannot speak of civil sanctions without taking criminal sanctions into account, as those two types constitute one system. Considering the overall character of those sanctions, we think that the system of law enforcement is currently too repressive in the cases when infringements are committed within the scope of non-commercial use or use for the purpose of public interest (education, science, etc.). As a result of inexplicitly defined scope of user's freedoms, many actions of this kind directly or indirectly infringe copyright. People who take such actions bear risk of very high financial sanctions (order to pay a multiplied amount of remuneration even in the case of inculpable infringements, or imprisonment). Even if cases of mass prosecution and enforcement from users of non-commercial, educational or scientific content are unknown, the responsibility regime makes them limit the level of their involvement (e.g. giving up e-learning, text and data mining, etc.) – these are the so called "chilling effects".

Vague definition of actions which are not allowed in connection with very harsh sanctions bring about pathological situations. More and more often there emerge companies whose business model is based on a mass submission of motions on behalf of authors, publishers

or producers for prosecuting illegal distribution of works on the Internet. Police and prosecution undertake actions aimed at establishing the users' identity. A company which is the aggrieved party obtains access to such data which is used for settlement agreement. Next, it offers to withdraw the motion for prosecution once the user pays certain amount of money in return. Many users agree to this, even if the charges have no grounds whatsoever, and the agreement does not necessarily lead to discontinuation of penal proceeding. This business is based on mass submission and taking advantage of user's lack of legal knowledge, who after being faced with the risk of serious civil and criminal sanctions feel motivated to sign the settlement.
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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?***
This question cannot be answered without prior knowledge of the character of such "common EU copyright law", what provisions it would provide for and what its legal effect would be.
However, we consider common EU legislation which would take into account also users' rights and grant them freedom to use works as we mentioned earlier (e.g. right for non-market distribution) to be highly necessary.
n/a
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?***
n/a
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.***
n/a