

Position Paper

UEAPME¹ position on the public consultation on the review of the EU copyright rules

1. Introduction

UEAPME welcomes the public consultation on the review of the EU copyright rules. It is undisputed that there is a huge need to reform the current copyright rules in the EU. The laws in place are not up-to-date anymore, because they do not take the possibilities on the internet and the technical developments into account. A reform of the copyright is also necessary to better address the increasing flow of digital content across borders within the EU and to tackle cross border limitation within the internal market. As the interests of the copyright stakeholders are diverse and very often even contrary, it is important to involve all types of stakeholders from a very early stage in the process. Doing an open consultation on the review of EU copyrights is already a good start in collecting the various opinions.

2. Specific comments on copyrights

2.1. Rights and functioning of the Single Market

- **Accessibility of online content from anywhere in the European Union**

Accessing online content within the EU should not be territorially limited, as long as the copyright is protected and the levies for the use have been paid. For the functioning of an internal market, the products also need to be interoperable (e.g. digital content bought in one country from one provider must be able to be used in another country and/ or with another provider).

Harmonising VAT on the different products of copyrights within the EU would increase accessibility of online content and help to reduce anti-competitive behaviour.

- **Need for more clarity as regards the scope of what needs to be authorised in digital transmission**

Currently users very often do not see clearly if the content they are using online is available legally. It is important to have more transparency for the legal use of digital rights. Sometimes it is even difficult for legal experts to state clearly whether the use is still legal or if it might lie outside the legally boundary due to some territorial limits. A clarification of the territorial scope of the “making available” right would have a positive effect on the recognition of rights, remuneration and enforcement of rights.

Under current law two rights apply to a digital transmission: the reproduction right and the making available right. This separation of rights is already difficult to grasp for the regular user/ SME. If those two rights are held by different persons/ entities the confusion is certainly complete. In this aspect - as for every legislative act- it is important, to be as simple and clear as possible.

¹ UEAPME subscribes to the European Commission’s Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

The provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, should not be subject to the authorisation of the right holder. Hyperlinks are indispensable for the functioning of the internet. In many cases it is almost impossible for the user to know whether the works on the internet are simply not marked, or orphan works (a copyright protected work for which rights holders are positively indeterminate or uncontactable). The same applies for the viewing of a web-page where this implies the temporary reproduction of work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer. Therefore, it needs to be avoided that the user of a hyperlink is held responsible.

- **Registration of works**

UEAPME supports the creation of an optional registration system at EU level because it would help in the identification and licensing of works and other subject matter. It would specially be beneficial if the rights had been transferred several times and it is difficult to determine the current right holder. This would also serve those people keen on finding out who is the current right holder of a particular work. Keeping in mind that you might have, e.g. for photos, many similar motives, it would be very helpful if the right owner could be easily located. The registration of course would need to be easy (very few administrative burdens) and very low in costs. Such a system would increase the protection of intellectual property rights. It would lead to more transparency in a very mixed up market. The incentive of the right owner to register his work would be that he is the legitimate rights owner. Registration should not be a condition for copyrights to take place.

- **Term of protection**

The current terms of copyright protection are not any more appropriate in the digital environment. They were designed for permanent works of cultural value. The difference in the periods of protection between copyright and protection of intellectual property rights are quite huge and the actual classification of a work in one of these two categories is getting more and more difficult. The periods for protection in the area of copyright very often are longer than the economic lifespan of those works. The extension of the list of orphan works is another result of those long periods of protection.

2.2. Limitations and exceptions on the Single Market

The current territoriality of limitations and exceptions constitute problems for cross border cases. The fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States creates problems especially on the internet. Sometimes complying with the law of one Member States excludes the compliance with another Member States, so that legal threats against a provider on the internet from other Member States arise easily. The legal uncertainty in this area can only be tackled by full harmonisation.

Further, there is a need for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions. The catalogue of limitations and exceptions has not been significantly modified since the directive 2001/29/EG² apart from small additions by the directive 2012/28/EG³, because no political consensus could be reached on those points. Exceptions to be added to the existing catalogue should be the use of works in an entrepreneurial environment. For example, it should be allowed to store reports from the media about your own enterprise in an archive of your own enterprise in case this would be needed for a later legal dispute.

If during the review of the EU copyrights rules no consensus can be reached on reviewing the current limitations and exceptions than another way forward could be the introduction of a general clause similar to the fair-Use-

² DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

³ DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 on certain permitted uses of orphan works

Principle of § 107 Copyright law of the US (limitation on exclusive rights: fair use).

The national divergences on limitations and exceptions established at national level, which are having cross-border effects, can only be avoided by full harmonisation.

2.3. Private copying and reprography

The necessity to clarify at the EU level the scope and application of the private copying and reprography exceptions in the digital environment is obvious. It is reflected in the increased demand for preliminary rulings which are submitted to the European Court of Justice. Especially for cross border situations there are a lot of open questions.

Digital copies made by end users for private purposes in the context of a service that has been licensed by rights holders should not be subject to private copying levies. The digital environment has challenged all the fundamental rules and methods of distribution of copyright protected material. The old provisions of private copying approach the problem mainly from the time of C-cassettes and VHS. Advances in technology have made it possible to buy copy righted material online (i.e. by downloading music) against a payment. This is where the end user pays the copyright holder. In order to favor the development of new and innovative business models in the digital single market, based on licensing agreements between service providers and right holders it is recommended to clarify that copies that are made by end users for private purposes - in the context of a service that has been licensed by right holders - should not trigger the application of levies. An opposite approach would pave the way for double payments. Users cannot be expected to show understanding for such double payments.

Making levies visible on the invoices for products subject to levies would certainly be an added value. Organisations and people obliged to pay levies would find it easier to pass on the levy in the price if there were an obligation to make the levy visible to the final customer. Such a measure would also make the system more transparent and raise awareness among consumers. Moreover, evading the payment of the levy would in this way be made more difficult, and collecting societies might find it easier to collect the correct amount of levies from retailers.

A problem in the current functioning of the levy system is that it is quite difficult to define a reasonable contribution. This applies to the contribution from the user as well as for the distribution of the levies within the collective rights management. Further legal clarification in this respect is urgently needed.

2.4. Respect for rights

The constant conflict between copyrights and property rights in the current system however needs to be solved.

2.5. A single EU copyright title

UEAPME would welcome a single EU copyright title, even though this would be a long term project.

2.6. Other issues

It is of the utmost importance to clarify the ownership of copyrights during an employment. The rights to a work done under employment should automatically belong to the employer, unless agreed otherwise. Now a prudent practice is to have every employee to sign an agreement of transfer of all copyrights to the employer during the employment. If a business which works in an IPR intensive field has forgot to do so they might face a lot of trouble when they try to sell their products etc. when the right holder is the employee or an ex-employee.

The civil law enforcement with regard to the internet as stated in Article 12 till 14 of the Directive 2000/31/EC⁴ has

⁴ DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

found a good balance between responsibility of the provider and the interests of a right holder. This system should be continued in an enforcement and/ or info-directive.

3. Conclusion

The clear and simple conclusion is that there is definitely a need to reform the copyright rules on EU level. Keeping in mind the diverse interests of the stakeholders, we are expecting a long and difficult way in front of us. Therefore, it is of utmost important to involve the different interests by bringing the various stakeholders together from the start of the review of the current copyright rules.

On the content, there is a need to clarify the legal situation. It needs to be easier to see whether a product is copyright protected, who is the current right owner and to who to address if a third party wants to use this product. A solution also needs to be found for cross border scenario, which currently even pose great difficulties to professional lawyer in assessing the legality of a specific conduct. The current limitation's and exceptions need to be updated in line with current technical developments. The legal difference between copyright and intellectual property needs to be clarified. In particular for online products, it is nowadays sometimes almost impossible to draw the line between copyright and intellectual property right, if you are not an IP lawyer. The revised copyright rules need to be clear and unambiguous and any new instruments introduced on EU level, e.g. registry or a single EU copyright title, needs to come along with clear rules, low costs and a minimum of administrative burdens. A good balance between responsibility of the provider and the interests of a right holder needs to be the underlying principle of any new EU rule on copyright. A review of the copyrights rules in the EU should eliminate legal and political disputes among the various interests groups in the long run as much as possible.

Brussels, March 2014

For further information on this position paper, please contact:

Sabine Erkens

Legal advisor

s.erkens@ueapme.com