

European Copyright Society

General Opinion on the EU Copyright Reform Package

24 January, 2017

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law¹. Its members are renowned scholars and academics from various European countries, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholder.

The members of the ECS have carefully examined the European Commission's proposals on copyright reform released on September 14th, 2016. In this opinion, we are pleased to submit our comments, observations and suggestions.

The current package of proposals incorporates several issues and policies that have already inspired responses by our Society:¹

- In our Society's response to the Public Consultation on the review of the EU copyright rules of March 2014, we suggested a number of improvements to the existing (harmonized) EU rules on copyright law.
- In our opinion of 13 October 2014 we stressed the importance of exceptions and limitations in facilitating creativity and securing a fair balance between the protection of and access to copyright works, and underlined the need to reach full harmonization or unification in this area of EU copyright law.
- In our letter of 19 December 2014 to the European Commission, we encouraged the Commission to take further steps towards true unification of EU copyright law.
- In our response to the European Commission's Public Consultation on the Review of the EU Satellite and Cable Directive of 15 November 2015, we suggested expanding the SatCab Directive's country of origin approach to content services offered online, subject to certain reservations.
- In our answer to the EC Consultation on the 'panorama exception' of 15 June 2016, we recommended that the current art. 5.3 (h) of the Information Society Directive should not be amended.
- In our answer to the EC Consultation on the role of publishers in the copyright value chain of 15 June 2016, we strongly argued against the introduction of a special neighbouring right for news publishers.

¹ All opinions of the European Copyright Society are available on its website, <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>.

The structure of this opinion is as follows. In the first part we make a number of overarching observations on the entire copyright reform package. Thereafter, we submit specific comments on a number of substantive issues addressed by the proposals.

Part 1. General observations

Introduction

We generally support the policy objectives of the reform package, as announced in the preamble to the proposed DSM Directive: 1) ensuring wider access to content, 2) adapting exceptions to a digital and cross-border environment, and 3) achieving a well-functioning marketplace for copyright. We therefore endorse the proposed mandatory exceptions on distance education, text and data mining and preservation of cultural heritage – subject to our reservations set out below. We also generally support the proposed rules enabling cross-border portability of online content services (as per the proposed Portability Regulation), the rules on the import of VIP-accessible copies (as per the proposed VIP Regulation) and proposed rules on ancillary online services of broadcasters (as per the proposed Regulation on online transmission of broadcasting).

We are pleased to see that the proposed copyright reform package addresses several of the weaknesses of the current *acquis* identified by our Society in previous opinions. In line with our recommendations, the proposed DSM Directive departs from the Information Society Directive's maximum (optional) exceptions approach, and proposes several exceptions that should become mandatory upon all Member States. This approach, in our view correctly, recognizes that exceptions in many cases reflect cultural and information policies and fundamental freedoms that are universal across the EU, and should therefore be uniformly implemented in all Member States. The introduction of mandatory exceptions would also, clearly, contribute to the Digital Single Market for creative content that the Commission has set as its ultimate goal. At the same time, the Commission's shift towards mandatory exceptions raises the question why many other exceptions that equally deserve universal implementation across the EU, such as those for the purposes of quotation and criticism, parody and personal use, should remain optional. The introduction of only a handful of mandatory exceptions, while the extensive 'shopping list' of art. 5(2) and (3) of the Information Society Directive is left intact, will do little for the Digital Single Market.

We are content to see that several of the Commission's proposals address the problems of EU market fragmentation caused by copyright's territorial nature. The proposals recognize that this is a structural problem that traditional copyright harmonization (i.e. approximation of national laws) cannot completely solve. We therefore laud the Commission's reform package for proposing pragmatic, albeit piecemeal, solutions to copyright territoriality, by way of a *country of origin* approach, as envisaged in proposed art. 4.3 of the DSM Directive, the Portability Regulation and the Online Broadcasting Regulation. In our view, such rules are an important intermediate step towards full unification of EU copyright law, which should remain the ultimate goal of EU copyright policies.

For the same reason, we praise the Commission for proposing directly binding regulations in lieu of

directives in some instances. Clearly, regulations are a much more effective legislative instrument for achieving the Digital Single Market. Furthermore, the adoption of regulations avoids the costs of complex and protracted national implementation procedures, and immunizes the EU copyright framework against diverging national interpretations, thus ensuring legal certainty and equality for all citizens of the EU.

The European Copyright Society does, however, have a number of general concerns about the copyright reform package.

Lack of ambition

Despite its ambitious overarching goal and key objectives, as stated (inter alia) in the preamble of the proposed DSM Directive, the Commission's reform package does not seem to reflect an overall vision of the future of EU copyright law, and fails to deliver on its promise of wholesale copyright reform. The copyright package proposes only piecemeal solutions, leaving the existing – already fragmented and partly outdated – copyright *acquis* intact.

This minimalist approach is apparent, for instance, in the proposed articles on the contractual protection of authors and performers; see our comments in Part 2 below. Lack of ambition also characterizes the proposed provisions on exceptions. The exception for text and data mining (art. 3) is limited to non-commercial research purposes, thus denying journalists, teachers and others the ability to engage in text and data mining of copyright works without permission. The exception for cultural heritage institutions (art. 5) seems only to cover acts of reproduction carried out for preservation purposes. This would include, as explained in recital 23, techno-obsolescence and risk of degradation. Whether the exception would allow mass-digitization of collections by libraries, archives or museums remains uncertain.

The introduction of the country of origin principle to 'ancillary online services' in the proposed regulation is to be welcomed, but it is not easy to understand why the principle should be limited to such services. Furthermore, given the ongoing controversy and conflicting court decisions regarding the concept of 'retransmission' in several European countries, it is incomprehensible that the Commission now proposes to extend the rights clearance regime for 'cable retransmission' to other kinds of 'retransmissions' without even trying to define the concept of retransmission beyond the very circular definition of Article 2(b) ('any simultaneous, unaltered and unabridged retransmission').

The proposed Directive also avoids addressing the proper scope of the economic rights that were harmonized in the Information Society Directive of 2001. In recent decisions of the CJEU, the rights of reproduction, of communication to the public and of distribution have been interpreted in ways that have further complicated the *acquis* and have left commentators and stakeholders unhappy and confused. There is now an urgent need for legal certainty on these crucial notions and for the scope of these rights to be brought more closely in line with economic and technological realities.

Finally, the minimalist approach of the current reform agenda is also apparent in the framework of the proposed Directive on certain aspects concerning contracts for the supply of digital content of 9 December, 2015. The proposed Directive seeks to harmonize contractual aspects of the supply of digital content, which in most cases will consist of copyright protected works, such as software,

music and movie files and streaming services, pictures, texts, databases. Our Society is concerned that the proposed Directive overlooks consumer rights that are directly linked to the supply contract but which find their legal basis in copyright law, namely the right to use legally acquired digital content without further authorisation of the right holder (e.g. by way of end user licence agreements). In our opinion, the proposed Directive should also answer the question whether legally acquired copies of digital content may be resold by the consumer.

Private ordering

Two of the three newly proposed mandatory exceptions are subject to private ordering. The proposed text and data mining exception (art. 3(1)) applies only where a research organization has "lawful access" to the database. Thus, the exception can effectively be denied to certain users by a right holder who refuses to grant "lawful access" to works or who grants such access on a conditional basis only. Moreover, this deference to private ordering allows publishers to price TDM into their subscription fees. However, many research organisations will not be able to acquire licences for all databases that are relevant for a TDM research project. Even more problematic is art. 4(2), according to which the availability of "adequate licences" alone may trump the exception for teaching activities, be it directly (denial of licence) or indirectly (by establishing excessive and unfair licensing terms that cannot be met by the teaching institution). As the German experience with such a provision (§ 52a UrhG) shows, even highly professional "educational establishments" like university libraries are unable to apply such a rule. Legal uncertainty prevents beneficiaries from relying on the exception and non-commercial teaching establishments tend to be risk-avoiding entities. Art. 4(2) also runs contrary to the idea of a mandatory exception, and should therefore be deleted. Exceptions reflect policy choices and values. Their benefit should not be dependent on the market decisions of copyright owners, particularly for exceptions grounded in fundamental rights or public interests like research and education.

Fragmented approach

The current copyright acquis already comprises no fewer than ten directives. These directives paint a fragmented picture of copyright law in the EU, with different and sometimes contradictory provisions. Instead of a revision of the existing framework that could have taken the form of a comprehensive revision or codification of the existing legislation, the Commission has chosen to propose two additional directives and two new regulations. This will inevitably lead to further fragmentation and inconsistency. For example, the new mandatory exceptions to be added by the proposed DSM Directive are intended to apply in parallel with the existing, partly overlapping exceptions of article 5 of the Information Society Directive.

The sharing economy

Notwithstanding the mandatory exceptions considered above, the proposed DSM Directive appears to be largely predicated on the idea that the dissemination of copyright protected content over the Internet is to be based on licensing agreements, subject to the right holder's complete control. This rather traditionalist perspective overlooks the sharing economy/culture that drives much of the content production and dissemination on the Internet today. In our opinion, any forward-looking copyright policy at EU level should reflect not only the economic needs and interests of traditional

right holders, but should also be designed in light of a broader and more inclusive ambition to foster cultural production, access to culture and knowledge and technological progress (see e.g. art. 3(3) of the TFEU). In this context, we also deplore the fact that the Commission has shied away from proposing a flexible exception as suggested in our response to the 2014 public consultation – a much-needed open norm in times of rapid social and technological change.

Method

While the Commission's proposals generally conform to the – now standard – legislative procedure of consultation, impact assessment and proposed legislation, we are disappointed to see that the proposals are not grounded in any solid scientific (in particular, economic) evidence. This is the case, in particular, for the proposed neighbouring right for news publishers, which was not included in the general consultation round of 2014-2015, but became the subject of a separate – rather hasty – consultation process in 2016. Given that the proposal would lead to a completely new type of intellectual property right with obvious impact on the digital single market, we find it hard to comprehend why the Commission has elected not to engage in, or commission, any scientific studies on the economic rationale and possible impact of such a new right. We refer to our separate opinion on this issue published on June 15, 2016.

Part 2. Substantive comments

Text and data mining (art. 3 DSM Directive)

The European Copyright Society welcomes the proposed exception for text and data mining (TDM) in article 3. TDM is an important tool for research in a wide range of fields. The mining of pre-existing protected content should therefore not, as a matter of principle and given the public interest at stake, come under the control of right owners. The Society is of the opinion that TDM should be permitted, first, on the ground of the idea/expression dichotomy and, second, because TDM has no impact on the normal exploitation of works or other protected content. We therefore regret the fact that the Directive proposes to limit the benefits of the exception to “research organisations”, as narrowly defined in the Directive. In our view, data mining should be permitted for non-commercial research purposes, for research conducted in a commercial context, for purposes of journalism and for any other purpose.

Copyright allows a right owner to control the exploitation of a work. Text and data mining of copyright protected works is not ‘exploitation’. Works which are subject to TDM are not “used as works”. TDM does not affect the market for these works. Yet, due to the currently prevailing, formalistic interpretation of the reproduction right – see e.g. Infopaq cases I (C-5/08) and II (C-302/10) – the current proposal would continue to allow copyright owners to inhibit the purely technical copies made through TDM activities by non-research organisations and companies. The need for a licence that emerges from this situation is inconsistent with copyright logic and creates chilling effects on research activities that are in the general interest. At the same time, it does not produce any incentive effect on new creations or productions. Such an outcome runs counter to the goals of copyright and the functions of economic rights. Another reason for generally permitting

TDM – preferably by way of a carve-out from the reproduction right – would be to ensure a level playing field with the United States, where companies engaging in TDM activities are likely to benefit from the fair use exemption.

Neighbouring right for news publishers (art.11 DSM Directive)

In our Society's response of June 15, 2016 to the Commission's consultation on the role of publishers in the copyright value chain, we presented a range of arguments against the introduction of a special neighbouring right for news publishers, as is now proposed in art. 11 of the DSM Directive.

Because of the fundamental role that news and information play in democratic society, and especially on the internet, any new rule creating intellectual property rights in news must be carefully balanced. However, unlike the corresponding German rule, the proposed right comes without any limitation.

An exclusive right to control the exploitation of press contents online will in our opinion not only negatively affect freedom of expression and information, but also distort competition in the emerging European information market. By raising the barrier of entry to the online news market, the proposed provision will ultimately privilege large incumbent (US-based) online news providers, such as Google, for whom the enhanced transaction costs of the proposed new right might not be prohibitive. Small (European) entities and startups will be prevented from entering this emerging market.

As indicated by its precedents in Germany and Spain, such a rule is also unlikely to achieve its intended purpose., i.e. actually to support the ailing newspaper industry. If the aim of the proposal is to promote licensing arrangements between newspaper publishers and content providers concerning the (re)use of journalistic content, then it is unnecessary since most if not all newspaper publishers already enjoy copyright protection – based on transfers or licences of the authors' rights of the journalists.

In sum, we believe the proposed measure will not in any way benefit the newspaper industry and will detract from other potentially more effective ways of promoting high-quality newspaper journalism and newspaper publishing, such as tax privileges.

'Reprobel article' (art. 12 DSM Directive)

Member States implementing limitations on the reproduction right under art.5(2)(a) and art.5(2)(b) of the Information Society Directive must ensure that right holders receive "fair compensation" for such reproduction. In its judgment in (C-572/13) *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, the Court of Justice held that, in the case of authorial works, Member States must ensure that such "fair compensation" is payable to authors or to their successors in title. As a result, it is not currently permissible for a Member State to establish a system under which a proportion of this compensation is payable to the publisher of the work. Art. 12 of the proposed DSM Directive effectively seeks to reverse the Court's Judgment in *Reprobel* by providing that: "Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses

of the work made under an exception or limitation to the transferred or licensed right.”

It is difficult to see how art.12 will promote the development of a fully harmonised set of copyright rules. In accordance with Repobel, the full amount of “fair compensation” relating to the reproduction of authorial works under Arts 5(2)(a) and 5(2)(b) must currently be paid to the authors of those works. If art.12 were to be adopted, Member States would be able to introduce divergent regimes on the sharing of fair compensation between author and publisher.

Furthermore, our Society is concerned that the implementation of such a provision would be harmful to the interests of individual creators. The total sum of “fair compensation” payable under art. 5(2)(a) and (b) is determined in accordance with the “harm” suffered by right holders. If art. 12 is adopted, there is unlikely to be an increase in this total sum of compensation. As a result, if a state were to take advantage of the freedom to allocate a proportion of the compensation to publishers, the amount available for human creators will be correspondingly reduced. In our Opinion of 5 September 2015, we wrote that “[c]opyright law is linked to the freedom of the authors to create and should remunerate the creative authors in first instance. Therefore, copyright law should not grant rights ab initio to persons other than the individual creators. This principle (the “author principle”) applies to the exclusive rights within the copyright bundle. It also applies to any right to remuneration provided by law to compensate for the exempted uses of copyright-protected works.” The automatic allocation of a proportion of an author’s compensation to his or her publisher would violate this “author principle”.

Platform liability (art. 13 DSM Directive)

Our Society is puzzled by the rather ambiguous text of Article 13 of the proposed DSM Directive, and unsure of its application. Furthermore, we do not understand how the proposed text relates to the existing provisions of the E-Commerce Directive (Directive 2000/31/EC), notably art. 14 (safe harbour for hosting service providers) and art. 15 (no general obligation to monitor). What is particularly unclear to us, and would require clarification in the legislative process, is whether proposed art. 13 applies merely to cases mentioned in recital 38, in other words, where information society service providers engage in acts “going beyond the mere provision of physical facilities and performing an act of communication to the public”. In such cases of primary copyright infringement, in our opinion, the rights and remedies of the present *acquis* are generally sufficient for right holders to enforce their rights against these content providers, or to negotiate licensing deals that fairly remunerate authors, performers and other rights holders.

As with art. 11, we are concerned that proposed art. 13 will distort competition in the emerging European information market. The obligation for content platforms to implement “effective content recognition technologies” will privilege large incumbent platforms that have already successfully implemented such measures (such as YouTube), whereas entry to this market for newcomers may become all but impossible. The unforeseen effect of the provision may, therefore, be locking in YouTube’s dominance in the EU.

Fair remuneration in contracts of authors and performers (DSM Directive, art. 14-15)

While various studies commissioned by the European Commission have demonstrated that there is a

real and urgent need to improve the negotiating position of authors and performers – usually the weaker parties in contractual dealings with media companies and other users – and to protect creators against overbroad transfers of rights, inequitable remuneration and other unfair practices, we are afraid that the proposed provisions – the transparency obligation and the ‘best-seller’ clause – will remain largely ineffective. Both are mechanisms that can be employed only after a contract has been concluded. As authors are rarely in a position to litigate against their publishers or producers, for lack of financial means or for fear of being blacklisted, such provisions may be of limited use. In some cases, unwaivable remuneration rights and/or provisions that limit the freedom to transfer rights in future works or uses might provide more effective protection for creators.

In our view, more comprehensive and effective forms of protection are needed in order to provide authors and performers with sufficient independence in contractual negotiations and to shield them against those who exploit their creations. Authors and performers should be given the proper means to claim fair remuneration, modify or opt out of unfair contracts and control the benefits yielded by all exploitations of their works.

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