



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 30 August 2016
sj.a(2016)5374919

*Opinion of the Legal Service**

**NOTE TO MR ROBERTO VIOLA
DIRECTOR-GENERAL, DG CONNECT**

Subject: Copyright Reform

Ref.: Fast-Track Consultation ISC/2016/04250 from DG CNECT

I. DRAFT DIRECTIVE

The Legal Service's comments focus on the text of the Draft Directive as this fast track consultation is the first occasion on which the Legal Service has seen a single text of the Draft Directive, although the Legal Service has made a number of comments on various parts of the text which were circulated prior to the ISC.

The stated aim of the Draft Directive is to ensure a functioning digital single market by addressing the following areas for action:

1. **Adapting certain of the existing Union law exceptions and limitations** in the copyright acquis (notably Directive 2001/29 and Directive 96/9) to the rights harmonised by EU law by introducing:

- a mandatory exception from the right of reproduction (Directive 2001/29) and extraction (Directive 96/9) for the benefit of certain research organisations for acts of **text and data mining** in the interest of legal certainty;

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
Office: BERL - Tel. direct line +32 229

*Commission document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

- a **mandatory exception for teaching** with cross border effect. In the case of the teaching exception, despite its mandatory nature, MS need not apply the exception if there are sufficient licences in place in that MS;
 - a new **exception to the right of reproduction for acts of preservation for the benefit of cultural heritage institutions**;
2. Provisions on **video on demand**
 3. Provisions on **out of commerce works** where a licensing presumption operates for the benefit of agreements concluded between collecting societies and cultural heritage institutions in relation to authors' works in their collection;
 4. Introduction of **rules on remuneration of authors and performers**: in contracts and in particular:
 - providing for transparency and information obligations; and
 - a contract adjustment mechanism whereby both licences and transfer of rights (assignments, cessation) previously entered into will be renegotiated
 5. Introduction of a **new right** for a new class of legal person, **news publisher**, and of new rules allowing publishers access to fair compensation under certain exceptions or limitations in national law in order to overcome the effect of the *Reprobel* judgment;
 6. The **value gap** - i.e., addressing the role of online platforms in the context of their role in providing access to copyright protected works uploaded by third parties. .

Given the scope of this Draft Directive, the Legal Service has considered the compatibility of the matters listed above in the light of the choice of legal base and the established principles of the *acquis*.

LEGAL BASE

The Draft Directive should meet the requirements for the choice of legal basis¹ and instrument in the light of the Court's case law. This requires measures adopted on the basis of Article 114 TFEU to genuinely improve the conditions for the establishment and functioning of the internal market. The Court has set a high threshold, since it found that a mere finding of disparities between national rules and the abstract risk of infringements

¹ See in particular Case C- 58/08 *Vodafone*, Paras 32-34

of fundamental freedoms or distortion of competition is not sufficient to justify measures on the basis of Article 114 TFEU. Recourse to it can be had:

- if it is shown that there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market;
- if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be shown to be likely and the measure in question must be designed to prevent them;
- where an act based on Article 114 TFEU has already removed an obstacle to trade in the area that it harmonises, the Union legislator may adapt that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty².

On this basis, when Article 114 TFEU is chosen as a legal basis in an area which has been largely harmonized such as copyright, the clear aim must be to complete the internal market by removing *remaining* differences. The policy choices must be consistent and compatible with that aim and at the same time meet the principles of proportionality and subsidiarity.

The current draft falls short of the threshold for recourse to Article 114 TFEU at least in the case of the provisions on Teaching (Article 4), Out of Commerce works (Article 7) and Rights in Publications (Article 12), as set out in more detail below.

ESTABLISHED PRINCIPLES OF THE ACQUIS

Whilst the currently text largely respects the legislative framework of Union copyright law as interpreted by the Court, in some instances, issues raised by the Legal Service from the point of view of insufficient motivation for recourse to Article 114 TFEU also touch upon issues part of the copyright law framework. Therefore, and also to frame any possible adjustments as a result of the ISC, the Legal Service considers it useful to recall the binding framework within which Union copyright law must remain.

Union copyright law is spread over several directives and has been subject to extensive interpretation by the Court. The rights of the principal rightholders and existing exceptions and limitations have already been harmonized at Union level in the copyright *acquis*.

² Case C- 58/08 *Vodafone*, Paras 32-34

The Draft Directive seeks to merely adapt, extend and only partially amend Union copyright law, and therefore it will continue to be based on the established principles of Union copyright law. For this reason also, in introducing any new measure to the copyright acquis, those principles must be adhered to.

These principles include:

- Unity and coherence of the acquis³,
- Wide exercise of Union competence limiting the scope for Member States to determine in an un-harmonized manner the limits of legislative options left open to them and resulting in potential inconsistencies of application⁴;
- The exclusive rights at issue are preventive in nature and allow the author to intervene between possible users of his work and the reproduction (or communication to the public) which users might contemplate making, in order to prohibit such use. Where applicable, the rightholder enjoys an exclusive right to decide whether and, where applicable, when and how he will authorise or prohibit the reproduction of his work or its communication to the public, thus necessity of an express and prior consent of the author⁵;
- Copyright is a fundamental right⁶ which must be balanced against other fundamental rights where necessary⁷;
- Exhaustive nature of exceptions and limitations under Union law;
- Effective application of exceptions and limitations for users⁸;
- Where an exception or limitation applies, there is no legal scope for licensing⁹;
- Consistency, so far as possible, with the Union's international obligations (TRIPS, Berne, WCT and WPPT) especially with respect to the scope of rights agreed at international level and in addition the rights of third country nationals;
- Respect for acquired rights and acts concluded prior to entry into force save where there are express provisions which provide for transitional periods.

SPECIFIC COMMENTS ON THE DRAFT DIRECTIVE

The current draft subject to the Inter Service Consultation contains a number of issues of a legal nature which require addressing including, in a few instances, to in order to clarify the coherence with and of the political choice taken.

³ Joined Cases C-431/09 and C-432/09, *Airfield*, para 44

⁴ Case C-510/10 *TV Denmark*, Para 36

⁵ Case C-5/08, *Infopaq*, Paras 33 and 57

⁶ Case C-70/10 *Scarlett Extended*, Para 43

⁷ Case C-70/10 *Scarlett Extended*, Paras 43 and following

⁸ Case C-510/10 *TV Denmark*

⁹ Joined Cases C-457/11 to C-460/11 *VG Wort*, paras 36 following

We set these out below **in the order of their appearance in the operative part** of document, referring back, where necessary, to the recitals.

In addition, we made a number of track changes in the text itself seeking to address some of the issues below as well as including track changes from a legal revision point of view, and these form integral part of the Legal Service's reply.

DEFINITIONS

1. Research Organisation

The definition currently proposed appears to largely mirror 2006 Community Framework for Research State Aid¹⁰. This framework has, however, since been reviewed in 2014 and the definition of research organisation has been fine-tuned in the light of experience and in particular the necessity to reinvest all the profits in scientific research has been reviewed. The possibility of separation of accounts between a commercial and a non-commercial part of the organisation has also been introduced.

- Accordingly, the Legal Service recommends, also for coherence of approach, adapting the definition to the 2014 State Aid Framework for state aid for research and development and innovation¹¹, including in the relevant recitals (in particular recital 11). For ease of reference the definition used in this Framework is:

"research and knowledge dissemination organisation' or 'research organisation' means an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities, the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, for example in

¹⁰ Community framework for state aid for research and development and innovation, OJ C 323 of 30.12.2006 p. 1

¹¹ Document C(2014) 3282 of 21.5. 2014

the quality of shareholders or members, may not enjoy a preferential access to the results generated by it."

This wording can be adapted, in particular taking into account the fact that certain notions are defined in the framework and will not necessarily be defined in the draft proposal.

2. News publication

There is a discrepancy between the definition and the corresponding recital 34. Whilst the definition – rightly in the Legal Service's view – focuses on "*literary works of a journalistic nature....having the purpose of providing information to the general public related to new or other general interest topics*", recital 34 includes the notion of "*entertainment*" which is both very wide and vague. Importantly, including the notion of "*entertainment*" substantially weakens the motivation for the exemption, as set out in recital 32, i.e. to support press publication on account of their "*fundamental contribution to public debate*". In addition it is unclear why, if entertainment publications are included "*scientific*" ones should not be, this incoherence further weakening the motivation.

➤ The Legal Service strongly recommends deletion of "*entertainment*" in recital 34.

OPERATIONAL PROVISIONS

1. Text and Data Mining

The current provision of Article 3, when read in conjunction with recital 7, does not appear to cover the situation in which items are available on the internet and the user has no way to ascertain whether it is available legitimately.

➤ In order to increase the effectiveness of the new exception, the Legal Service suggests also covering the situation in which material is freely available on the internet but where there can be doubt as to whether it is lawfully available in Article 3 and recitals 7 and following.

2. Teaching

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

➤ [Redacted text block]

3. Out of Commerce

[Large redacted text block]

In respect of Article 7, the Legal Service would recall that the Court is currently examining a reference concerning a national system for out of commerce works in Case C-301/15 *Soulier and Doko*¹³. While the legal issues are not exactly the same in the case

¹² Cf. e.g. joined Cases C-431/09 and C-432/09, *Airfield*, para 44

¹³ Pending.; AG Wathelet's opinion issued on 7 July 2016

of the EU provisions at issue there, it cannot be excluded that the forthcoming judgment may have an impact on this aspect of the draft proposal.

4. Rights in publications

Article 11(1)

The current text foresees for publishers to obtain the rights provided for in Articles 2 and 3/2) of Directive 2001/29/EC.

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

¹⁴ See, for instance, C-596/13 P Moravia Gas §32

[Redacted]

Article 19 – protection of personal Data

This clause is unnecessary as the EU data protection framework applies in any event. The Legal Service Recommends (i) deletion of this article, however (ii) adding a new recital recalling the Data Protection rules. In this context, please note that even still applicable (until May 2018), Directive 95/46 has been replaced by Regulation 2016/679. In any new legislative proposal, reference should therefore now be made to Regulation 2016/679.

II. THE DRAFT REGULATION

[Redacted]

[Redacted]

[Redacted]

Vittorio DI BUCCI

Annexes: Track changed versions of the draft Directive and draft Regulation

c.c.: Pauline ROUCH (CAB JUNCKER);
Claire BURY, [Redacted]
[Redacted]
[Redacted] (LS)