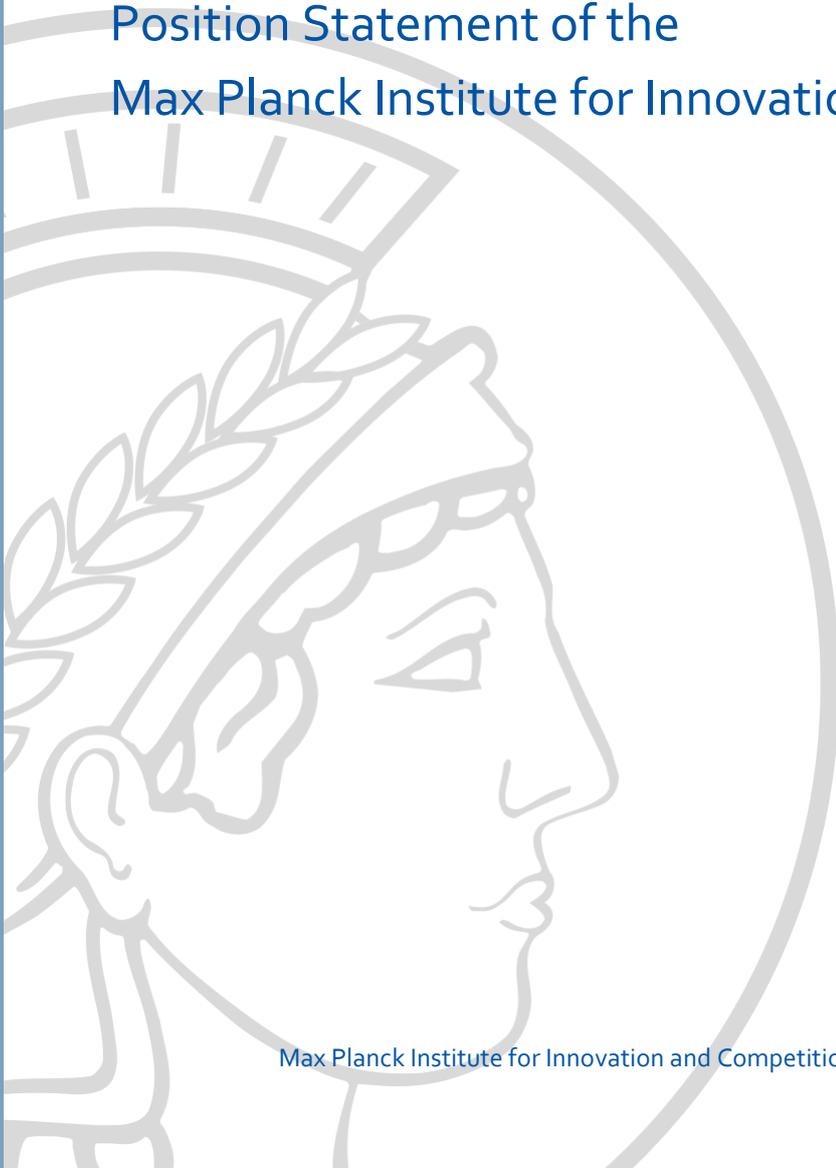


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Reto M. Hilty  
Valentina Moscon  
*Editors*

# Modernisation of the EU Copyright Rules

Position Statement of the  
Max Planck Institute for Innovation and Competition





Reto M. Hilty • Valentina Moscon  
(Editors)

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*Editors*

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## Foreword

On 14 September 2016 the European Commission published a package of proposals aimed at the modernisation of copyright within the digital single market. The full suite of proposals (hereinafter “copyright package”) as well as the Commission’s background documents can be accessed via [ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules](http://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules).

This copyright package is of particular interest to the Max Planck Institute for Innovation and Competition (hereinafter the Institute), which has been committed since its founding in 1966 to the analysis and development of intellectual property and competition law on the basis of established scientific principles. The Institute regularly advises governmental bodies and other organisations taking an international approach and placing emphasis on the comparative analysis of law as well as economic and technological aspects of legal development.

The Institute has responded to all of the proposals included in the copyright package in a Position Statement. It includes several parts and chapters written by a project team composed of Professor Dr Reto M. Hilty (lead), Dr Valentina Moscon (coordination), Andrea Bauer, Dr Silke von Lewinski, Ricarda Lotte, Tao Li, Heiko Richter, Moritz Sutterer. This team examined in different working groups whether the suggested provisions are adequate for reaching their intended objectives. In response to certain critical evaluations, a number of alternatives have been suggested. Each part and chapter has been published on the Institute’s website in the course of recent months. These have been brought together in the present e-book.

The comments included in this Position Statement follow positions already taken by the Institute on related subject-matter, in particular the Position Statement on the “Public consultation on the role of publishers in the copyright value chain” from 2016, and the Position Statement concerning the “Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled” from 2015.

We would like to express our sincere thanks to Peter Weber and Marcus Noack for their efforts in the publication of this e-book.

Munich, September 2017

The Editors

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## **PART A**

### **General Remarks**

[Version 1.2]

*Reto M. Hilty, Valentina Moscon*

#### **Executive summary**

European Commission's established objectives:

- Functioning of the digital single market (Article 114 TFEU);
- European social and cultural development;
- Eliminating territorial fragmentation;
- Favouring access to and circulation of content across Europe

Major criticisms of the European Commission's approach:

- Unjustified layering of new different legislative instruments (Regulations and Directives);
- Gaps and inconsistencies among single proposals and between proposals and *acquis*;
- Misalignments with respect to other legal areas that are relevant to copyright law (e.g. Directive 2010/31/EU);
- Lack of causal links between proposals and pursued objectives.

Recommended approach:

- Establishing legal measures pursuing – in the medium and long term – a clear vision of EU copyright law.
- Simplifying legislative measures on copyright law, possibly replacing existing ones with a single new measure, thereby avoiding overlaps and inconsistencies in the EU legal framework.
- As a minimum requirement, the copyright package should include all mandatory exceptions and limitations – existing and new ones – in a single Directive.

## I. Context and the Commission's objectives

- 1 The European Union has made considerable efforts to achieve an approximation of the laws of Member States in the field of copyright. A number of Directives ([http://ec.europa.eu/internal\\_market/copyright/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/index_en.htm)) define European copyright law and several decisions of the CJEU have been called upon to rule on the interpretation of these Directives. But the creation of a European copyright law has suffered from two main limitations: a) the different national implementations of European Directives; b) the national exercise of copyright that continues to be based on a territorial restriction linked to the geographical boundaries of sovereign states.
- 2 Facing the abovementioned problems and addressing them in a fundamental way the EU has cultivated the idea of a **unitary copyright title**. But more recently the Commission has sought to follow **a more cautious path**. The initial approach of overcoming existing copyright barriers thoroughly was replaced by one that largely leaves intact the national dimension of the EU copyright right system. The European Commission aims in the meantime “to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU”.
- 3 For this purpose **three general objectives** have been identified: a) to allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audio-visual works and cultural heritage; b) to facilitate digital uses of protected content for education, research and preservation in the digital single market; c) to ensure a well-functioning marketplace for copyright where rightholders may set licensing terms and negotiate on a fair basis with those distributing their content.

## II. Summary table of the proposals included in the copyright package

- 4 First, it seems useful to summarise the legislative proposals included in the copyright package. The table below shows 1) subject-matter covered by the proposals; 2) amendments of the existing Directives; 3) Directives on which the proposals under discussion are based, and which are relevant for the implementation of these proposals. Recent non-copyright-related legislative initiatives – such as the proposed Regulation on geo-blocking (Prop. Reg. COM (2016) 289 final) and the approved Regulation on cross-border portability of online content services in the internal market (Reg. (EU) 2017/1128 of 14 June 2017) – should be taken into consideration in this context.
- 5 Specific overlaps and intersections between the proposed Directives and Regulations on the one hand, and between them and the copyright *acquis* on

the other, will be considered in the respective parts of the Position Statement on the copyright package.

### European Commission's Proposals and Links

<b>Proposals</b>	<b>Covered Subject-Matter</b>	<b>Amended Directives</b>	<b>Concerned Directives of the <i>Acquis</i></b>
<b>Prop. Dir. COM (2016) 593 final</b>	<ul style="list-style-type: none"> <li>- Exceptions and Limitations</li> <li>- Copyright Contract Law</li> <li>- Internet Service Providers</li> <li>- Rights in Publications</li> </ul>	Dir. 2001/29/EC (InfoSoc); Dir. 96/9/EC (Database)	Dir. 2014/26/EU (Collective management)  Dir. 2012/28/EU (Orphan works)  Dir. 2010/31/EU (E-Commerce)
<b>Prop. Reg. COM (2016) 594 final</b>	Online transmissions of broadcasting organisations and retransmissions of television and radio programmes		Dir. 2010/13/EU (Audiovisual)  Dir. 2009/24/EC (Software)  Dir. 2006/115/EC (Rental)
<b>Prop. Reg. COM (2016) 595 final</b>	Exceptions and Limitations (Marrakesh Treaty)	Dir. 2001/29/EC (InfoSoc)	Dir. 2004/48/EC (Enforcement)
<b>Prop. Dir. COM (2016) 596 final</b>	Exceptions and Limitations (Marrakesh Treaty)	Dir. 2001/29/EC (InfoSoc)	Dir. 2001/29/EC (InfoSoc)  Dir. 96/9/EC (Database)  Dir. 93/83/EEC (Satellite-Cable)

### III. Additional legislative layers

- 6 The Commission has come up with multiple proposals, thereby creating **additional** – but largely **unnecessary** – **legislative layers**. In fact, several proposals regulating the same subject-matter (for example, exceptions and limitations) superimpose an already problematic – at times also incoherent – regulatory framework. This legislative approach – if not corrected during the legislative process – will worsen the current patchwork causing further **significant inconsistencies**. Two significant examples, however, will be mentioned here:
- **Internet Service Providers:** As it stands Article 13 of the proposed Directive (Prop. Dir. COM(2016) 593 final) contradicts Article 15 of Directive 2000/31/EC (E-Commerce Directive).
  - **Press Publishers’ Neighbouring Right:** As it stands Article 11 of the proposed Directive (Prop. Dir. COM(2016) 593 final) is not aligned with Article 3 Directive 2001/29/EC (InfoSoc Directive); Article 7 Directive 1996/9/EC (Database Directive); Article 12-14 of the E-Commerce Directive.
- 7 The legislative approach adopted by the Commission is not based on a systematic re-evaluation of European copyright. Consequently, important aspects of copyright are regulated in a **non-systematic way**. A clear example concerns again exceptions and limitations. On the one hand, it is welcome the Commission’s intention to introduce and make mandatory the proposed exceptions on distance education, text and data mining, and preservation of cultural heritage in the proposed copyright Directive (COM(2016) 593 final). On the other hand, it is not understandable why many other exceptions contained in the InfoSoc Directive remain optional, such as those on the purposes of quotation and criticism, parody and personal use. Moreover, the proposed Directive is intended to apply in parallel with the existing, partly overlapping exceptions of Article 5 of the InfoSoc Directive. A clear example in this regard is Article 4 COM(2016) 593 final, “Use of works and other subject-matter in digital and cross-border teaching activities”, in relation to Article 5(3) InfoSoc Directive. The proposed provision does not replace the existing one, which – as it stands – remains valid in the analogue environment (on this specific issue, see Part B, Chapter 2 –Digital and cross-border teaching activities). Therewith, the Commission’s proposals make the **legal situation increasingly complicated**, and one can hardly imagine that those affected by these different rules would be able to effectively keep an overview. Instead, the difficulty in identifying which legislation applies to a specific case causes **legal uncertainty**.

#### IV. Fragmentation of the legal framework

The lack of coherence and legal certainty is enhanced by including in the copyright package both **Regulations and Directives**, partly for the same subject-matter, without a visible justification. The choice of the legislative instrument will be taken into consideration in section IX of this document and more in detail in the relevant parts of this Position Statement. 8

From a methodological point of view, general problems arise when a Regulation (partly) overrules a Directive. In this case, even assuming that 9

- national law – possibly implementing a Directive – is automatically abolished by a subsequent Regulation (based on the principles according to which a Regulation imposes upon national courts the disapplication of national law when it is in contrast to the Regulation itself);
- the subsequent Regulation repeals a prior Directive according to the principle of *lex posterior derogat priori*,

the regulatory framework remains **fragmented** if a Directive and a Regulation covering the same subject-matter coexist. Therewith, if the recipients of European law provisions have to refer to different legislative levels (Regulations and national law implementing Directives) governing the same cases or subject-matter, the complexity of legal framework unnecessarily increases.

This issue emerges, for example, in the case of the proposed Regulation on “Online transmissions of broadcasting organisations and retransmissions of television and radio programmes” (COM(2016) 594), with respect to copyright *acquis* including the Cable and Satellite Directive (see Part H of this Position Statement – “Content circulation in Europe”). 10

Of course the adoption of a Regulation does not in itself cause fragmentation of the European legal framework. Rather, Regulations, when properly confined in the scope and correctly located from a systematic point of view, can facilitate the creation of the digital single market. 11

#### V. Imprecisions of the legislative technique

The proposals under review lack conceptualisation as well as semantic and linguistic consistency. Some examples are listed below, but the proposals will be more comprehensively examined in the different parts of this Position Statement. 12

## 1. The notion of rightholder

- 13 The European legislature has not harmonised the concepts of **copyright ownership and authorship** and the related notion of rightholder. The consequences of this lack of clarity have emerged again and again, recently, for example, in the *Reprobel* case (C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL, Epson Europe BV intervening*). By interpreting the InfoSoc Directive and the term “rightholder” as synonymous for the original owner of the right, the CJEU excluded publishers – the actual (but derivative) rightholders in the majority of cases – from the right to a share of “fair compensation”. This concept is by no means clarified by the proposed Art. 12 of COM(2016) 593 final. The issue will be examined in detail in part F of the Position Statement.

## 2. Exceptions, limitations and fair compensation

- 14 Another issue of fundamental relevance is the definition of the exceptions and limitations to copyright and related rights (see, e.g. Article 5 of the InfoSoc Directive) as well as of fair compensation, equitable remuneration and remuneration.
- 15 The distinction between exceptions and limitations is incorporated in the EU copyright *acquis*, but the nature and significance of this distinction has never been clarified by the European legislator, even though the CJEU draws a contrast between exceptions and limitations (see cases C-457/11, *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and Others*; C-458/11, *Canon Deutschland GmbH*; C-459/11, *Fujitsu Technology Solutions GmbH and C-460/11, Hewlett-Packard GmbH v Verwertungsgesellschaft Wort (VG Wort)*)).
- 16 This differentiation, however, does not seem to be clarified in the proposed copyright package. Articles 3 to 5 of COM(2016) 593 final introduce new mandatory permitted uses, but their qualification as **exception or limitation** seems **unclear**. Specifically, Articles 3 (Text and Data Mining) and 5 (Preservation of Cultural Heritage) speak of exceptions. Article 4 (Use of works and other subject-matter in digital and cross-border teaching activities), in contrast, seems to allow Member States to introduce permitted uses both in the form of exception and limitation.
- 17 Further, the text of Proposal COM(2016) 593 final does not appropriately distinguish between the concept of fair compensation (used in the InfoSoc Directive) and (equitable) remuneration. In this sense, it is important to note that the EU *acquis* attributes to the term fair compensation a specific meaning, which is different from the one of (equitable) remuneration. The term (equitable) remuneration was used in Directive 2006/115/EC (Rental Directive) and, according to the CJEU, a (equitable) remuneration should be determined based on the value of use of a work in financial transactions (see, cases C- 245/00, *Stichting ter Exploitatie van Naburige Rechten*

(*SENA*) v *Nederlandse Omroep Stichting (NOS)*; C-271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*). This distinguishes it from fair compensation, which might also be a flat rate, as long as it is associated with the “harm” suffered by rightholders (C-467/08, *Padawan SL v SGAE*). Therefore, the distinction involves a different method of quantification.

With regard to Proposal COM(2016) 593 final, it is unclear a) whether the Directive Proposal, and in particular Articles 3 to 5, stick with the classification of exception and limitation according to the InfoSoc Directive, as interpreted by the CJEU; b) what the relationship is between this qualification and the obligation (or the freedom) of Member States to allow fair compensation or (equitable) remuneration; c) in what cases Member States can allow (equitable) remuneration instead of fair compensation. 18

Answering these questions is particularly important in relation to **Article 12 of the Directive Proposal**, entitled “**Claims to a fair compensation**” as well as with regard to Articles 3 to 6 of Proposal COM(2016) 593 final. First, it is worth noting that in disagreement with the mentioned heading, the text of Article 12 as well as Recitals 13 and 36 of proposed Directive use only the term compensation and not fair compensation. The main interpretative issues, however, emerge from Recital 36 (of Proposal COM(2016) 593 final). The wording of this recital is ambiguous, especially considering that the European Commission seems to be biased. On the one hand it reflects a particular notion of fair compensation, which is quantified on the basis of the “harm” suffered by rightholders: “[...] *there are systems in place to compensate for the harm caused by an exception or limitation* [...]” (see also Recital 13 of Proposal COM(2016) 593 final). On the other hand, the European Commission seems to recognise and accept the systems in place in most of the Member States, applying a statutory remuneration system based on different quantification criteria ([...] *publishers [...] may in some instances be deprived of revenues where such works are used under exceptions or limitations [...]. In a number of Member States compensation for uses under those exceptions is shared between authors and publishers [...]*). 19

### 3. Communication to the public and making available to the public

Another aspect that is neglected by the proposal under review is the definition of the scope of the rights to communication to the public and making available to the public, particularly in relation to hyperlinking. The CJEU has recently offered important guidance on the interpretation of these rights (see most recently Case C-610/15 *Stichting Brein v Ziggo BV, XS4ALL Internet BV*; Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*). But this domain should not be left to the CJEU to be developed without sufficient foundation in EU copyright legislation. 20

- 21 A clearer notion of these rights would be essential for defining the scope of the neighbouring right that the Commission proposes in favour of press publishers in Article 11 (Protection of press publications concerning digital uses) of Proposal COM(2016) 593 final. Although Article 11 needs to be assessed critically anyway (see part E), it would be unavoidable to clarify what acts of **hyperlinking** do constitute communication to the public.
- 22 Furthermore, Proposal COM(2016) 593 final refers to the notion of “communication to the public” in **Recital 38** on the responsibility of “information society service providers”, as defined in Article 13 of the proposal. It is important to note here, however, that the recital appears to suggest that providers storing protected subject-matter and providing access to the public, unless it is eligible for the hosting safe harbour (Article 14 E-Commerce Directive), themselves perform an act of communication to the public. If this is the notion of communication to the public, such providers would be infringing copyright, which explains why this highly relevant issue should be clarified in the proposed Directive.

## VI. Incompliance with the principle of proportionality

- 23 The Impact Assessment on the modernisation of EU copyright law that the Commission made publicly available on 14 September 2016 does not provide a sufficient foundation for certain key issues. It makes a **superficial analysis** of the different policy options both in terms of the type of instrument and the desired content, however, on the sole basis of theoretical options and general data. In addition, the Impact Assessment does not make efficient use of the Member States’ experience to delineate policy options.
- 24 Thus, in some points the Impact Assessment seems to serve more as ex-post justification of a predetermined policy choice, rather than as ex-ante substantiation of the need for action. In view of that, it is more than doubtful whether the **principle of proportionality** (laid down in Article 5 of the TEU) has been observed.
- 25 Furthermore, not even **Article 22** of the proposal (“**Review**”) seems to align with the principle of proportionality. This principle primarily governs the mode and intensity of EU intervention in the laws and policies of the Member States requiring that legislative measures are fit for their purposes. In order to assess the effectiveness of the legal provisions, the review needs to be carried out within a reasonable timeframe and manner. However, Article 22 is too generic with regard to both the **timeframe** in which the assessment of the proposed Directive needs to be completed and the **methods** to apply during the review. When assessing the appropriate evaluation, it must be taken into account whether at the EU level similar provisions have existed previously and whether some Member States have any prior experience. For instance, Article 4 of the proposed copyright

Directive on the teaching exception is partly similar to Article 5(3) InfoSoc Directive. But, particularly for cross-border teaching activities, the introduction of the proposed mandatory exception offers new possibilities. In this case, a comparison needs to be made with the prior situation. Also, a certain amount of time is required to recognise and realise the opportunities arising from the changed legal framework. However, the review should be completed no later than a specified period especially considering how quickly changes in the digital market occur. A period of **five to seven years** seems appropriate for a review of the new rules.

## VII. Alternative regulatory approach

As early as in 2009 the idea of a **unitary copyright system** including a single European copyright title arose on the policy level (see “Reflection Paper” on Creative content in a European digital single market: Challenges for the Future jointly issued by the DG INFSO and MARKET 22 October 2009, available at <http://studylib.net/doc/18540363/en-en-creative-content-in-a-european-digital-single>). At the time, the DG Information Society and the DG Market stated that: “A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyright and related rights”. The idea was further strengthened in the Communication of 24 May 2011 COM(2011) 287 final where the Commission stated that “the Commission will also examine the feasibility of creating an optional ‘unitary’ copyright title on the basis of Article 118 TFEU and its potential impact for the single market, right holders and consumers”. Even the recent Draft Report by the European Member of Parliament on the evaluation of the InfoSoc Directive considers “the introduction of a single European Copyright Title that would apply directly and uniformly across the Union, in compliance with the Commission’s objective of better regulation as a legal means to remedy the lack of harmonisation resulting from Directive 2001/29” (Report of the Committee on Legal Affairs on the evaluation of Directive 2001/29/ of 22 May 2001, item 3,3, rapporteur Julia Reda, February 2015). More recently, the Commission declared that “the full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, would require substantial changes in the way our rules work today” (Communication “Towards a modern, more European copyright framework” COM(2015626) final).

A unitary copyright system can be fostered only by means of Regulations. Adopting Regulations is in theory a realistic prospect which is linked to **TFEU, Article 118**. And there is more: according to current primary European law, it is reasonable to think that the Union is even obliged to adopt Regulations, at least if adopting a copyright Regulations is necessary for the functioning of the internal market. Indeed, according to Article 118 TFEU “In the context of the establishment and functioning of the internal

market, the European Parliament and the Council [...] **shall establish measures for the creation of European intellectual property rights** [...]”. It is notable that the provision uses the term “shall”. And it is obvious that when adopting Directives certain aspects of copyright remain unharmonised. Directives indeed have disadvantages regarding legal uncertainty related to diverging national interpretations, with the added problems of costly and slow national implementation procedures.

- 28 The adoption of Regulations would be consistent with the Commission’s intention of proposing pragmatic solutions to copyright territoriality, which is a limitation to the functioning of a **digital single market**. When choosing the appropriate legislative instruments, it is important to take into account their characteristics and the context in which they will apply. Whereas in the analogue market, Regulations (as opposed to Directives) are not the *condicio sine qua non*, but merely an element that favours the single market, the functioning of the digital single market largely **presupposes uniform legislation**. If the digital market is based on Internet without barriers within the EU, an inconsistent notion of “communication to the public” or “making content available to the public” is likely to prevent the unhampered circulation of protected subject-matter.
- 29 Therefore, the adoption of Regulations for regulating copyright for the purposes of the functioning of the digital single market seems to be in **accordance with the principles of subsidiarity and proportionality** as long as it does not address issues of little or no impact on the internal market. A Regulation would be in line with the three main integration clauses in the Treaties that are relevant to copyright in the internal market: culture (Article 167(4) TFEU), consumer protection (Articles 12 and 169/2(a) TFEU) and competitiveness of the Union’s Industry (Article 173(3) TFEU).
- 30 A unitary copyright system is in the **mid-term** to be favoured. Although it hardly seems achievable in the course of this package, it is crucial that the Commission’s choice of one or the other of the legislative instruments is sustainable. As described above, this is currently not the case. Instead, the legislative instruments should be chosen in a way that does not counteract the medium and long-term vision of a modern European copyright law. Above all it makes sense to **simplify European copyright law** rather than making it even more complex and inconsistent. It seems particularly ill advised to add new provisions to existing ones, which already deal with similar issues. As an alternative, existing legislative measures could be replaced with a new (possibly single) one, therewith avoiding overlaps and inconsistencies in the EU legal framework.
- 31 However, since this postulation might go beyond the realistically attainable objectives, the copyright package should at least be limited to one new Directive containing all mandatory exceptions, including those concerning

uses for the benefit of people with disabilities (Implementation of the Marrakesh Treaty (COM(2016) 596 final and COM(2016) 595 final)).

### Table of Equivalences

Old Numbering of Paragraph, Part A (Version 1.0)	Old Numbering of Paragraph, Part A (Version 1.1)	New Numbering of Paragraph, Part A (Version 1.2)
1	1	<b>Deleted</b>
2	2	<b>Deleted</b>
4 (amended in version 1.1)	3	<b>Deleted</b>
3 (amended in version 1.1)	4	<b>Deleted</b>
5	5	<b>1</b>
6	6	<b>2</b>
7	7	<b>3</b>
8	8	<b>4</b>
9	9	<b>5</b>
10	10	<b>6</b>
11	11	<b>7</b>
12	12	<b>8</b>
13	13	<b>9</b>
14	14	<b>10</b>
15	15	<b>11</b>
16	16	<b>12</b>
17	17	<b>13</b>
18	18	<b>14</b>
19	19	<b>15</b>
20	20	<b>16</b>
21	21	<b>17</b>
22	22	<b>18</b>
23	23	<b>19</b>
24	24	<b>20</b>
25	25	<b>21</b>
26	26	<b>22</b>
27	27	<b>23</b>
28	28	<b>24</b>
29	29	<b>25</b>
30	30	<b>26</b>
31	31	<b>27</b>
32	32	<b>28</b>
33 (amended in version 1.2)	33	<b>29</b>
	34	<b>30</b>



## PART B

### Exceptions and Limitations

#### Chapter 1: Text and Data Mining

(Article 3 COM(2016) 593 final)

[Version 1.2]

*Reto M. Hilty, Heiko Richter*

##### Executive summary

The proposed Article 3 COM(2016) 593 final is to be criticised regarding the applied regulatory method (permission via copyright limitation) and its scope.

- The proposed limitation misleadingly suggests that carrying out text and data mining (TDM) is per se of relevance to copyright.
- In reality, only reproductions and extractions need to be authorised, whereas automated searching and the like are free.
- Excluding commercial users from permitted TDM contradicts the interests of European industry.

An alternative regulatory approach is recommended.

- A field exemption would allow everyone having lawful access to works or other protected subject-matter to carry out TDM.
- This exemption involves the permission to extract contents of databases and to make reproductions for the sole purpose of TDM.
- TDM as such constitutes a normal use of works and other protected subject-matter.

The alternative proposal includes a specific provision obliging rightholders who market works or other subject-matter primarily for research purposes to provide research organisations not having lawful access with datasets suitable for TDM only. They may request a reasonable payment.

## I. Introduction

- 1 **Text and data mining (TDM)** refers to comparatively new analysis techniques to automatically assess large amounts of digital information by means of computers, thereby generating new knowledge (in particular by identifying correlations or trends). TDM is applied in a wide range of fields: in the social sciences, humanities and natural sciences, such as pharmaceutical and medical research, and in journalism, but also in the private sector, for example in financial industries or for the purpose of market research.
- 2 The European Commission's intention to exempt TDM from licensing for research purposes is, **in principle, to be welcomed**. A clear legal framework avoids the complicated rights clearance between the parties involved and reduces investment risks. The innovation effect will likely be immense in view of the rapidly growing importance of data analysis techniques. It is also positive to see the European legislature taking the initiative, as this prevents a fragmentation of the law.

## II. The Commission's proposal

### 1. Content

- 3 Article 3(1) of the proposed Directive provides for an exception for reproductions pursuant to Article 2 of Directive 2001/29/EC (InfoSoc Directive) and extractions pursuant to Article 7(1) of Directive 96/9/EC (Database Directive) in order to carry out TDM for the purposes of scientific research (defined in Article 2(1) of the proposed Directive). The prerequisite is that the respective research organisation has lawful access to the sources searched. The exception is limited to **not-for-profit research** and research with a public interest objective. According to Article 3(2), contrary contractual provisions are unenforceable. Furthermore, rightholders shall be allowed to apply technical measures to ensure the security and integrity of networks and databases (Article 3(3)). Rightholders and research organisations should agree on good practices (Article 3(4)).
- 4 Similar regulation has already been enacted, inter alia, in the United Kingdom in 2014 for non-commercial research. In Germany, corresponding proposals are discussed in the context of the debate on the research exemption (*de la Durantaye*, Allgemeine Bildungs- und Wissenschaftsschranke, 2014; in favour of a broader scope, however, *Schack*, ZUM 2016, 266, 269; about the general legal situation of TDM *Spindler*, GRUR 2016, 1112, 1117).
- 5 The proposal refers to reproductions (Article 2 InfoSoc Directive) and extractions (Article 7(1) Database Directive) as affected **exploitation**

**rights.** If TDM were considered to be relevant for copyright (see, for example, *Spindler*, “Text und Data Mining – urheber- und datenschutzrechtliche Fragen”, GRUR 2016, 1112; *Stamatouidi*, “Text and Data Mining”, in: *Stamatouidi* (ed.), “New Developments in EU and International Copyright Law”, 2016, 253; *Triaille et al.*, “Study on the legal framework of text and data mining (TDM)”, 2014), then this would be consistent. In fact, TDM usually requires a not merely temporary reproduction, for which Article 5(1)(a) InfoSoc Directive would not apply.

## 2. Concerns regarding the regulatory method

However, the proposed rule **wrongly suggests** that carrying out TDM is per se of relevance to copyright. The explanations given in Recital 8, according to which an authorisation to undertake such acts must be obtained from rightholders if no exception or limitation applies, are too sweeping. Especially in the case that a user has lawful access to contents (the user has acquired the relevant data as such or has acquired access to them on a contractual basis), the automated analysis of these contents must be permitted, just as reading by the human being does not require any separate consent by the rightholder. 6

The **illusory protection** thus suggested has an effect, in particular, in those cases in which the contractual agreement between the rightholder and the user does not contain any express provisions on TDM. The proposed limitation would allow for the conclusion *e contrario* that TDM is a separable type of use. An omission in a contract would therefore have to be interpreted in the sense that the contractually granted right does *not* refer to TDM. 7

The **consequences** of such a wrong conclusion are far-reaching, since the proposed rule allows TDM to be carried out only by not-for-profit research organisations and research organisations acting directly in the public interest. This would force users of TDM to conclude contractual agreements with the rightholders for commercial purposes and for research not in the public interest. This lacks a substantive justification (see paras. 10-12) and also leads to complex questions of demarcation in the legal practice. As a result of the different national implementations to be expected, the fragmentation of law in the internal market would be pushed even further, which is contrary to the declared objective of the Union-wide harmonisation of the law. 8

In addition, the general **role model effect** of such a rule is to be viewed with scepticism regarding the development of the data-driven economy: TDM is to be considered only as a first, albeit an important, data analysis technique. Submitting TDM to an isolated copyright rule would lead to a fragmentary and incoherent legal development in the longer run. Instead, only holistic regulatory approaches that accommodate overarching interrelations of 9

interests can account for the societal and economic significance of data analyses.

### 3. Concerns regarding the content

- 10 The proposed Directive assumes that TDM is of particular benefit to scientific research and, in particular, creates incentives for innovation. While this is true, this must not, however, lead to the conclusion that TDM does not bear the same **high potential for innovation and discovery** for purposes beyond scientific research, e.g. for start-ups, journalists or information intermediaries.
- 11 Even **within the field of research**, however, the Commission intends to limit the scope of the proposed provision to not-for-profit research organisations and to those pursuing a public-interest objective recognised by a Member State. The latter raises delimitation problems and so does the specific goal to submit public-private partnerships to the provision. Although the proposal aims to add contour to the rule by giving a definition (Article 2(1)), this definition uses a large number of legal terms that are vague or to be further defined, which will most likely lead to lengthy court procedures involving the CJEU as an interpreting instance.
- 12 Including profit-oriented – and also **purely private** – research in a provision on TDM would avoid not only the aforementioned delimitation problems. More importantly, this would strengthen the position of research-based companies in the European Union against their competitors who are not subjected to similar restrictions.

## III. Alternative regulatory proposal

### 1. TDM as normal use

- 13 Against the background of these concerns, an alternative regulatory proposal is presented here. In the first place, the proposal is based on the fact that the performance of TDM as such – as described at the outset (see para. 6) – has no more relevance under copyright than any other kind of use of the work, in particular the reading and comprehension of connections by a human being. Just as reading corresponds to the normal use of analogue written works (this awareness of contents does not conflict with copyright), the **normal use of digitally stored content** lies – in the light of today's technologies – in automatically finding and correlating the information it contains. In a sense comparable, Article 5(3) of Directive 2009/24 (Software Directive) defines the normal use of computer programs such that “[t]he person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the

functioning of the program in order to determine the ideas and principles which underlie any element of the program” (see also Recital 13).

However, the special feature of TDM is that the actual process of TDM itself is usually **preceded by a reproduction**, since the datasets involved are usually available in different formats and must therefore be normalised for the purpose of the comprehensive automated search (and, as the case may be, undergo a taxonomy). At first sight, this process is comparable to so-called “format-shifting” (for example, from an analogue to a digital carrier), which inevitably leads to a reproduction. 14

Depending on the sources on which the TDM is based, databases that are protected subject-matter under the Database Directive can also be affected. The stated normalisation might constitute an **extraction**, which requires consent, and is defined as “the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form” (Article 7(2)(a) Database Directive). 15

Neither the necessary extraction from databases nor the reproduction resulting from the required normalisation allows the user an independent use, however (unlike e.g. format-shifting). Rather, these processes are **technically necessary** in order to carry out TDM at all, just as, for example, a reproduction is unavoidable for the use of software. For this reason, Article 5(1) of the Software Directive provides that a permanent or temporary reproduction of software according to Article 4(1)(a) of the same Directive “shall not require authorisation by the rightholder where they are necessary for the use of the computer program”. Thus, in relation to the very broad concept of reproduction in Article 2 of the InfoSoc Directive, a specific field exemption is created that goes beyond the much narrower rationale of Article 5(1) of the InfoSoc Directive. 16

Nothing else applies regarding TDM, as far as concerns content to which the persons performing the mining have lawful access. In other words, the **regulatory model** suggested here constitutes another specific field exemption based on the fact that the performance of TDM as such, like acts under Article 5(3) of the Software Directive, does not require the consent of the rightholder. In order to be able to carry out TDM at all, however, reproductions are just as necessary as they are permitted to the lawful user of software pursuant to Article 5(1) of the Software Directive. This means that Article 2 InfoSoc Directive does not cover such reproductions. The same applies with regard to certain extractions from database contents that are necessary for the purposes of TDM. 17

The proposed regulatory model does not entitle any third party to carry out TDM, but only the user to whom the rightholder has granted **access** to the sources affected by it. Just as a rightholder who allows users to use software must assume that reproductions and other actions according to Article 5(1) and (3) of the Software Directive are performed, the rightholder must 18

assume that TDM is carried out if he allows access to sources in a manner that enables TDM. Therefore, in principle, an “implied licence” is to be assumed – comparable to the provision in the Software Directive (*Grützmacher*, in: *Wandtke/Bullinger, UrhR*, 4th edition, § 69d, para. 3 with further references).

- 19 Thus, the purpose of the proposed rule is primarily to determine the permissible range of **divergent contractual arrangements**, in particular those which would prohibit TDM. The rule constitutes an indispensable core of permitted acts of the intended user, as it renders contrary contractual terms void (in this sense, Article 8(2) of the Software Directive). Article 3(2) of the Commission’s proposed Directive also reflects this concern.
- 20 The decisive reason for the fact that those users who have legal access to the sources used must be able to carry out TDM without the consent of the rightholder lies in the fact that the rightholder does **not need to take any specific actions** to enable TDM. Rather, the user can basically perform the above-mentioned normalisation himself, even if this is neither necessary nor particularly meaningful or efficient.

## 2. Advanced business models on a contractual basis

- 21 Against this background, **new business models** are available to the rightholders (such as scientific publishers), who have so far used them in rather isolated cases in relation to certain TDM-driven industries. Such industries, as well as researchers, may prefer not to undertake the normalisation step themselves, but to involve a specialised third party. Should those users who are not specialised and who have lawful access to the recorded content perform the normalisation themselves, this does not simply produce a dataset that is necessary to achieve optimal results of TDM. This primarily opens up the possibility for the rightholders to technically process content designated by users, who can then directly carry out TDM.
- 22 Such services, however, relate only to the **necessary preparatory measures**, namely to the normalisation and the corresponding reproductions. In this respect, the abovementioned field exemption for the benefit of legitimate users does not come into play. However, this does not alter the fact that the actual TDM does not require the consent of the rightholder, since this does not constitute a copyright-relevant use of works from the outset (on this, see para. 6). It is true that a rightholder will demand compensation for the normalisation of data; but such compensation does not refer to the TDM itself. In other words, the use of the service of the rightholder simply means that the user who has lawful access to the contents covered does not make the necessary reproductions himself, but this does not change the principle that TDM in itself is permitted without the need for consent.

Rightholders still remain free to differentiate the **prices** for such services provided on a contractual basis. This can be justified in situations where commercial users perform TDM to increase their chances in competition and to achieve corresponding profits. Such users in particular are already working together with rightholders (for example with scientific publishers), with corresponding business models under development. Against this background as well, it is not clear why commercial users should not be included in the proposed provision. Profit-oriented users will primarily follow efficiency considerations for deciding how to carry out TDM. They will often prefer appropriate services of rightholders to their own, more complex normalisations of content, even if they have access to it. 23

Under the proposed rules, rightholders are also **not exposed to excessive competition**. Only the user who has his own lawful access to the recorded content and who wants to carry out the actual TDM himself is allowed to make the reproductions required for TDM. This excludes the possibility for third parties to offer similar services and to thus compete with the rightholders. Though third parties may gain access to a wide range of content, they do not fall under the field exemption from the general rights of reproduction and extraction proposed here as long as they do not carry out TDM themselves. 24

### 3. TDM related to non-accessible content

A particular problem faced by research organisations relates to TDM of content to which there is **no (lawful) access**. Smaller research organisations, in particular, with only limited access to content, are already facing the challenge of being able to compete internationally. This problem will be exacerbated by the fact that the field exemption for TDM requires lawful access, thus effectively increasing the lead of the fewer, large and financially strong research organisations. 25

**Research organisations** must therefore also be able to carry out TDM without having to acquire access to the content themselves. In fact, in practice certain providers of content already provide normalised datasets for the purpose of TDM without giving the users access to the content. Rather, the actual access to scientific content must be acquired (and paid for) separately. Indeed, the provision of normalised data solely for the purpose of TDM is a business model, especially since a rightholder will either offer this service for payment or hopes for other, indirect profit opportunities. However, this practice is far from being comprehensive, and – as far as can be seen – it has not yet been developed with research organisations in mind at all (see for a recent overview of the TDM policies of scientific research publishers *Casper/Guibault*, “Baseline report of policies and barriers of TDMs in Europe”, 2016, p. 84 et seq.). However, such a practice would be of particular interest and benefit, given the stated limited access to scientific research information. 26

- 27 Accordingly, the proposed provision obliges rightholders to **provide datasets** to research organisations (as defined in Article 2 of the proposed Directive) that exclusively allow them to carry out TDM. This obligation applies, of course, only to those rightholders who market content primarily for research purposes. The provision does not stipulate how this provision of datasets is to be implemented in particular. Rather, it is sufficient if the obligation creates incentives for self-regulation. The more open the provision is, the more likely it is to allow co-operation between rightholders of complementary content with regard to such business models.
- 28 Such an obligation can be justified by the fact that the rightholders are entitled to request a reasonable payment for the provision of their normalised data. What is crucial is that the normalised data provided can only serve as **a substitute for access** to the actual content to a limited extent. The mere possibility to perform TDM does not, however, replace the knowledge of a particular research discipline’s current state. TDM is merely a possible research approach, which, however, is particularly important because the knowledge gained can be the subject of new publications. If this modern research approach is not to be hampered by a lack of factual availability of normalised data, it is indispensable that TDM also be made possible with respect to content that is not lawfully accessible. A residual risk may be seen in the fact that TDM-capable data sets could be used (and e.g. “converted back”) in a way that would allow for the substitution of access to the content. However, this does not only require a certain amount of effort; the back-conversion would ultimately also constitute a reproduction on the part of the party to which the TDM-capable data sets have been made available. However, such a reproduction lacks not only the contractual consent of the concerned rightholders, but also a statutory authorisation. A back-conversion of purely TDM-capable data sets would therefore be illegal.

#### 4. The need and importance of technical protection measures

- 29 It goes without saying that access to the networks and databases of rightholders for the purpose of TDM is associated with certain risks. This applies in principle irrespective of whether the user has lawful access to the content or not, since the marketing of scientific information in particular nowadays often no longer requires permanent data transfers. Accordingly, a rightholder must be able to protect his legitimate interests by taking **certain technical measures**. However, such measures must not go beyond what is required, i.e. technical protection measures must be precluded from making TDM unnecessarily more difficult or even *de facto* impossible.

#### 5. Storage and accessibility

- 30 In so far as the rightholders themselves carry out the normalisation of the data and only provide them for the purpose of the TDM, they have the power to exclude unauthorised uses of these data. If, on the other hand,

normalisation is carried out by those users who carry out TDM, the dataset remains under their control, provided that it is not destroyed after the TDM has been carried out. If, in principle, this is a reproduction (para. 14), for which the proposed standard provides for a field exemption for the benefit of the party that intends to carry out TDM, it follows that such datasets may not be left in the hands of third parties. Accordingly, they are to be **stored** in such a way as to prevent unauthorised uses by third parties.

Conversely, in both cases, a very important question for practice is whether there is any obligation to retain the corresponding datasets after TDM has been carried out. In the field of scientific research there is a particularly strong **interest in the verifiability of research results**. This may determine that the relevant datasets have to be retained and made available for the purpose of verification, unless it can be ensured that re-normalisation and repeated TDM leads to identical results. If it is necessary to store the datasets used in the research, all Member States must have facilities for storing the relevant datasets in such a way as to allow any EU national without discrimination to make the necessary verifications.

31

#### IV. Proposal

##### *Article 3*

##### *Text and data mining*

- (1) A person is allowed, without the rightholder's consent, to carry out text and data mining related to works or other subject-matter to which this person has lawful access. This includes, for the sole purpose of text and data mining, the permission to extract contents of databases and to make reproductions.
- (2) Rightholders who market works or other subject-matter primarily for research purposes are obliged to provide research organisations not having lawful access with datasets that enable them to carry out text and data mining only. These rightholders may request a reasonable payment.
- (3) Any contractual provision contrary to the rights and obligations provided for in paragraph 1 or paragraph 2 shall be unenforceable.
- (4) Rightholders shall be allowed to apply measures necessary to ensure the security and integrity of the networks and databases. Such measures shall not unnecessarily hamper text and data mining.
- (5) The Member States shall designate a facility to safely store datasets used for text and data mining and to make them accessible for verification purposes only.



## PART B

### Exceptions and Limitations

#### Chapter 2: Digital and Cross-Border Teaching Activities

(Article 4 COM(2016) 593 final)

[Version 1.1]

*Reto M. Hilty, Ricarda Lotte*

#### Executive summary

The proposed Article 4 is to be welcomed; however, some concerns arise for the following reasons.

- The scope of application is
  - too narrow: it does not sufficiently meet the needs of modern teaching;
  - uncertain: the proposal does not define “educational institution”.
- Article 4(2), concerning licence priority, unnecessarily reduces the harmonisation effect of the provision and undermines the scope of the limitation.
- The merely optional fair compensation contained in Article 4(4) appears to be insufficient in two respects:
  - it has an optional nature;
  - it seems to be limited to the original rightholders.
- The relation of the proposed Article 4 to previous limitations and the wording of the German version of the proposal raise questions.

Alternatives are suggested with regard to:

- Scope of application: the criterion according to which a use must be directed to a “specifically limited circle of those taking part in the teaching” is preferable.
- Licence priority should be limited to actual existing licensing agreements.

Remuneration for use pursuant to the proposed Article 4 should be compulsory.

## I. Background

- 1 An **optional** exemption for the use of works and other subject-matter for teaching already exists in Article 5(3)(a) of Directive 2001/29/EC (InfoSoc Directive). Articles 6(2)(b) and 9(b) of Directive 96/9/EC (Database Directive) contain similar rules for databases. There is no corresponding exemption for computer programs.
- 2 Article 5(3)(a) InfoSoc Directive has hardly been able to achieve its objective of facilitating **digital teaching**. Its implementation into Member States' laws has led to considerable insecurity on the part of teachers and learners concerning the use of protected content, since the prerequisites were partially unclear and too narrowly interpreted by some Member States. In addition, the enormous differences between the implementations in the Member States have created difficulties in cross-border learning activities (Impact Assessment, p. 79). The proposed Article 4 aims at increasing the legal certainty in the digital use of copyright-protected content in the field of education and, in particular, facilitating cross-border teaching activities.

## II. The Commission's proposal

### 1. Content

- 3 The scope of the proposed Article 4 includes databases and computer programs and provides for **mandatory** implementation of the rule in the Member States' national laws. However, according to Article 4(2)(1), the Member States have the option of narrowing the scope of the limitation. According to Article 4(2)(2), this requires that adequate licensing authorising the acts privileged by Article 4 is easily available in the market.
- 4 As already provided for in Article 5(3)(a) InfoSoc Directive, Article 4 further requires that the protected content is used "for the sole purpose of illustration for teaching" and for a "non-commercial purpose". In addition, Article 4 restricts the use to the premises of an educational establishment or a secured electronic network. The **most important modification** concerning cross-border situations is found in Article 4(3). It creates the fiction, in the case of a use made via secure electronic networks and in accordance with the Member States' provisions based on Article 4, that the act takes place solely in the Member State in which the educational establishment is established.

### 2. Degree of harmonisation

- 5 The **harmonisation** of the legal framework regarding the use of protected content in digital education is vital in order to fully exploit the potential of technological advances for education. In most cases, a meaningful use of digital educational offers is only possible in a cross-border context. The introduction of a mandatory limitation is therefore to be welcomed.

However, Article 4(2) unnecessarily **mitigates** the harmonisation effect of the provision. The Member States will most likely use this option to varying degrees, and different national regulations will ensue. Digital learning opportunities will therefore continue to diverge significantly among the Member States. 6

### 3. Concerns regarding content

#### a) Scope of application

The scope of Article 4 does not sufficiently meet the needs of modern teaching. The **new forms of teaching and learning** that have emerged over the past few years due to advances in technology, which extend far beyond supplementing traditional teaching at schools with digital media, are not covered (see Impact Assessment, p. 81). This restriction is especially regrettable since for the first time the limitation also rightly includes databases and computer programs. 7

According to the Commission’s considerations in the Impact Assessment, Article 4 is not intended to apply in particular to use in the open internet. This should also include so-called **Massive Open Online Courses** (MOOCs) (Impact Assessment, p. 82). This classification corresponds to the literal meaning and origin of MOOCs. Meanwhile, “MOOC” has developed into an umbrella term for a variety of teaching offers, which also diverge in the degree of their openness. Therefore, excluding such offers altogether from the privilege based on the interests of the rightholders and the needs of classical teaching methods falls short. Instead, copyright must adapt to the “new technological realities” (see, Commission Communication “Towards a modern, more European copyright framework”, COM(2015) 626 final, 9 Dec. 2015 p. 3). 8

The scope of application of Article 4 does not meet these requirements. The restriction to the premises of an educational establishment or a secure electronic network, which is only accessible to the pupils, students and staff of an educational establishment, is too narrow insofar as only learning activities that comply with this **rigid framework** are covered. In turn, linking the limitation to the location of the usage goes too far, since it requires merely a formal affiliation of the potential recipients with the educational establishment, without functionally restricting this circle. 9

The proposal for a Directive does not define “educational institutions”, in contrast to “research organisations” and “cultural institutions”, which are referred to in Article 3 and Article 5. Therefore a definition of “educational institution” should be added to Article 2. In order to ensure **flexibility** in the aforementioned sense, this term should be interpreted broadly. Recital 15 also indicates such an interpretation. In particular, it must be taken into account that there will be a definite need for the cross-border use of digital technology for universities and in the field of lifelong learning. 10

## b) Licence priority

- 11 Article 4(2) allows the Member States to provide for a licence priority in national law for all or certain types of works or other subject-matter. The limitation is then not applicable if adequate licences are easily available on the market. As Article 4(2)(2) shows, “licences” – contrary to Article 5(3)(n) InfoSoc Directive – are to be understood as **licensing offers** (see, C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG*).
- 12 However, the exclusion of the uses covered by the exemption in the case of a mere licensing offer is too **far reaching**. In the case of a mere licence offer, the rightholder can still prevent the conclusion of the contract by means of a unilateral act. It is therefore not guaranteed that protected works can actually be used for acts pursuant to Article 4(1).
- 13 In addition, the requirements regarding the “adequacy” of a licensing offer remain unclear. This increases the risk that the scope of the limitation will be **undermined** by an extensive licence priority. In addition, there is a growing risk that institutions of higher education will have to face high transaction costs. The obligation of the Member States under Article 4(2)(2) to take “necessary” measures for adequate availability and visibility of the licences is, on the other hand, too vague to eliminate prohibitive costs for the use of the limitation.

## c) Remuneration

- 14 Taking into consideration that the rightholders (at least the original ones) can benefit monetarily from a limitation that requires remuneration (see also below paras 15 and 27), the merely optional fair compensation contained in Article 4(4) appears to be **insufficient**. Apart from this factual justification for a compulsory obligation of fair compensation, its optional nature reduces the degree of harmonisation within the European Union and brings forth a risk that the compensation of rightholders may lead to disruptions between the Member States. This is of particular concern in view of the fiction of Article 4(3), according to which the use through secured electronic networks is deemed to occur solely in the Member State in which the educational establishment is established. Specifically, this would also be decisive concerning the remuneration; whereby, the same rightholder would be remunerated once for identical usage transactions, and not for another one.
- 15 The right to fair compensation pursuant to the proposed Article 4(4) may be – in line with the decision of the CJEU *Hewlett-Packard Belgium SPRL v Reprobel SCRL* (C-572/13) – limited to the original rightholders. This restriction follows from a conclusion *e contrario* from the proposed Article 12 (see Part F in detail), since the option granted to the Member States to give publishers a share of the fair compensation would not be necessary if they were, as derivative rightholders, entitled to a compensation pursuant to Article 4(4) anyway. However, such a restriction of the compensation of the

original rightholders remains unconvincing. When exploitation rights are assigned to an intermediary, the economic loss resulting from performing the use permitted pursuant to Article 4(1) is incurred – regularly as well or even exclusively – by the **derivative** rightholder (for details, see Part F). This fact cannot even be adequately balanced out by the proposed Article 12 due to its structural deficits (see further Part F).

In line with the CJEU decision in C-467/08, *Padawan SL. v SGAE*, fair compensation pursuant to Article 4(4) is linked to damage (see also Part A, para. 22). This would, of course, only be convincing if Article 4(4), contrary to the proposed concept (see para. 15), would also provide for compensation for those derivative rightholders, for whom the use of the works or other subject-matter is based on a use of their investment. Such would actually lead to a damage – a result to their detriment. On the other hand, the criterion of damage with regard to authors as original rightholders is **doubtful**. They may be granted an equitable remuneration for the use of their works, but this only independently of the existence of a concrete damage (on this distinction considering the proposed Article 12, see Part F). Moreover, the explicit inclusion of the criterion of damage in Article 4(4) would be of concern with regard to continuity and consistency. The criterion was introduced by the CJEU, but neither one of the previous Directives nor any other provisions within the proposed Directive explicitly presuppose damage.

#### 4. Relation to previous limitations

The complementary application of Articles 6(2)(b) and 9(b) Database Directive and Article 5(3)(a) InfoSoc Directive (Recital 5) increases the **complexity** of the legal framework of copyright law at the EU level regarding teaching activities (see Part A). Moreover, there is a risk of divergent rules among Member States since the regulatory content of those provisions is not clearly delineated from the newly proposed Article 4.

It therefore appears to be preferable to adapt the scope of application of the existing limitations and to restrict them to scientific research in order to condense the privileges of use for teaching activities into a **single** new provision. To this end, the proposed Article 4 should be supplemented by a regulation concerning such analogue uses, rather than – as highlighted in the Impact Assessment– limiting the previous Article 5(3)(a) InfoSoc Directive regarding teaching to this primary purpose (p. 82). The amendment’s scope is, of course, small, since analogue uses are limited to the aspect of the reproduction right, because neither the right of making available to the public nor the right of communication to the public is relevant with respect to analogue uses.

## 5. Wording (concerns the German version only)

- 19 Limiting the scope of the proposed exemption to teaching in a strict sense would have almost **no significance** with respect to digital teaching. In Article 5(3)(a) InfoSoc Directive, the German text of the prerequisite “for the sole purpose of teaching” (*Veranschaulichung “im” Unterricht*) already raises questions regarding the local and temporal limitation of the regulation. According to Recital 16, in addition to teaching in a strict sense, the newly proposed Article 4 is also intended to cover related learning activities and examinations. In order to avoid ambiguities, the German version of Article 4 should therefore reflect this scope (*Veranschaulichung “des” Unterrichts*). Should Article 5(3)(a) InfoSoc Directive – contrary to the proposal made here – not be limited to the field of scientific research (see para. 16), it seems obvious to adapt the provisions correspondingly within the proposed Article 17(2)(b).
- 20 The German text of the proposed Article 4 regarding “the sole purpose” is different from Article 5(3)(a) InfoSoc-Directive (“*für den alleinigen Zweck*” instead of “*ausschließlich*”). However, a change regarding the content does not seem to be intended. In order to ensure the **continuity** of the concretisation in practice and the conformity with the possibly complimentary applicable Article 5(3)(a) (see also para. 16 above), the German version of Article 4 should also contain the term used in Article 5(3)(a) InfoSoc Directive (“*ausschließlich*”).
- 21 The requirement of a “non-commercial purpose” is indicated differently in the German versions of Article 4 (“*nichtgewerblich*”) and Article 5(3)(a) InfoSoc Directive (“*nicht kommerziell*”). However, a modification of the requirements is presumably **not associated** with this change. Recital 15 of the proposal for a Directive, as already set down in Recital 42 of the InfoSoc Directive, determines that the organisational structure and financing of the institution are irrelevant for the classification of the establishment. Admittedly in the context of the German implementation (apart from Article 52a(1) of the German Copyright Act (UrhG)), the term used in Article 5(3)(a) InfoSoc Directive (“*kommerziell*”) was replaced by the term applied in the proposed Article 4 (“*gewerblich*”), as for example in Article 87c(1) sentence 1 nos. 2 and 3 of the German Copyright Act (UrhG), which is based on Article 9(b) Database Directive. However, for the sake of clarity, the German text of the proposed Directive should retain the term used in the InfoSoc Directive (“*kommerziell*”).
- 22 Regarding “fair” compensation, the German version of the proposed Article 4 does not use the same term as the InfoSoc Directive (“*fairen*” instead of “*gerechten*” *Ausgleich*, see Recitals 35 and 36 InfoSoc Directive). However, there are **no indications** of a related change in the scale. In order to avoid ambiguities, the German text of the proposed Article 4 should contain the term used in the InfoSoc Directive (“*gerechten*” *Ausgleich*).

### III. Alternative regulatory proposal

#### 1. Scope of application

The restriction of the scope of application of Article 4 to the premises of an educational establishment or a secure electronic network raises concerns, in particular with regard to new forms of teaching and learning (see para. 8). The criterion according to which a use must be directed to a “specifically limited circle of those taking part in the teaching” as required by the German law for the application of Article 52a of the German Copyright Act (UrhG) is **preferable**. This excludes an arbitrary extension of the circle of potential recipients and thus prevents the scope of the limitation from expanding. However, at the same time this criterion is open to the development of new forms of teaching and learning. This does not affect the fact that an authentication procedure of the participants may be required (see Recital 16). 23

#### 2. Licence priority

In accordance with the CJEU decision in C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG*, the licence priority under Article 4(2) should be limited to actual existing **licensing agreements** in order to ensure the effectiveness of the rule (see para. 11). Should, in spite of the associated disadvantages, a priority of adequate licensing offers be provided, this exemption of the limitation should at least be restricted to defined areas. It is only through a conclusive definition of these areas that the undermining of the limitation through the introduction of extensive exceptions on the part of the Member States can be prevented. 24

#### 3. Exemption

The Commission justified the introduction of Article 4(2) in the Impact Assessment for among other reasons, that in the event of the inclusion of content primarily intended for use in teaching within the scope of the limitation, the quality and diversity of the educational resources will most likely decrease (p. 86). This may be true in certain cases, but this can be **more effectively** prevented by allowing the Member States to exclude all or part of the contents primarily intended for use in teaching from the scope of the limitation. 25

However, one cannot agree with the Commission that the exemption will have the greatest impact on scientific authors (Impact Assessment, p. 88), should researchers be meant at all. In fact, scientific authors generally do not profit financially from the commercialisation of their content, whereby a limitation requiring remuneration can provide them with a certain amount of **revenue** (MPI Position Paper, “Schranken im Bereich Bildung, Wissenschaft und Kopienversand”, Anhörung vom 8. November 2006, p. 4 f) If at all, it is instead science publishers who would likely be affected by 26

the limitation, at least if derivative rightholders do not participate in the remuneration (see para 15 and below para 27; on the proposed Article 12: Part F, paras 6 ff.).

#### 4. Remuneration

- 27 Remuneration for use pursuant to the proposed Article 4 should be **compulsory**, both on account of the greater harmonisation effect and on factual grounds (see para. 14), even if the specific expression is the responsibility of the Member States. Derivative rightholders should not be excluded from compensation since they are primarily impacted by the permitted use under Article 4 of the proposed Directive. Article 12, as drafted in Part F as an alternative to the proposal of the Commission, applies accordingly (for details, see Part F, paras 14 ff.). As in the corresponding provisions of the InfoSoc Directive, it is not the function of this provision to undertake a distribution between different categories of rightholders.

#### IV. Proposal

##### *Text proposed by the Commission*

##### *Amendment*

##### Article 4

##### Amended Article 4

(1) Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EG, Articles 5(a) and 7(1) of Directive 96/9/EG, Article 4(1) of Directive 2009/24/EG and Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

(1) Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EU and Article 11(1) of this Directive in order to allow for the ~~digital~~ use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

(a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff;

(a) ~~takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff;~~ is restricted to the specifically limited circle of those taking part in the teaching;

(b) is accompanied by the

(b) is accompanied by the

indication of the source, including the author's name, unless this turns out to be impossible.

(2) Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-matter, to the extent that adequate licences authorising the acts described in paragraph 1 are easily available in the market.

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure appropriate availability and visibility of the licences authorising the acts described in paragraph 1 for educational establishments.

(3) The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

(4) Member States may provide for fair compensation for the harm incurred by the rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

indication of the source, including the author's name, unless this turns out to be impossible.

(2) Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-matter to the extent that adequate licensing agreements authorising the acts described in paragraph 1 ~~are easily available in the market~~ exist.

Member States ~~availing themselves of the provision of the first subparagraph~~ shall take the necessary measures to ensure appropriate availability and ~~visibility of the licences authorising the acts described in paragraph 1~~ for educational establishments may provide that the exception adopted pursuant to paragraph 1 does not apply to individual or all works primarily intended for use in teaching.

(3) The use of works and other subject-matter for the sole purpose of illustration for teaching ~~through secure electronic networks undertaken~~ in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

(4) Member States ~~may~~ provide for fair compensation for ~~the harm incurred by the rightholders due to the~~ for the use of their works or other subject-matter pursuant to paragraph 1.



## PART B

### Exceptions and Limitations

#### Chapter 3: Preservation of Cultural Heritage

(Article 5 COM(2016) 593 final)

[Version 1.1]

*Reto M. Hilty, Valentina Moscon, Tao Li*

##### Executive summary

Article 5 of the proposed Directive is in principle well justified. Nevertheless, concerns arise, regarding:

- the definition of the concept of cultural heritage institutions (CHIs); it should be consistent with those in Article 1(1), (2)(a)(b) Directive 2012/28/EU and in Article 5(2)(c) Directive 2001/29/EC;
- the lacking possibility to outsource the legally permitted activities to third parties; CHIs benefiting from Article 5 should be allowed to delegate them to other CHIs or specialised institutions, provided that:
  - copies made by such third parties under this exception are directly returned to the mandating cultural heritage institution;
  - any provisional or incidental copies are immediately destroyed.

However, making maximum use of the potential of CHIs requires a more ambitious approach: a further-reaching limitation of copyright might be supported for the purposes of carrying out other public interest missions – particularly, interests in research, education and teaching.

## I. Background

### 1. General considerations

- 1 As appropriately recalled in the Impact Assessment, the space allowed for preserving cultural heritage collections under national exceptions is sometimes too narrow, unclearly defined or simply non-existent. Indeed Articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC (InfoSoc Directive) only cover some specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives and are of an optional nature. Moreover, even when they have been transposed on a national level, their scope of application differs in the various Member States.
- 2 Recently the CJEU, while ruling on the scope of these exceptions (see C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG*), made even more evident the need for legislative action in order to 1) adapt exceptions in copyright law to the potential offered by technology; 2) make these exceptions consistent throughout Europe fostering legal certainty.
- 3 Therefore, the EU proposal for a mandatory exception for the preservation of cultural heritage, as drafted in Article 5 COM(2016) 593 final is in principle to be welcomed. It is an important step towards 1) creating a certain legal framework that facilitates the preservation of works and other subject-matter which are protected by copyright or related rights; 2) enhancing interoperability and standards; and 3) fostering research and innovation. These are key actions of the Europe 2020 strategy and of the Digital Agenda for Europe, as set out in the Communication from the Commission entitled “A Digital Agenda for Europe” and also recalled in Directive 2012/28/EU (Orphan Works Directive).

### 2. Justification

- 4 This proposed permitted use enhances **cultural diversity** within Europe while promoting the functioning of the internal market. Indeed, allowing cultural heritage institutions (CHIs) to “make copies of any works or other subject matter” that are in their collections, means ensuring the preservation of works that represent the cultural identity of every Member State and, at the same time, of Europe itself.
- 5 On the one hand, according to Article 167(1) TFEU, the harmonisation of copyright law towards a digital single market aligns with fostering cultural diversity. Indeed, Article 167(1) mandates the EU with respect to ensuring the national and regional cultural diversity of the Member States, while at the same time “bringing the common cultural heritage to the fore”, as well as establishing a functioning internal market. In its Communication on a European Agenda for Culture in a Globalising World (2007), the Commission suggests that a reconciliation of diversity and commonality is

possible by nurturing cultural diversity needs while promoting exchange between different cultures and citizens’ access to cultural works (see COM (2007) 242 final, 10 May 2007).

Article 5 of the proposed Directive facilitates the **functioning of the European single market** and strengthens the position of European CHIs on different levels. A common approach to allowing the preservation of works or other subject-matter in any format or medium is necessary in order to ensure legal certainty and to foster: 1) collaboration and sharing of infrastructures among CHIs located in the different Member States; 2) the development of business models that revolve around the digitisation, or copying in any other form, of cultural heritage. 6

The **high transaction costs** for locating the rights over the content and acquiring licences have made the digitisation of cultural heritage and the construction of content databases by CHIs difficult. The majority of cultural heritage digitisation projects until now have been based on partnerships with large commercial enterprises that have the financial means to bear such costs as well as the technological infrastructures. For a long time, the European Commission has encouraged such cooperation between CHIs and private companies (e.g. see Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation). These public–private partnerships assume such a great significance that this cooperation model is regulated in detail by Directive 2003/98/EC (PSI Directive) on the re-use of public sector information as amended by Directive 2013/37/EU (see Recital 30 of the amending Directive). 7

In this context, the proposed exception potentially reduces transaction costs, allowing CHIs to directly manage cultural heritage preservation projects, only outsourcing reproduction activities to third parties. This means that **cultural heritage remains in the hands of CHIs**. 8

Moreover, collaboration and sharing of infrastructures among CHIs located in the different Member States promotes the **standardisation** of techniques for digitising. Further, the preservation and storage of content with uniform technical standards has the potential of easing **content retrieval** as well as enabling **text and data mining**. The innovation effect will likely be immense in view of the rapidly growing importance of data analysis techniques. 9

## II. Concerns regarding the Commission’s proposal

### 1. Definitions

#### a) “Cultural heritage institutions”

10 Any reform of copyright law to facilitate the preservation of cultural heritage needs to be considered alongside the question of which institutions ought to be the custodians of this cultural heritage. However, the European Commission does not seem to pay sufficient attention to this matter; the definition of the institutions benefiting from the exception is **not sufficiently precise**.

11 Most of all, the CHIs described in Article 2(3) of the proposed Directive do not correspond to those described in the Orphan Works Directive and the InfoSoc Directive, Article 5(2)(c). According to Recitals 1 and 23, Article 1(1), (2)(a)(b) of the Orphan Works Directive, CHIs are “Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States”. Article 5(2)(c) of InfoSoc Directive also includes among CHIs “educational establishments”. Therefore, the Commission needs to be consistent in its definition of the concept of CHIs, including among these “educational establishments”, and all the other institutions indicated in the abovementioned Directives.

#### b) “Works or other subject matter that are permanently in their collections”

12 The requirement that CHIs need to have “works or other subject matter that are permanently in their collection” is misleading. The idea behind that wording should be that physical copies or carriers (such as paintings, prints, movies and the like) are in their possession. It goes without saying that copyright and neighbouring rights are a different matter than the physical goods themselves, and that the CHIs – although possessing a copy or carrier – usually will not dispose of those rights. In the exceptional case that CHIs themselves are the owners of copyright or related rights (e.g. in case of legacy of both, the physical good and the copyright or related rights) an exception – in terms of a legal permission to do something without the consent of the rightholder – is not needed. The proposed Article 5 therefore only applies to the collections of CHIs for which they do not at the same time own the copyrights or related rights. This clarification of that scope of application in one of the recitals would enhance legal certainty and help with a compliant implementation of the provision by the Member States.

### 2. Making copies on behalf of CHIs

13 CHIs often will not dispose of the technical, technological, financial and other resources to copy their collections themselves. They should therefore

be allowed to outsource the activities permitted by the proposed Article 5 to third parties. Following the above-mentioned private-public cooperation model, the European legislator should specify that the CHIs benefiting from Article 5 may delegate the legally permitted activities to other CHIs or specialised institutions. This specification is necessary in order to directly exempt such third parties from copyright infringement. Beyond legal certainty, this will also enhance the effectiveness of the preservation of cultural heritage.

In cases of delegation of permitted uses to third parties acting on behalf of CHIs, Article 5 should specify that 1) copies made by such third parties are directly returned to the mandating cultural heritage institution; and 2) any provisional or incidental copies are immediately destroyed.<sup>1</sup> 14

### III. A more ambitious approach

To make maximum use of the potential CHIs have, a further-reaching limitation of copyright might be supported for the purposes of carrying out other public interest missions – particularly, interests in **research, education and teaching** – but this ultimately is a question of the political determination. 15

The proposed provision should allow access to copies reproduced by CHIs pursuant to the proposed Article 5. Whereas providing access to the originals is the purpose of most CHIs (e.g. museums, libraries, etc.), access to such copies is likely to be an issue of copyright law. The need to access copies instead of the originals is particularly evident where the originals are **endangered** and access to them needs to be substituted by access to copies. 16

Furthermore, to better allow CHIs – libraries in particular – to fulfil their function, the EU legislator might consider extending copyright limitations already existent in the European copyright *acquis*, including **public lending** 17

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<sup>1</sup> In Version 1.0 of the Position Statement it was recommended that where CHIs do not dispose of the technical, technological, financial and other resources to copy their collections themselves, they should be allowed to outsource the activities permitted by the proposed Article 5 to other CHIs or specialised institutions under three conditions. In addition to those mentioned above in para. 14 it was suggested that “in cases of delegation of permitted uses to third parties acting on behalf of CHIs in return for cost compensation, an adequate payment to the rightholders should be secured”. However, further considerations based on the copyright *acquis* and on the particular circumstances of this case advise deleting this third condition. Indeed, the possibility to delegate to third parties under the conditions mentioned in para. 14 above does not conflict with “a normal exploitation of the work or other subject-matter” and does not “unreasonably prejudice the legitimate interests of the rightholder”. The use allowed to third parties substitutes only the use otherwise directly made by CHIs.

of copies made for the purpose of preservation according to the proposed Article 5, but possibly also **document delivery**.

#### IV. Proposal

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Article 2	Amended Article 2
(1) (...)	(1) (...)
(2) (...)	(2) (...)
(3) “cultural heritage institution” means a publicly accessible library or museum, an archive or a film or audio heritage institution;	(3) “cultural heritage institutions” <del>means a publicly accessible library or museum, an archive or a film or audio heritage institution;</del> <u>are publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States;</u>
(4) (...)	(4) (...)
Article 5	Article 5
(1) (...)	(1) (...)
	(2) Cultural heritage institutions shall be allowed to mandate specialised third parties to make the copies according to paragraph 1, provided that such copies are directly returned to the mandating cultural heritage institution and any provisional or incidental copies are immediately destroyed.

## PART B

### Exceptions and Limitations

#### Chapter 4: Implementation of the Marrakesh Treaty

(Proposal for a Directive - COM(2016) 596 final; Proposal for a Regulation - COM(2016) 595 final)

[Version 1.1]

*Reto M. Hilty, Silke von Lewinski, Valentina Moscon*

##### Executive summary

The Commission's intention to implement the Marrakesh Treaty into the EU *acquis* is to be welcomed; however, the proposals are criticised for their legislative approach and content.

- As to the legislative approach it seems unnecessary to provide for two different instruments (Directive and Regulation) implementing the Marrakesh Treaty; instead, one Directive is suggested.
- Contentwise, in contrast to Recital 11 of the proposed Directive, it should be up to the national legislature to determine whether remuneration shall be mandatory and whether commercially available copies shall have priority.
- The definitions of “work and other subject-matter” as well as “accessible format copy” and “authorised entities” need to be aligned with those provided in the Marrakesh Treaty.
- The permitted uses provided for in the proposal should be specified according to the Marrakesh Treaty.

Changes to the proposed Directive aimed at aligning it with the Marrakesh Treaty as well as with the recommendation included in this Position Statement are suggested at the end of this chapter.

## I. Introduction

- 1 Concerning the implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) into the EU *acquis*, reference is made firstly to Position Statement issued by the Max Planck Institute for Innovation and Competition (the Institute) in 2015 ([http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/positionsapier\\_wipo\\_marrakesh\\_treaty-2015-05-20.pdf](http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/positionsapier_wipo_marrakesh_treaty-2015-05-20.pdf)).
- 2 The European Commission has submitted a proposal for a Directive (COM(2016) 596 final) and a proposal for a Regulation (COM(2016) 595 final). The proposed Directive covers the limitations to be provided under national law and intra-EU uses, while the proposed Regulation refers to cross-border exchange of accessible format copies between Member States of the European Union and third countries.

## II. Regulatory approach

- 3 The Commission's intention to implement the Marrakesh Treaty, as called for in the abovementioned Position Statement, is welcome. The Marrakesh Treaty explicitly aims at the cross-border flow of accessible format copies (see Article 5), which, from an EU perspective, also has an implication for the internal market, (see Article 4(2)(a) TFEU).
- 4 However, the regulatory method appears ill conceived. It seems unnecessary to provide for two different instruments for the implementation of the Marrakesh Treaty; the already complex **legal situation** in EU copyright law would thereby be rendered yet **more complicated** without an evident need. As explained in Part A of this Position Statement – paras 11–14 and 29–34 – to which reference is made, the regulatory framework remains **fragmented if a Directive and a Regulation** covering the same subject-matter **coexist**. It is worth noting that that the CJEU in its recent Opinion (Opinion procedure 3/15) when deciding on the exclusive competence of the EU for the conclusion of the Marrakesh Treaty observed that according to the Treaty, “the Contracting Parties must use two separate and complementary instruments” (No. 71). In fact, the Treaty imposes two different categories of obligations (as the CJEU explains in Nos. 72 and 73). However, the term “instrument” is misleading. No provision in the Treaty specifies the formal method of implementation of these obligations in the laws of the Member States. Therefore, the Position of the Institute according to which the implementation of the Treaty would best be based on one Directive only, continues to be supported.
- 5 In any case, the choice of the legal instrument has an impact on the implementation of European law into national law. While the permitted use

drafted in the proposed Directive has to be transposed into national law, the proposed Regulation would apply directly. In this regard, some have raised the question of whether, in this case too, in order to establish a consistent system, the Member States are permitted to “implement” the Regulation into national law in the same way as in the case of Regulation 2016/679 (General Data Protection Regulation), Recital 8 “Where this Regulation provides for specifications or restrictions of its rules by Member State law, Member States may, as far as necessary for coherence and for making the national provisions comprehensible to the persons to whom they apply, incorporate elements of this Regulation into their national law”. However, this approach does not seem desirable and appears to be inconsistent with the system of sources of European law: Where it is necessary to transpose or adapt European law to national law, legislators should issue a Directive. Otherwise, the distinction between Regulation and Directive loses its essential meaning. This would increase the level of uncertainty of law in the European system, thereby hindering the digital single market.

The legislative instrument should be chosen in a way that does not counteract the mid- to long-term vision of a modern European copyright law. From this perspective, above all it makes sense to **simplify European copyright law**. Therefore the provisions of the proposed Regulation COM(2016) 595 final could be transposed into a Directive without evident harm to the EU’s obligations towards third countries. 6

Moreover, in a broader perspective, as argued in Part A (paras 29–34), existing legislative measures could be replaced with a new (possibly single) measure, thereby avoiding overlaps and inconsistencies in the EU legal framework. However, since this postulation might go beyond the realistically attainable objectives, the copyright package should at least be limited to one new Directive containing all mandatory exceptions, including those concerning uses for the benefit of people with disabilities (Implementation of the Marrakesh Treaty (COM(2016) 596 final and COM(2016) 595 final)). At the same time, it is acknowledged that a separate instrument may enable a faster implementation and ratification of the Marrakesh Treaty. 7

### III. Concerns regarding the content of the proposed Directive

The following remarks refer to individual provisions of the proposal for a Directive, and where the text is the same, also for the proposal for a Regulation, in particular as regards the definitions. 8

#### 1. Right of remuneration

Among the main points to criticise with respect to the implementation of the Marrakesh Treaty as proposed, is the provision contained in Recital 11 of 9

the proposed Directive, which seems to forbid Member States from providing authors and derivative rightholders with a statutory right of remuneration for the use of works according to the introduced exception to protection. There is no need to destroy existing systems of remuneration as they exist, for example, in Germany. While it would seem appropriate to provide for a mandatory statutory remuneration right in all Member States, it should at least be possible to do so. After all, the EU and its Member States fought for this possibility in Marrakesh, and it would send the wrong signal now to prohibit the provision of such a remuneration and compensation right.

- 10 Furthermore, it is **up to the national legislature rather than the EU to determine**, as regards such local uses, **whether or not to introduce such a remuneration right**. In fact, given the languages of most EU Member States, demand from beneficiary persons will mainly come from within these countries, without any cross-border effect being involved. Even where cross-border uses take place, remuneration may be paid through collective management organisations (CMOs), which have to a certain extent already developed practical solutions for management of the remuneration right, such as between German-speaking countries.

## 2. Priority to commercial offers made under reasonable terms

- 11 Concerns are related to the flexibility offered in the Marrakesh Treaty to give priority to commercial offers made under reasonable terms. This is another flexibility fought for by the EU in the international negotiations for the Marrakesh Treaty, and for good reason. The aim of the Marrakesh Treaty is to facilitate access where necessary, but not where such access is offered commercially under reasonable terms; in the latter case, there is no need for a limitation of copyright. At least as regards local uses such as reproduction and distribution or making available to users in one Member State, it is again a matter for the national legislator to regulate the issue of commercial availability. Where accessible format copies are already available under reasonable terms, such facilitation may not occur or be necessary. While it would seem appropriate to provide for a mandatory provision on commercial availability in all Member States, as suggested in the Position Statement of the Institute in 2015 (see above), it should at least be possible to do so if no agreement on a mandatory provision is possible, rather than prohibiting, as in Recital 11 of the proposed Directive, such a provision on commercial availability.

## 3. Definitions

### a) “Work and other subject-matter”

- 12 The definition of a “work and other subject-matter” seems less clear than in the Marrakesh Treaty as regards the reference to publication: what is meant under the Treaty are works that have already been published or otherwise

made publicly available in any media. Accordingly, unpublished works are not covered. The phrase “which is published” in the English version is ambiguous and should be clarified (by the phrase “has been published”). Also, it would be clearer to state: “... published or otherwise lawfully made available in any media”, as formulated in Article 2(a) Marrakesh Treaty, in order to express the fact that the work in the form of text, etc., must have been published or otherwise lawfully made publicly available in any media.

Furthermore, if the approach of an independent Directive and a Regulation in addition is pursued, the clarification in Recital 5 of the proposed Directive (according to which works and other subject-matter may have been published or otherwise lawfully made publicly available “in analogue and digital form”) should also be included in the corresponding Recital 3 of the Regulation. In the near future, however, most digital publications of text will by their nature be “born-accessible”. If that happens, this particular piece of legislation might address a transitional problem that, in the long run, can only be solved technologically. 13

**b) “Accessible format copy”**

As regards the definition of “accessible format copy”, the second sentence of Article 2(b) of the Marrakesh Treaty (“The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons”) should be taken into account, which is a part of the definition, as is reflected by its placement under the heading “definitions”. Accordingly, under the Treaty, an accessible format copy is only one that also fulfils the conditions of phrase 2 of Article 2(b) Marrakech Treaty, such as the use exclusively by beneficiary persons. 14

**c) “Authorised entities”**

A similar remark applies to the definition of “authorised entity” in Article 2(4) of the proposed Directive, which does not include the qualifications under Article 2(c) Marrakesh Treaty. However, under the Treaty, such qualifications are part of the definitions, so that, for example, an entity that does not establish and follow its own practice as described in lit. (i) is not an “authorised” entity under that definition. Furthermore, as under Article 2(c) Marrakesh Treaty, the authorised entity should be one that is authorised or recognised by the government to provide education, etc. 15

**4. Permitted use**

**a) Rights covered by the limitation**

Article 3 of the proposed Directive (and Article 4 of the proposed Regulation) should not extend to the general communication right (which 16

should thus be deleted from these provisions and in each document). It does not seem necessary to allow for a limitation of the general communication right. Indeed, the Marrakesh Treaty does not do so (see Articles 4 to 6): it only allows such limitation as regards public performance rather than communication to the public in general (see in Article 4(1)(b)). Even with respect to public performance, the debates at the Diplomatic Conference in Marrakesh showed that there are hardly any cases in real life where a limitation of the communication right in general (and even the public performance right) could at all apply. Therefore, the limitation to the communication right should be deleted or at least specified so as to single out the cases, if any, in which it would seem to be possible and necessary to facilitate access to works covered by the limitation (printed works). In addition, as regards terminology and its consistency with other Directives (in particular Article 3 of the Directive 2001/29/EC – InfoSoc Directive -), it would be confusing to juxtapose the communication right with the making available right (as does the proposed Directive), since the communication right includes, for authors, the right to make available.

#### **b) Conditions**

##### *Lawful access*

- 17 The condition, set out in Article 4(2)(a)(i) Marrakesh Treaty, of “lawful access” does not seem to have been picked up in the Directive proposal for no particular reason. Moreover, there seems to be no reason for excluding this condition, the inclusion of which is actually strongly recommended.

##### *Further conditions*

- 18 Article 4(2)(a) lit. (ii) to (iv) of the Marrakesh Treaty provide further conditions that seem to be included in Articles 2(4) and 3(1), (2) of the proposed Directive. However, it would be clearer to include these conditions at the end of paragraph 1 of Article 3 of the proposed Directive.

#### **IV. Proposal**

- 19 In the following proposal the suggested changes and amendments are highlighted. The proposed Regulation should be amended accordingly if the approach of an independent Directive and a Regulation is pursued by the EU legislator. In this case, the clarification in Recital 5 of the proposed Directive (according to which works and other subject-matter may have been published or otherwise lawfully made publicly available “in analogue and digital form”) should also be included in the corresponding Recital 3 of the Regulation.

*Text proposed by the Commission*      *Amendments*

Recital 6

This Directive should therefore provide for mandatory exceptions to the rights that are harmonised by Union law and are relevant for the uses and works covered by the Marrakesh Treaty. These include in particular the rights of reproduction, communication to the public, making available, distribution and lending, as provided for in Directive 2001/29/EC, Directive 2006/115/EC, and Directive 2009/24/EC, as well as the corresponding rights in Directive 96/9/EC (...).

Amended Recital 6

This Directive should therefore provide for mandatory exceptions to the rights that are harmonised by Union law and are relevant for the uses and works covered by the Marrakesh Treaty. These include in particular the rights of reproduction, ~~communication to the public~~, making available, distribution and lending, as provided for in Directive 2001/29/EC, Directive 2006/115/EC, and Directive 2009/24/EC, as well as the corresponding rights in Directive 96/9/EC (...).

Recital 11

In view of the specific nature of the exception, its targeted scope and the need for legal certainty for its beneficiaries, Member States should not be allowed to impose additional requirements for the application of the exception, such as compensation schemes or the prior verification of the commercial availability of accessible format copies.

Amended Recital 11

In view of the specific nature of the exception, its targeted scope and the need for legal certainty for its beneficiaries, Member States ~~should not be~~ are allowed to impose ~~additional requirements for the application of the exception, such as compensation~~ remuneration schemes ~~or~~ and the prior verification of the commercial availability of accessible format copies as additional requirements for the application of the exception.

Article 2

For the purposes of this Directive the following definitions shall apply:

1) ‘work and other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other writing, including sheet music, and related illustrations, in

Amended Article 2

For the purposes of this Directive the following definitions shall apply:

1) ‘work and other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other writing, including sheet music, and related illustrations, in

any media, including in audio forms such as audiobooks, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;

2) (...)

3) ‘accessible format copy’ means a copy of a work or other subject-matter in an alternative manner or form that gives a beneficiary person access to the work or other subject-matter, including allowing for the person to have access as feasibly and comfortably as a person without a visual impairment or any of the disabilities referred to in paragraph 2;

4) ‘authorised entity’ means an organisation providing education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as its main activity or as one of its main activities or public-interest missions.

any media, including in audio forms such as audiobooks, which is protected by copy-right or related rights and which ~~is published~~ has been published or otherwise lawfully made publicly available in any media;

2) (...)

3) ‘accessible format copy’ means a copy of a work or other subject-matter in an alternative manner or form that gives a beneficiary person access to the work or other subject-matter, including allowing for the person to have access as feasibly and comfortably as a person without a visual impairment or any of the disabilities referred to in paragraph 2. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

4) ‘authorised entity’ means an organisation that is authorised or recognised by the government to provide ~~providing~~ education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, as its main activity or as one of its main activities or public-interest missions.

An authorised entity establishes and follows its own practices:

(i) to establish that the persons it serves are beneficiary persons;

(ii) to limit to beneficiary persons and/or authorised entities its

distribution and making available of accessible format copies;

(iii) to discourage the reproduction, distribution and making available of unauthorised copies; and

(iv) to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons.

### Article 3

1. Member States shall provide that any act necessary for:

(a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter for the exclusive use of the beneficiary person; and

(b) an authorised entity to make an accessible format copy and to communicate, make available, distribute or lend an accessible format copy to a beneficiary person or authorised entity for the purpose of exclusive use by a beneficiary person;

does not require the authorisation of the rightholder of any copyright or related right in the work or protected subject-matter pursuant to Articles 2, 3 and 4 of Directive 2001/29/EC, Article 1(1) of Directive 2006/115/EC, Article 8(2) and (3) and Article 9 of Directive 2006/115/EC, Article 4 of Directive 2009/24/EC and Articles 5 and 7 of Directive 96/9/EC.

(...)

### Amended Article 3

1. Member States shall provide that any act necessary for:

(a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter for the exclusive use of the beneficiary person; and

(b) an authorised entity to make an accessible format copy<sub>2</sub> and to ~~communicate~~, make available, distribute, or lend an accessible format copy to a beneficiary person or authorised entity for the purpose of exclusive use by a beneficiary person;

does not require the authorisation of the rightholder of any copyright or related right in the work or protected subject-matter pursuant to Articles 2, 3 and 4 of Directive 2001/29/EC, Article 1(1) of Directive 2006/115/EC, Article 8(2) and (3) and Article 9 of Directive 2006/115/EC, Article 4 of Directive 2009/24/EC and Articles 5 and 7 of Directive 96/9/EC, when all of the following conditions are met:

(i) the authorised entity wishing to undertake said activity has lawful access to that work or a copy of that work;

(ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;

(iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and

(iv) the activity is undertaken on a non-profit basis;

(...)

## PART C

### Out-of-Commerce Works

(Articles 7-9 COM(2016) 593 final)

[Version 1.1]

*Reto M. Hilty, Tao Li, Valentina Moscon*

#### Executive summary

The Commission’s proposal, aimed at preserving European cultural heritage while eliminating the fragmentation of European law, is to be welcomed. Nevertheless, the proposal raises some concerns regarding the following issues.

- The definition of “out-of-commerce works and other subject-matter” provided in the proposal
  - does not align with that provided in the “Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works” (MoU) of September 2011;
  - does not clarify the meaning of the expression “not available to the public through customary channels of commerce”;
  - does not include any clear criterion - such as a time frame - to define out-of-commerce works and other subject-matter.
- Regarding the scope of use of out-of-commerce works and other subject-matter two points are questionable:
  - the extension to the distribution right;
  - that uses of out-of-commerce works and other subject-matter are limited to non-commercial purposes.

The notion “broadly representative” collective management organisations is unclear.

## I. Background

- 1 Current digital technologies facilitate world-wide availability of cultural heritage. However, a sizeable share of works and other subject matter in collections of cultural heritage institutions (CHIs), including out-of-commerce works, is still protected by copyright. In such cases, CHIs need the permission of the rightholders before digitising them and putting them online as part of their digital library projects.
- 2 The European Union has been working for several years on opening up the world of European cultural heritage to the public, in particular by promoting digital access to public collections of CHIs. Articles 7 to 9 of the proposal for a Directive on copyright in the digital single market (COM(2016) 593 final) can be seen as the culmination of this process. It is an overdue response to the need to provide a standardised solution to out-of-commerce works in the EU. These provisions dovetail with Article 5 of the proposed Directive regulating the preservation of cultural heritage (see Part B, Chapter 3, of this Position Statement).
- 3 The issue of out-of-commerce works was already mentioned in Recital 4 of Directive 2012/28/EU (Orphan Works Directive), but left to the Member States. A common definition of out-of-commerce works can be found in the “Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works” (MoU) of September 2011. This stakeholder-driven agreement contains the key principles that these parties were supposed to follow in licensing the digitisation and making available (including across borders in the EU) of books or learned journals out of commerce. This is a document the European legislature should keep in mind while discussing the proposed Articles 7-9.
- 4 Similarly, the experience of some Member States should be taken into consideration. In particular Germany and France have already adopted legal measures concerning out-of-commerce works (France, Loi 2012 – 287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle; Germany, §§ 51, 52 of the Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften).
- 5 However, the CJEU ruled on 16 November 2016 (C-301/15, *Marc Soulier and Sara Doko v Premier ministre and Ministre de la Culture et de la Communication*) that the French law was not compliant with the EU *acquis*. According to the CJEU, exercising the rights outlined in Article 2(a) and Article 3(1) of Directive 2001/29/EC (InfoSoc Directive) requires the prior informed consent of the authors, whereas the French law lacks a “mechanism ensuring authors are actually and individually informed”. Furthermore, according to the CJEU “the authors are the only persons to whom that directive gives, by way of original grant, the right to exploit their works [...]. It follows that, if InfoSoc Directive does not prohibit Member

States from granting certain rights or certain benefits to third parties, such as publishers, it is provided that those rights and benefits do not harm the rights which that directive gives exclusively to authors [...]. Consequently, [...] when the author of a work decides, in the context of the implementation of legislation such as that at issue in the main proceedings, to put an end to the future exploitation of that work in a digital format, that right must be capable of being exercised without having to depend, in certain cases, on the concurrent will of persons other than those to whom that author had given prior authorisation to proceed with such a digital exploitation and, thus, on the agreement of the publisher holding only the rights of exploitation of that work in a printed format [...]” (see *Soulier and Doke*, para. 48 and 49). Also, the author must be able to do so “without having to submit beforehand, in certain circumstances, to a formality consisting of proving that other persons are not, otherwise, holders of other rights in that work, such as those concerning its exploitation in printed format” (*Soulier and Doke*, para. 51).

In this context, the proposal aimed at allowing out-of-commerce works to play the full and prominent role they deserve to preserve European cultural heritage while eliminating the fragmentation of European law, is to be welcomed. 6

## II. Concerns about the Commission’s proposal

### 1. Definition of “out-of-commerce works”

Article 7(2) of the proposal states that a work or other subject-matter is deemed to be out of commerce “when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so”. This definition raises some questions. 7

Firstly, it is not clear what is meant by the expression “not available to the public through **customary channels of commerce**”, for example as concerns second-hand bookshops. They might commercialise still-protected works and other subject matter no longer otherwise available. In this regard, the above-mentioned MoU can be of inspiration for the European legislature. According to this memorandum, a work is out of commerce “when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops)”. 8

Secondly, the Commission does not suggest any time frame in defining out-of-commerce works. In contrast, the German and French legislations limit 9

out-of-commerce works to those published before 1966 and 2001, respectively. A time frame seems useful, but rather than setting a cut-off date for all works, a more flexible approach seems advisable. For example, the relevant term might be calculated on the basis of the publication year: subject to further criteria, only works initially published a certain period of time ago meet the requirements of out-of-commerce works.

- 10 Finally, Article 7(2) goes beyond the definition in the above mentioned MoU in further requiring that a prospective availability through customary channels of commerce “cannot be reasonably expected”. It is questionable whether collecting societies may assume the task of predicting future intentions of rightholders that are not their members – apart from the fact that “reasonably” seems rather unclear. At least the German translation “*nach menschlichem Ermessen nicht davon ausgegangen werden kann*” (which basically means “as far as humanly possible cannot be surmised”) hardly defines a sound benchmark. In the light of the possibility that “all rightholders may at any time object to their works or other subject matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject” (Commission’s proposal in Article 7(1)(c); for the amendments here suggested, see III below), a further threshold seems needless from the outset.
- 11 At the same time the wording of the proposed Article 7(2) – “available to the public through customary channels of commerce” – might be differently interpreted at national level depending on the availability of bibliographic data. This suggests, on the one hand, the stipulation of a clear criterion by the European legislature like, in particular, the **time frame** mentioned above. The specification of this frame is of a political nature; in view, again, of the possibility given to all rightholders to object at any time, ten years might be sufficiently long, but some jurisdictions could prefer twenty years (in Italy, for instance, this corresponds to the maximal duration of a publishing contract). On the other hand, this status should be determined by a competent collecting society in one Member State with EU-wide effect; only this approach allows for legal certainty throughout the internal market and avoids different national evaluations of the same works or subject-matter.

## 2. Scope of use of out-of-commerce works

- 12 The scope of permitted uses of out-of-commerce works according to the proposed Articles 7 and 8 includes digitisation, distribution, communication to the public and making available. With the right to distribute this provision is broader than the scope of Principle No. 1(1) of the MoU of 2011, which omits the **distribution right**. This extension is not sufficiently explained by the Commission – and it is **doubtful whether it is necessary**. If the objective of the proposal is to promote the widest possible access to cultural heritage throughout the EU while saving transaction costs, the rights of digitisation, communication to the public or making available would seem

to suffice, unless justifications beyond the Commission’s explanations exist. In this respect it also should be considered that the Orphan Works Directive – pursuing similar legislative objectives (see Recital 1) – omits the right of distribution as well. Whichever approach is justifiable, the scopes of both legislations should be aligned.

### 3. “Non-commercial purposes”

According to the proposed Article 7(1), uses of out-of-commerce works and other subject-matter are limited to non-commercial purposes. This is not adequately justified by the Commission. A number of arguments speak for a different approach:

13

- a) **Principle No. 1(3)** of the **MoU** does not exclude commercial use of out-of-commerce works.
- b) Monetary aspects are indeed addressed in Recital 27 of the proposed Directive, which states that “any licences granted under the mechanisms provided for in this Directive should not prevent [cultural heritage institutions] from generating reasonable revenues in order to cover the **costs of the licence**”. This suggests that licences are granted by collecting societies in **return for payment**. However, the reference to “costs” might be related to both a statutory compensation and (contractual) licensing fees. Since the Commission does not provide for a statutory compensation (see on this point para. 17 below), the second option seems more probable. But then it becomes difficult to argue against granting such licences for commercial purposes as well. As a result, the whole concept of the proposed Articles 7 to 9 appears rather not well reasoned if it explicitly limits permitted uses to non-commercial purposes.
- c) “Circulation of cultural diversity” in the internal market best can be achieved through the development of culture-related industries. **Private initiatives** to digitise works are likely to be faster and also less expensive for the Member States. In particular, public-private partnership appears to be a promising approach (see also Part B, Chapter 3, of this Position Statement).
- d) This approach also aligns with other initiatives of the Commission fostering the **cooperation between CHIs and private companies** (e.g. Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation; Directive 2003/98/EC – PSI Directive - on the re-use of public sector information as amended by Directive 2013/37/EU).
- e) **Interests of the rightholder** are not negatively affected by commercial use; above all, they “may at any time object to their works or other subject-matter being deemed to be out of commerce and

exclude the application of the licence to their works or other subject-matter” (Article 7(1)(c); the additional safeguards apply according to Article 7(3)), but this is also true because commercial uses might be subject to compensation rules.

#### 4. “Broadly representative” CMOs

- 14 While it is to be welcomed that the Commission has suggested both the model of extended collective management, which is widely used in the Nordic countries, and the presumed collective management model, which is for instance widely used in France and countries with Germanic law systems, the requirement of the proposed Article 7(1)(a) needs clarification. According to that provision read in conjunction with Article 7(4), the collective management organisations (CMOs) shall be “broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence”. At the same time Article 8 – also read in the light of Directive 2014/26/EU (Collective Management Directive) – indicates that the Commission intends to foster a system of pan-European collective management to manage the works of non-members. From that, however, it may not be concluded that CMOs have to be broadly representative of rightholders within the internal market as a whole; none of the CMOs in the EU would comply with this requirement. Hence, it is advisable to **clarify in Article 7(1)(a)** that the notion of “**broadly representative of rightholders**” has to be understood as such **in the relevant Member State** according to Article 7(4).
- 15 It should further be considered that some creations may combine different categories of works, for instance audio-visual works. In such cases, the creation may fall under the management of different CMOs. The German approach (Section 51(3) of the German Collecting Societies Act; see para. 4 above) could serve as model for a further paragraph stipulating that where more than one collecting society is authorised to manage the rights the extension in Article 7(1) only applies if the rights are **jointly managed** by all of them.

#### 5. Right to object and to exclude a licence (Article 7(1)(c) and Article 7(3)(c))

- 16 Article 7(1)(c) not only requires the implementation of a right of the rightholder “to object to their works or other subject-matter being deemed to be out of commerce”, but also to “exclude the application of the licence to their works or other subject-matter”. Recital 24 states that such exclusion should be possible regardless of the objection stipulated in the first part of the provision. Certain reasons to exclude the application of a licence may be rooted in moral rights that are ascribed to the author and are not assignable to subsequent rightholders. In view of that it might be clarified that the term “all rightholders” includes original rightholders at least as far as the exclusion of the application of the licence is concerned. In contrast, it is

likely that the right to object to works or other subject-matter being deemed to be out of commerce in the first instance will be claimed by subsequent rightholders (like publishers). In relation to these rightholders, one should consider introducing a burden of proof that the work or other subject-matter will be available to the public through customary channels of commerce again within a reasonable timeframe.

## 6. Compensation

The present proposal does not provide for statutory compensation. At first view this looks reasonable considering the overarching purposes of the suggested provisions and in particular in the light of the Commission’s intention to exclude commercial uses. As explained above, however, this exclusion is not advisable. In return, commercial uses obviously lead to income on the side of certain market participants benefiting from the permission of such uses. It goes without saying that the consequence of this should be that revenues on the side of the rightholders are generated as well. This may in fact be the case. As mentioned before, Recital 27 suggests that CMOs are in a position to charge (contractual) licensing fees – irrespective of whether uses are of a commercial or a non-commercial nature (see para. 13 above). This allows the economic interests of the rightholders to be taken into account and may provide for **incentives to rightholders to limit objections** according to Article 7(1)(c) to relevant cases. At the same time CMOs have the possibility to differentiate licensing fees according to the purpose of uses. As a result it is reasonable that no statutory compensation is provided, because payment mechanisms are of a different nature – but in view of these possibilities to adequately compensate rightholders, it is not reasonable to exclude non-commercial uses.

17

## III. Proposal

In the following proposal the suggested amendments are indicated.

<i>Text proposed by the Commission</i>	<i>Amendments</i>
<p>Article 7</p> <p>1) Member States shall provide that when a collective management organisation, on behalf of its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution,</p>	<p>Amended Article 7</p> <p>1) Member States shall provide that when a collective management organisation, on behalf of its members, concludes a non-exclusive licence <del>for non-commercial purposes</del> with a cultural heritage institution for the digitisation, <del>distribution,</del></p>

communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:

(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence;

(b) (...)

(c) all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.

communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:

(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative in the relevant Member State of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence;

(b) (...)

(c) all rightholders may at any time substantiate that a work or other subject-matter will again be available to the public through customary channels of commerce within a reasonable timeframe and object to the status of being out of commerce;

(d) authors may at any time exclude the application of the licence to their works or other subject-matter.

(e) all authorised collecting societies manage rights according to paragraph 1 jointly if differently administered rights are involved.

2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.

2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, ~~is not~~ has not been available to the public through customary channels of commerce for ten/twenty years, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops) ~~and cannot be reasonably~~ expected to become so.

The determination of the out-of-commerce status in one Member State shall have effect in all others.

(...)

(...)

#### Article 8

#### Amendments to Article 8

1. (...)

1. (...)

2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the possibility of rightholders to object referred to in Article 7(1)(c) are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.

2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the possibility of rightholders to object referred to in Article 7(1)(c) are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, ~~distributed,~~ communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.

3. (...)

3. (...)



## PART D

### Copyright Contract Law

(Article 10, Articles 14 - 16 COM(2016) 593 final)

[Version 1.1]

*Reto M. Hilty, Valentina Moscon*

#### Executive summary

The purposes behind Article 10 and Articles 14 to 16 may be welcome. However, the provisions as they stand present considerable shortcomings, including the following:

- The legislative competence of the European Union has not been properly justified by the Commission.
- Supposing the European Union has competence on copyright contract law, the Commission proposals are too narrow and to some extent misleading, while ignoring the generally weak position of authors and performers, in particular
  - in determining the scope of transfer of rights or the prevention of all-encompassing and time-unlimited assignments;
  - in providing for an “appropriate” remuneration in the initial agreement and considering the interplay of alternative payment mechanisms (i.e. equitable remuneration and fair compensation);
  - in enforcing protective legal provisions.

Alternatively, a comprehensive and effective approach is suggested, including

- measures to counteract authors’ and performers’ weak bargaining power; measures to grant appropriate remuneration for authors and performers, even in the case of alternative payment mechanisms (i.e. equitable remuneration and fair compensation).

## I. Background

- 1 Copyright contracts are the first and indispensable legal act after the creation of a work to trigger the value chain of exploitation. Contracts are also the basis for authors and performers to involve third parties in bringing a work or performance into the public sphere. Therefore, **copyright contract law** influences the **copyright balance** between different players in a number of ways. Contract law is becoming even more relevant in the digital age, in which new intermediaries – such as internet providers – are increasingly joining or even replacing traditional publishers or producers.
- 2 A report commissioned by the European Parliament’s Directorate-General for Internal Policies to assess the state of copyright legislation in Europe highlights three issues, related to technological, social and economic development, that need attention (see *Dusollier et al.*, Contractual arrangements applicable to creators: Law and practice of selected member states, 2014):
  - New internet-related business models are likely to disrupt the balance of interests in contracts between authors or performers and exploiters; media companies tend to **acquire all possible rights**.
  - Secondary exploitations (such as traditional broadcasting, rental or public lending) are becoming less important; works and performances are increasingly exploited by other entities that **evade the fair remuneration** previously ensured by mechanisms of collective rights management.
  - Increasing **cross-border** exploitations and uses of works in an environment of inconsistent national legislations enhance the already existing fragmentation and increasingly undermine the protection provided for authors and performers by copyright contract law.
- 3 The European Union has frequently pointed out the need to ensure appropriate rewards to authors and performers. Indeed, Articles 10 and 14 to 16 of the proposed Directive go in this direction. They intend to
  - facilitate the licensing of rights in audiovisual works to video-on-demand platforms;
  - ensure that authors and performers are given adequate information by their contractual counterparts to assess the economic value of their rights;
  - allow authors and performers to renegotiate long-term contracts.

The purpose behind these proposals certainly may be welcome; the provisions as they stand, however, are largely useless or may even turn out to be a harmful superstructure within the European *acquis*.

## II. Concerns about the Commission's proposal

### 1. Competence

The legislative competence of the EU should be more carefully justified by the Commission. 4

According to the principle of conferral (“*Prinzip der begrenzten Einzelermächtigung*”), as stated in Article 5 of the TEU, the EU has competence to legislate in a given area whenever the **Treaties** (TEU and TFEU) empower it to act in order to achieve the objectives set therein. The competence of the EU to act in the field of copyright law is primarily based on Articles 118 and 114 of the TFEU, which however do **not** explicitly give the EU legislature a **general competence for copyright contract law**. 5

However, the mentioned provisions of the TFEU grant the EU legislature a **functional competence**; there must be a link between the aim and content of the measure and the establishment of an internal market. From this perspective, rules on copyright contracts between authors or performers and exploiters might fall under the shared competence of the European Union. Moreover, certain **integration clauses** in the Treaties require the EU institutions to integrate particular horizontal policy interests in their actions under internal market policies. There are three main integration clauses that are relevant to copyright: culture (Article 167 TFEU), consumer protection (Articles 12 and 169 TFEU) and competitiveness of the Union's industry (Article 173 TFEU). As for **culture** in particular, according to Article 167(2) TFEU, action taken by the EU “shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action” in the area of artistic and literary creation, including in the audiovisual sector. 6

The protection of the interests of authors and performers has always been one of the primary goals of the EU legislature. The *acquis* contains various references to the general need of protecting authors and performers and the aim of rewarding them is expressly recognised throughout the *acquis*. A case in point is Directive 2006/115/EC (Rental Directive), which introduced an unwaivable remuneration right for authors and performers. Directive 2001/84/EC (Resale Right Directive) is another example. It provides for a right to share in the successive sales of an original work of graphic or plastic art. However, unless contract law practices are taken into consideration, the primary goal of protecting authors and performers will not have the necessary strength. In the absence of mandatory provisions related to 7

contracts, measures intended to reinforce the authors' and performers' rights might ultimately benefit copyright industries.

- 8 Supposing European competence on copyright contract law is indeed affirmed and sufficiently justified in this respect – an issue not properly clarified in the Commission's proposal – European legislation must also be **effective** in safeguarding the interests of authors and performers.

## 2. Neglected issues

- 9 First of all, the European legislature should be **more ambitious** about taking a **comprehensive approach**. In its proposal, the Commission focusses on a few significant issues only, while largely ignoring the generally weak position of authors and performers, in particular

- in determining the **scope of transfer** of rights or the prevention of all-encompassing and time-unlimited assignments;
- in providing for an **“appropriate” remuneration** in the **initial agreement**;
- in **enforcing** protective legal provisions.

As far as certain issues are addressed, the proposals of the Commission turn out to be too narrow and to some extent misleading.

## 3. Shortcomings in the proposals

### a) Article 14

- 10 The proposed Article 14 covers both aspects of transparency and financial reporting related to the exploitation of works. However, paragraphs 2 and 3 qualify these obligations in relation to administrative expenses. Therefore, depending on the implementation of this provision in national law, authors and performers with limited bargaining power could be deprived of information relevant to them. This contradicts the fact that the digital environment considerably facilitates an administration of the exploitation of works. In view of that it seems appropriate to establish general reporting obligations to the benefit of **all authors and performers**. Adequate information is essential in order to apply Article 15, which unconditionally entitles all authors and performers to request additional, appropriate remuneration if the remuneration originally agreed upon is disproportionately low.
- 11 However, if the EU legislature should maintain such a limit according to proportionality, it should at least provide for clear guidelines regarding the scope of information duties, but also introduce adequate **distinctions** between different types of works and differing contexts of commercialisation. At the same time it should be explained to what extent

this right to information can be balanced with legitimate interests of private companies in keeping their own commercial strategies confidential.

Beyond that, Article 14 needs to clarify the **parties responsible for providing the relevant information**. Reporting obligations may not be limited to the direct contractual partners of authors and performers. Such obligations should – at least indirectly – also be imposed on sub-licensees (such as content providers or other exploiters). Ensuring adequate shares to authors and performers presupposes their full understanding of the financial flows related to their works and performances. 12

#### b) Articles 15 and 16

Article 15 aims to ensure “appropriate” remuneration to authors and performers based on additional payments upon request. This attempt is certainly worthy of support. There are, however, **two shortcomings**. 13

**First**, adjustments in a (merely potential) renegotiation phase are of an exceptional nature and presuppose rather specific constellations – but it remains unclear how (and by whom) the “appropriateness” of the remuneration needs to be assessed. This “second best” approach leaves the structural problems of unequal bargaining power of the contracting parties unaddressed; it is the **original contract** in the first instance that should provide for “appropriate” remuneration. This issue is not at all addressed in the Commission’s proposal. 14

**Second**, Article 15 is limited to payments for the transfer or licensing of exclusive rights. This disregards the fact that the copyright *acquis* partly allows for a replacement of exclusive rights by fair compensation or equitable remuneration (e.g. in the case of private copying or rentals). This provides for an **alternative payment mechanism** that should be taken into account in an overall assessment of the economic situation of authors and performers. 15

At the same time it is worth examining the value of such payment mechanisms for all parties involved. In fact, this approach presupposes that the participation in a payment for uses under an exception or limitation is stipulated as unwaivable. This, however, applies in Article 5 of the Rental Directive only, whereas similar rules are missing in Directive 2001/29/EC (InfoSoc Directive). The CJEU has nevertheless interpreted the InfoSoc Directive as guaranteeing not only the participation, but the full amount of fair compensation to authors as the original rightholders (see C-277/10, *Luksan Martin Luksan v Petrus van der Let*; C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*). These decisions give rise to a number of questions addressed in detail in Part F of this Position Statement, to which reference is hereby made. The CJEU interpretation is particularly doubtful if an exception or limitation primarily harms the contractual partner (e.g. the publisher), but not the author or performer. 16

- 17 What is most important for the present discussion, however, is the need for clarification of the terminology used in the copyright *acquis*. The unclear delineation of the notions “equitable remuneration” and “fair compensation” blurs the overall picture of the economic situation of authors and performers on the one hand and their contractual partners as derivative rightholders on the other. If the proposed Article 15 focusses on an “appropriate remuneration”, but is limited to the adequacy of payments for the transfer or licensing of exclusive rights, it masks the interplay of different payment mechanisms.
- 18 Although the scope of Article 15 is limited, it is questionable whether it ultimately will help authors and performers to receive “appropriate remuneration” based on renegotiation. Adequate ways to enforce such claims are missing. The proposed Article 16 obliges Member States to provide for a voluntary, alternative dispute resolution procedure. This is certainly promising if the involved parties are willing to settle a case. In cases of structural imbalance with largely unequal negotiating power, combined with a lack of mandatory enforcement mechanisms as a last resort, however, it appears rather naive to believe that the Commission’s proposal would change anything compared to the current situation.
- 19 One measure to protect the authors’ and performers’ interests in long-term contracts is a so-called “rights reversion”. This enables them to terminate a contract, namely in the case of lack of exploitation, lack of payment of the expected remuneration or lack of regular reporting. The Commission has not envisaged that measure, although some Member States have already introduced it in their legislation, though with great variation from one country to another. A “rights reversion” clause may apply to all or specific kinds of copyright contracts, such as publishing contracts and film contracts. It is obvious with a view to the aim to establish a digital single market that this measure should apply consistently across Europe. This suggests an additional provision defining the grounds for which a “rights revision” may apply.

**c) Article 10**

- 20 The proposed Article 10 resembles Article 16. Of course, the facilitation of licensing agreements in general and of agreements for the purpose of making available audiovisual works on on-demand video platforms is desirable. In practice, however, the effectiveness of an impartial body providing assistance with negotiations and helping to reach agreements seems limited. It is also not clear why the scope of Article 10 should be limited to audiovisual content.
- 21 Beyond the limited impact, the proposed provision seems to be a *carte blanche* for Member States. Some flexibility certainly may be welcome. Sufficiently clear guidelines, however, are missing, to the detriment of a reasonable degree of harmonisation across Europe.

### III. Conclusions

The European legislature, when providing protection to authors and performers by the means of copyright contract law, should take into account two major aspects: 22

- Authors and performers on the whole have less bargaining power than their contractual partners; possible measures to counteract this weakness are contract formalities, exploitation obligations and reporting obligations. Further, protection of authors and performers may require time limitations for licensing agreements, renegotiation mechanisms or a “rights reversion”.
- “Appropriate” remuneration for authors and performers may be safeguarded through various measures. Beyond obligations of transparency and reporting mechanisms, the European legislature should determine the “appropriateness” of a payment in more comprehensible ways. Additionally, in cases of compensation of rightholders for uses based on limitations and exceptions through collecting societies, unwaivable participation of authors and performers may provide them with relevant income.



## PART E

### Protection of Press Publications Concerning Digital Uses

(Article 11, COM(2016) 593 final)

[Version 1.1]

*Reto M. Hilty, Valentina Moscon*

#### Executive summary

The proposed Article 11 COM(2016)593 final should be entirely removed from the Directive proposal. A reasonable basis for a press publishers' neighbouring right is missing, and it may even be harmful to the public interest because:

- the scope of the proposed neighbouring right is undefined;
- it lacks an economic “rationale”, particularly because activities of intermediaries do not substitute content of press publishers;
- instead, it might hinder the development of new business models;
- German and Spanish experiences have proven negative impacts of a neighbouring right – even on publishers' economic interests;
- the proposed neighbouring right would not be consistent with the EU copyright *acquis*; it also conflicts with fundamental rights;
- enhancing quality of journalism does not lie in the competence of the EU;

Alternatives to strengthen the position of press publishers exist, e.g. extending their entitlement to sue copyright infringers.

## I. Introduction

- 1 A group of press publishers has recently claimed the right to be acknowledged as holders of neighbouring rights with the aim of tackling the alleged risk of being taken over by new intermediaries (such as content aggregators). These intermediaries would profit from using content while preventing publishers from receiving a market compensation for their productive activities.
- 2 The position of the publishers in general has been influenced by the *Reprobel* decision of the CJEU (C-572/13, *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*). The judgment is worrying from the publishers' perspective in light of possible national reactions to the *Reprobel* decision that might lead to stopping the practice of sharing copyright levies between authors and publishers.
- 3 In this context, the European Commission from 23 March to 15 June 2016 conducted a consultation on the role of publishers in the copyright value chain and the possible introduction of an EU neighbouring right for publishers. Almost 2,500 responses collected by YouCanFixCopyright (<http://youcan.fixcopyright.eu/>) expressed the idea that the adoption of a **neighbouring right for publishers** – regardless of the nature of the publisher – would have a **strong negative impact** on all aspects. But this fact does not emerge from the Commission synopsis report on the results of the public consultation, which does not provide a numerical analysis of respondents “for” and “against” the publishers' neighbouring right. Moreover, there is a reasonable concern that a numerical analysis is difficult to make if lobbying groups try to significantly obscure certain aspects while highlighting others.
- 4 Indeed, disregarding the consultation results, the Commission launched the proposal of a new neighbouring right for press publishers, which stands alongside the proposal of claims to fair compensation in favour of publishers. These are respectively regulated by Articles 11 and 12 of the Proposal for a Directive on Copyright in the digital single market, COM(2016) 593 final.
- 5 The need and the opportunity to introduce a new neighbouring right in favour of press publishers will be discussed in this part of the statement, as it is, in the opinion of the Max Planck Institute for Innovation and Competition (hereafter the Institute), without any reasonable basis and is extremely **harmful to the public interest**. For reasons that will be outlined below, Article 11 should be removed entirely from the Directive proposal. After that, in part F of this statement, the proposed claim to fair compensation in favour of all publishers, which represent a category of derivative rightholders (Article 12), will be examined. This provision has some justifications but, as it stands, it only **increases the risks of**

**fragmentation** within European copyright law. An alternative approach will therefore be brought to the attention of the relevant authorities.

## II. The Commission proposal: Concerns

### 1. Undefined object of the proposed neighbouring right

In the Commission proposal the object of protection – defined in the Impact Assessment as a “fixation of a collection of literary works of a journalistic nature” – remains unclear with regard to the term “fixation”. In reality, the object of the proposed right is likely **ontologically undefinable**. In the first instance it is the author who “fixes” the work through writing. Therefore, in the case of literary works a distinction between the work and its “fixation” is hardly feasible, and the work is copyright-protected anyway. 6

Even assuming that “fixation” means arranging a particular layout, the proposed provision misses its mark, since the publisher’s layout is not indispensable for the online fruition of such works, as is proved by the fact that third-party online intermediaries – such as search engines and content aggregators – rarely use the publisher’s layout. Therefore a new neighbouring right would not prevent digital reproduction and communication to the public of news stories. 7

Furthermore, as far as the publishers’ neighbouring right is concerned, the proposed provision does not clarify the protection requirements. This might bring about the paradoxical and unacceptable consequence of always guaranteeing, regardless of the protectability of the work as such, the protection of the neighbouring right in the work published online by the publishers. 8

### 2. No economic “rationale” for a press publishers’ neighbouring right

A clear distinction has to be made between copyright for authors and neighbouring rights. As is clear from the name, the subject-matter of protection of “neighbouring rights” is not copyrighted works. “Creativity” or “individuality” is not the precondition for the allocation of a neighbouring right. The economic rationale for copyright law (whatever theory one may follow) does not entirely apply to neighbouring rights. These rights are triggered by specific investments by market players. The production of a sound recording, for instance, requires generally existing proficiency, technical (but common) production facilities and financial resources. *De lege lata* producers of sound recordings dispose of a specific neighbouring right, as do film producers and broadcasters. The rationale of neighbouring rights is based on the economic assumption that without the 9

legal protection provided by neighbouring rights a market failure would occur.

- 10 There is market failure when third parties can take advantage of goods or services, thereby preventing the party who made the investments in those goods or services itself from reaping an adequate profit. In the case of market failure, investors are guaranteed for a limited period of time an exclusive right allowing them to benefit from their investment.
- 11 It may be reasonable to assume that new sound recordings as well as films and broadcasts would no longer be produced without a legal protection of the investments that producers or broadcasters make. This is mostly related to the fact that subject-matter of neighbouring rights results in perfectly replaceable products, while the costs of generating such products (e.g. sound recordings or films) are comparatively high. If third parties were free to (commercially) use such products, the amortisation of costs accrued by the original producer would be impossible. As a result, original producers would give up producing such goods, i.e. sound recordings, films or broadcasts. Consequently, new products would not be generated anymore and the linked markets would fail.
- 12 The Commission proposal for a new neighbouring right for press publishers – as stated in Article 11 – is based on a situation that is completely different from those mentioned above. The **contribution of press publishers** cannot be taken over by third parties, since “press publications” are “literary works” that are themselves **protected by copyright law**. Even the reproduction of small parts of literary works – namely, the extraction of 11 words – may infringe copyright law (see *C-5/08 Infopaq International A/S v Danske Dagblades Forening*).
- 13 Thus, looking to the economic rationale of a press publishers’ neighbouring right, the comparison with those for producers of sound recordings, films or broadcasts fails from the outset. In fact, a few words extracted from an article can hardly substitute an article as such.

### 3. Non-substitutive effect of intermediaries’ activities

- 14 Content offered by press publishers is not substituted by activities of search engines or content aggregators. Quite to the contrary, **search engines and content aggregators** eventually **drive users** seeking content online to the websites of publishers, who then gain economic advantages by selling advertising space and subscriptions. Thus, from the perspective of the market functioning, new intermediaries use publishers’ content, granting them a (sort of) consideration. Moreover, aggregators and search engines also affect content quality due to the competition they generate among content websites (for empirical evidence see, e.g., *Calzada*, Joan and Gil, Ricard, What Do News Aggregators Do? Evidence from Google News in

Spain and Germany (September 11, 2016). Available at SSRN: <https://ssrn.com/abstract=2837553>).

Besides, if there really was direct competition in the market between the original sites and the aggregators' press publishers, the publishers could prevent the use of content by intermediary third parties. If publishers wished, **standard robots.txt exclusion protocols** could easily be used by copyright owners to avoid aggregation. Also, on this technical basis there is the option of contractual agreements, including remuneration on a voluntary basis. 15

#### 4. Hindering the development of new business models

Paradoxically, the neighbouring right that the Commission has proposed potentially clashes with the interests of the press publishers themselves, or at least some of them. In the digital environment the role of press publishers has been changing. It is obvious that press publishers are less tied to the printing press and that therefore the publishing business has to be found in **new business models** that are (or in the near future will be) likely based on the use of digital content platforms. Publishers themselves, including press publishers, are in fact developing interactive and multifunctional platforms. The **platform-based distribution** of content can occur in many forms (e.g. integrating journal articles and book contributions with a particular focus on the information needs of a specific user community). But what is certain is the fact that always or almost always platform-based distribution of content is based on aggregated content databases, including snippets and references or even content fragments from information resources that are available elsewhere. 16

The introduction of the proposed **neighbouring right hampers** these **business models**, which should be incentivised, rather than slowed down. Potentially, press publishers' content platforms might be required to pay remuneration or be prevented from using content due to high transaction costs. These effects clearly damage users' interests. In this respect the distorting potential of press publishers' neighbouring rights has already been seen in the German and Spanish models. 17

#### 5. Experiences from Germany and Spain

Germany and Spain went ahead with two different attempts to protect the interests of press publishers in the digital world. Both ultimately have proven that a neighbouring right has a strong negative impact on publishers' economic interests. 18

The first publishers' neighbouring right (*Leistungsschutzrecht für Presseverleger*) statute in Europe was enacted in Germany in August 2013: Section 87f-g Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Section 8 of the Act of 1 October 2013 19

(Federal Law Gazette Part I, p. 3714). The law, specifically aimed at granting revenues to publishers for news aggregation, attributes an exclusive right to press publishers. According to Section 87f “[t]he producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts [...]”. Providing access to press publications remains permissible, as long as the access provider is not a commercial search service or similar entity.

- 20 This is not the place to detail the many shortcomings of this law (nor comment on its inconsistency with European and international law; see, however, the related Position Statement of the Institute, “Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger”, available at [www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht\\_fuer\\_verleger\\_01.pdf](http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf)). Instead, it is worth pointing out the effects that this law had on the market without reaching the expected results. Indeed, according to a study performed by the *Bundesverband Informationswirtschaft, Telekommunikation und neue Medien e.V.* (Bitkom, 2015, Ancillary copyright for Publishers – Taking Stock in Germany), an enforcement attempt by the German collecting society VG Media on behalf of a group of publishers had a negative effect on traffic to the websites of the publishers involved. In particular, reacting to the VG Media claims for licence payments, search engines including Google declined to display snippets from related publishers’ products or hid related search results.
- 21 Thus, if the law shows **effects** at all, they are **negative** – particularly to the detriment of start-ups and small businesses. This right potentially restrains innovative services from offering new forms of providing online access to information. The established legal protection actually left the press publishers more vulnerable than before and at the mercy of huge monopolies. In fact, only big players can afford to negotiate and (if they are willing) to pay for licences.

Some conclusions can be drawn from the German experience:

- The new exclusive right promised much more than it could ever deliver.
- It ultimately did not change the situation that existed prior to its enactment – at least not as far as Google (the company mainly targeted) is concerned; its market position was even strengthened.
- Transaction costs for all parties have risen – to the detriment of newcomers and small companies.
- Other search engines than Google now face a potential competitive disadvantage.

- The Spanish legislature introduced into the Spanish Copyright Act a remuneration right in favour of press publishers for the aggregation of news and other copyrighted content available online by means of a statutory limitation that authorises the aggregation of online content. This “snippet levy provision” was enacted late in 2014 and went into effect on 1 January 2015. Section 32.2 provides that “[t]he making available to the public by providers of digital services of content aggregation of non-significant fragments of content, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment, will not require any authorisation, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be unwaivable and will be effective through the collective management organisations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorisation”.
- 22
- Unlike its German counterpart, the right is indispensable and has to be administered by the corresponding collective management organisation. Consequently, news publishers may not negotiate over their right to be remunerated – even if they want their content to be available on a more permissible basis, such as a Creative Commons licence or open publishing. Beyond that, unlike the German law, the Spanish remuneration right could be interpreted to cover any content online (apart from photographs), not only that of press publishers.
- 23
- The first consequences of this new law, however, go in the opposite direction of what was expected: Google, as probably the most relevant news aggregator, exited the market for Spanish news aggregation, closing down its news.google.es website in December 2014, de-listing links to Spanish news publications in Google search results. But domestic online service providers have also closed down their operations (e.g. Planeta Lúdico, NiagaRank, InfoAliment and Multifriki). Recently the Spanish Association of Publishers of Periodical Publications commissioned NERA Economic Consulting to assess the impact of introducing Section 32.2 into the Spanish Copyright Act. NERA’s analysis focuses on the new law’s effect on competition, primarily for the news aggregator and publication areas, as well as for consumers and advertisers. The study (*NERA Economic Consulting*, 2015, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)*) found that the law has done **substantial damage to the Spanish news industry**. According to this inquiry, “on the more distant horizon, the negative impact will be more significant, discouraging the development of innovative content and platforms in the ecosystem of online news consumption in Spain”.
- 24

25 These two “case studies” demonstrate the need to analyse more carefully – before introducing such a new exclusive right, that is – whether and under which conditions the lack of a neighbouring right for press publishers leads to a market failure. In any case, the studies have not proven that a new legal instrument in copyright is needed, in particular not in a field of digital business models in which publishers to a large degree are able to take technical measures to protect their economic interests.

## 6. Inconsistencies with the EU copyright *acquis*

### a) Indexing and displaying news and articles

26 The proposed neighbouring right would **not be consistent with the EU copyright *acquis*** to the extent that activities carried out by online intermediaries are not covered by copyright law (i.e. indexing and displaying news and articles).

27 The most important rulings of the CJEU in this respect are the *Svensson* (C-466/12, *Svensson v Retriever Sverige AB*) and *GS Media* decisions (C-160/15, *GS Media v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*). Both cases concern “hyperlinking” redirecting users to online content in which the applicants held the copyright. The CJEU affirmed that setting clickable links to works freely available on another website and published by or with the consent of the rightholder is not an act of “communication to the public”. Hyperlinking as such is therefore mostly not covered by copyright law. This is also confirmed by Recital 33 of the proposed Directive.

### b) Extracts of articles as copyright subject matter (so-called snippets)

28 Considering the EU *acquis*, Article 11 of the proposed Directive would have a comparatively very narrow scope of application. The CJEU has specifically dealt with headlines and extracts of articles as copyright subject matter (so-called snippets). Particularly in the *Infopaq* decision the CJEU interpreted the provisions of Directive 2001/29/EC (InfoSoc Directive) on copyright, pronouncing in particular on the concept of reproduction in part of a work and on the conditions relating to the requirement of the author’s consent. The Court emphasises that the **copyright protection extends to parts of a work**, since, as such, they share the originality of the whole work and contain elements which are the expression of the intellectual creation of its author. Therefore, even an act occurring during a data capture process that consists of storing an extract of a protected work comprising 11 words and printing out that extract falls under the concept of reproduction in part within the meaning of Article 2 of InfoSoc Directive.

29 Of course it might precisely be the purpose of the proposed Article 11 to overrule this jurisprudence, narrowing down the freedom to make use of

insignificant parts of a work as far as press publishers are concerned. This, however, should be expressly made clear by the Commission, and in any case it ignores the fact that links in many cases already contain the keywords of a headline. If links might no longer be composed in a way to signal where they are heading, the freedom to link would be undermined.

#### c) “Sui generis” right for databases

Press publishers dispose of the “sui generis” right for databases (Directive 1996/9/EC, Database Directive) which with good reason allows some leeway: the extraction of insubstantial parts of a database is explicitly **allowed** under **Article 7(1)**. This free space would be **overruled** by proposed Article 11, which is even less justifiable because the “sui generis” right is equally a means to protect investments as the newly envisaged neighbouring right for press publishers. 30

#### d) Conflict with relevant interests of authors and users

The proposal to introduce a neighbouring right for publishers ignores the decisive role of authors in making content available online. An exclusive right for publishers going against the interests of the party that copyright law primarily protects would in no way be justifiable. There is, however, no clear distinction between the proposed publisher’s right and the (existing) author’s related rights. This inevitably leads to **conflicts between both parties**. A journalist may have a keen interest in having an article found and linked by a search engine content aggregator. The decision whether this can be done, however, would remain in the publishers’ hands if the neighbouring right was exclusively attributed to publishers. Merely pointing out the fact that this right should not be exercised against the interests of the authors and other rightholders – as stated in the Impact Assessment – does not resolve the conflict of interests. It does not guarantee authors any protection against publishers. 31

Also, it is important to note that according to the wording of the proposed Article 11, even purely private, non-commercial acts of reproduction would fall under this provision. Hence, there is the risk that everyday practices of millions of EU citizens, who browse, download, recommend or share such content, would become illegal. 32

### 7. Duration of the right

The duration of the proposed right is **pointlessly long**. The neighbouring right established in Germany lasts for one year “only”. Considering that newspaper articles lose their value within days, it is obvious that the protection of press publishers would be extended beyond the concerns addressed by the Commission. In particular, independently operated archives would be prohibited from aggregating any content younger than 20 years without the consent of uncountable right holders. 33

## 8. Competence of the EU legislature

- 34 In any case, the introduction of a new neighbouring right for press publishers is justified by the Commission with the argument that “a free and pluralist press is essential to ensure quality journalism” (see Impact Assessment). This objective is certainly valuable; however it does not fall within the scope of Article 114(1) TFEU (Internal Market Competence), on which the Commission bases the whole copyright package. Other measures (outside of copyright law), in contrast – like tax privileges for newspaper publishers or the like – could be taken into account.

## 9. Conflicts with fundamental rights

- 35 In view of the above, the incompatibility of the proposed neighbouring right with fundamental rights is evident. In particular, serious consideration must be given to its interference with the **freedom of expression and information** including the freedom and **pluralism of the media** (Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 European Convention on Human Rights), as well as with the **freedom to conduct an online media business** (Article 16 of the Charter of Fundamental Rights of the European Union).
- 36 Search engines, content aggregators and other content platforms under development allow the public debate to move to a network structure where users can consult, share and comment on a huge variety of different sources. As already pointed out above, new neighbouring rights are likely to prevent this structural change, which reflects the intrinsic nature of the internet. In this sense, the proposed provision would constitute an unjustified copyright-related measure that hampers the users’ freedom of information (see C-484/14, *Tobias McFadden v Sony Music Entertainment Germany GmbH*).
- 37 At the same time the proposed provision seriously hinders the freedom of online intermediaries to conduct their business. Indeed it has the capability to prevent the development of business models as well as the promotion of innovative technology. In this context, it is important to recall that the EU is under a constitutional obligation to promote technological advance (see Article 3(3) third sentence TEU).

## 10. Focus on licensing and enforcement

- 38 In order to strengthen the press publishers’ position, the European legislature should focus on the publisher’s need to easily license and enforce their rights rather than on creating new rights. For instance, the legislature could amend Article 5 “Presumption of authorship or ownership” of Directive 2004/48/EC (Enforcement Directive) to create a presumption that a press publisher must be regarded as entitled to bring proceedings to enforce the copyright in any item if that publisher’s name appears on the news publication in the usual manner.

## PART F

### Claims to Fair Compensation

(Article 12 COM(2016) 593 final)

[Version 1.2]

*Reto M. Hilty, Valentina Moscon*

#### Executive summary

The proposal is in principle welcome but it impacts on the *acquis* without clarifying it, thereby causing further fragmentation of EU copyright law.

Alternatively, it would be worthwhile to:

- clarify the notion of “rightholder” within the European copyright *acquis*;
- define the terms “fair compensation” (as used in Directive 2001/29/EC) and “(equitable) remuneration” within the European copyright *acquis*;
- clarify the allocation of both fair compensation and remuneration against uncertainties that have been exacerbated by the *Luksan* and *Reprobel* decisions of the CJEU. In particular, the EU legislature should
  - ensure that both authors (and performers) and derivative rightholders who take on the risk of making the necessary investment for the work to yield revenues, including publishers, obtain a share of fair compensation in proportion to the harm resulting from use of the work;
  - ensure that authors obtain in any case a remuneration for the use of their work made under an exception or limitation where such use requires fair compensation.

## I. Background

- 1 The Commission’s intention behind the proposed Article 12 – although not explicitly mentioned in Recital 36 – seems to be aimed at restoring the *status quo* from before the decisions of the CJEU in the *Luksan* (C-277/10, *Martin Luksan v Petrus van der Let Reference for a preliminary ruling from the Handelsgericht Wien*) and *Reprobel* cases (C-572/13, *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*).
- 2 In the first case mentioned (*Luksan*), the Court held that “European Union law must be interpreted as meaning that, in his capacity as author of a cinematographic work, the principal director thereof must be entitled, by operation of law, directly and originally, to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29/EC (InfoSoc Directive) under the ‘private copying’ exception. [...] European Union law precludes a provision of domestic law which allows the principal director of a cinematographic work to waive his right to fair compensation. [...]the principal director, in his capacity as holder of the reproduction right, must necessarily receive payment of that compensation” (see *Luksan*, para. 95). The second case arose in Belgium when the collective rights management organisation *Reprobel* requested that Hewlett-Packard pay a €49.20 levy for every “multifunction printer” it sold. The Belgian Court requested a preliminary ruling concerning the interpretation of Article 5(2)(a) and (b) of the InfoSoc Directive. One of the issues raised before the CJEU was the allocation of the right to fair compensation. The Court held that Article 5(2)(a) and (b) precluded national legislation from allocating a part of the fair compensation to the publishers of works created by authors, unless those publishers are under obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.
- 3 On 12 May 2017, the **Court of Appeal of Brussels** ruled in favour of *Reprobel*. According to the national Court the Belgian Law can be interpreted in conformity with European law since it does not affect the authors’ own “fair compensation”. Following the reasoning of the Court, the Belgian law does not reduce the “fair compensation” due to authors for the benefit of publishers, but rather it **grants publishers a supplementary remuneration**. In the Court’s opinion the remuneration due to publishers is ontologically different from that due to authors, even though included in the “*rémunération*” of Article XI. 235 of the Code of Economic Law, which reads: “*Les auteurs et les éditeurs ont droit à une rémunération pour la reproduction sur papier ou sur un support similaire de leurs oeuvres, y compris dans les conditions prévues aux articles XI.190, 5° et 6°, et XI.191, § 1er, 1° et 2° [...]*”. The Belgian decision pivots on the use made by the Belgian Law of the word “*rémunération*” instead of fair compensation. The Court considers that such “*rémunération*” can and must be interpreted as a broad concept including “fair compensation” for harm (“*dommage*”) suffered by authors. Furthermore, the fact that the Belgian system collects

the remuneration for both the author and the publishers together does not diminish the “fair compensation” for authors.

The Belgian Court’s aim of ensuring that part of the amount collected for use of works made under an exception or limitation goes to both authors and publishers is understandable. However, the decision leaves a number of questions open, in particular how to construct a mere remuneration right of a party that does not dispose of its own exclusive right. 4

The decisions of the CJEU are based on a legislative **concept of fair compensation** that was deliberately introduced as a **compromise solution** aimed at respecting national legal traditions. The history of negotiations of the InfoSoc Directive reveals that the use of the expression “fair compensation” in the context of exceptions and limitations (instead of the term usually used, “remuneration”) is due to the compromise between most Continental European countries, which are familiar with statutory remuneration rights for private reproduction and similar uses, on the one hand, and the United Kingdom and Ireland, which do not have this tradition and were reluctant to introduce such remuneration rights, on the other. Accordingly, the term “fair compensation” allows for other forms of compensation than remuneration. But at the same time those Member States that already followed the tradition of remuneration schemes were allowed to maintain them (see *von Lewinski/Walter* (eds.), *European Copyright Law. A Commentary*, 2010, 1028; *Reinbothe*, *Private Copy Levies*, in *Stamatouidi* (ed.), *New Developments in EU and International Copyright Law*, 2016, 299). Consequently, the obligation of Member States to provide for **fair compensation** was **flexible** as to its content and attribution (i.e. distribution). And on a practical level this has resulted in the absence of guidance from the EU legislature on both the calculation of fair compensation and the assignment of that compensation. 5

However, in the years following the national implementation of the InfoSoc Directive the CJEU held that the concept of “fair compensation” introduced by the InfoSoc Directive must be regarded as an **autonomous concept of European Union law** to be interpreted uniformly throughout the European Union (see C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*). Concerning the **quantification criteria**, the CJEU argued that “the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorisation” (see *Padawan*, para. 40). 6

It goes without saying that the system of “fair compensation” in the context of exceptions and limitations in the European *acquis* has become highly confusing: on the one hand, the European legislature in 2001 intended to leave a margin of flexibility to the States on this matter; on the other hand, the CJEU, ignoring the historical background, eliminated the given flexibility through its attempt to harmonise the fair compensation system throughout Europe. 7

- 8 In addition, a statutory remuneration for authors, who are prevented by law from prohibiting some exclusive rights, is provided in Directive 2006/115 (Rental Directive), Article 6 (“Derogation from the exclusive public lending right”). However, in this provision the European legislature uses the word “remuneration” whereas, as mentioned, in the InfoSoc Directive the same legislature uses the term “fair compensation” (see part A).
- 9 In view of this situation, the goal of distributing the amount collected for use of works made under an exception or limitation between original rightholders and derivative rightholders who take the risk and make the investment needed for the work to yield revenues may in principle be welcome. But the approach suggested in the proposed Article 12 is more than doubtful. Firstly, it impacts on the *acquis* without effectively clarifying it, thereby causing further fragmentation of European copyright law. Secondly, it fails to solve general problems concerning financial participation in the value chain derived from the use of works and subject matter in cases where exclusive rights are reduced to a right to remuneration.
- 10 Furthermore, it must not be overlooked that statutory remuneration for the reprography and private copying exceptions are a **significant source of revenue** and raise **single-market issues**. Based on the fact that they are set, applied and administered in a variety of different ways by Member States and that “persisting national disparities can be problematic”, the Commission has announced an assessment of the need for action on several issues, including the “link between compensation and harm” to rightholders and “how levies can be more efficiently distributed” to rightholders, avoiding double payments (see Commission Communication “Towards a modern, more European copyright framework”, COM(2015) 626 final, 9 Dec. 2015, pp. 8, 9. See also *Victorino*, Recommendations resulting from the mediation of private copying and reprography levies, 31 Jan. 2013). Nevertheless such issues have not yet been addressed by the Commission.

## II. The Commission’s proposal: Concerns

### 1. Need for clear and consistent concepts

#### a) Fair compensation vs. (equitable) remuneration

- 11 As mentioned above, the EU legislature presumes a distinction, without however clarifying it, between the notions of fair compensation and (equitable) remuneration (see Part A). According to the CJEU, while (equitable) remuneration should be determined based on the value of use of a work in financial transactions (see cases C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*; C-271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs*

(*VEWA*) v *Belgische Staat*), fair compensation is associated with the “harm” suffered by rightholders (C-467/08, *Padawan SL v SGAE*). Also, the determination of the amount of the remuneration provided for in Article 6 Rental Directive concerning the derogation from the exclusive public lending right cannot be dissociated from the fair compensation set in the InfoSoc Directive. Indeed, the CJEU in the *VEWA* decision held that “It is true, in the context of Directive 92/100, that, when there is a derogation from the exclusive right of authors, the Community legislature used the word ‘remuneration’ instead of ‘compensation’ provided for in Directive 2001/29. However, that concept of ‘remuneration’ is also designed to establish recompense for authors, arising as it does in a comparable situation in which the fact that the works are being used in the context of public lending without the authorisation of the authors result in harm to the latter” (see *VEWA*, para. 29).

Despite the above, this distinction is neither addressed nor clarified in the proposed Article 12. The (re-)establishment of the possibility of Member States to stipulate the distribution of the amount collected for use of works made under an exception or limitation amongst authors and derivative rightholders (including publishers) who invest in the work’s exploitation is related to a clear understanding of the **notion of fair compensation**. The discrepancy in the term’s usage is clearly proved by the abovementioned decision of the Court of Appeal of Brussels (see para. 2a). 12

## b) Rightholder

The proposal does not touch upon the CJEU’s understanding of the notions of “author” and “rightholder” in the *Reprobel* decision. This becomes relevant with respect to Article 5(2)(a) and (b) of the InfoSoc Directive, allowing certain reproductions of a work provided that rightholders receive fair compensation. According to the CJEU the term “rightholder” in Article 5(2)(a) and Article 5(2)(b) of the InfoSoc Directive is equivalent to the term “author” as the party which, pursuant to Article 2 InfoSoc Directive, disposes of the exclusive right to authorise or prohibit reproductions. Consequently, only the authors who have created the work are entitled to receive fair compensation. Third parties (such as publishers) that contractually acquire copyrights are not deemed to be rightholders in terms of Article 5. 13

At the same time the CJEU in the *Reprobel* decision seems to aim at balancing publishers’ and authors’ interests: according to the Court Article 5(2)(a) and (b) of the InfoSoc Directive do not preclude national legislation from allocating a part of the fair compensation (i.e. levies plus volume-based copying fees) to the publishers provided that “those publishers are under obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived” (see *Reprobel*, para. 49). 14

## 2. Legal foundation to claims to fair compensation

- 15 The *Reprobel* decision is debatable for a number of reasons, and in order to define the legal foundation for the claims to fair compensation it is useful to start with the issues raised by the CJEU in that decision.
- 16 **First**, it ignores the **use of the term “author”** in international copyright law. The Berne Convention in Article 9 also provides an exclusive right to “authors” to allow or prohibit reproductions, but no provision prevents Member States from attributing this right to a derivative rightholder who has invested in the exploitation of works. Also, Article 2 of the InfoSoc Directive cannot be read in the sense that only authors are entitled to prohibit reproductions. If the copyright is assigned to a publisher, for instance, it is doubtlessly this **(derivative) rightholder** who has the right to prohibit third parties from reproducing the work.
- 17 **Second**, the **derivative rightholder** who invests in the “production” and “commercialisation” of the work may obviously **suffer a direct (economic) harm** from statutory permissions to use a work, in particular uses according to Article 5(2)(a) and (b) of the InfoSoc Directive. The original rightholder, in contrast, may – but does not necessarily – suffer indirect economic harm due to losses incurred by the derivative rightholder (e.g. if the publisher compensates the authors based on its own revenues). This leads to the conclusion that quantifying the amount to be collected for use of works made under an exception or limitation based on the criterion of harm (as required by the CJEU in certain cases) makes sense for the derivative rightholders who bear the risk of making the investment needed for the work to yield revenues.
- 18 One might discuss whether an author could be entitled to remuneration for the use of a work for which he previously assigned or transferred his economic rights to a derivative rightholder. But it can be hardly justified why a party that actually incurs harm and that is the actual rightholder should not be compensated – for the benefit of a party (the author) that (possibly) does not suffer direct harm.
- 19 **Third**, there may nevertheless be reasons to argue why the **author** (as the original rightholder) should obtain **remuneration** in cases in which his work is used – irrespective of the economic circumstances of the case, and in particular of whether he has transferred or assigned the copyright to a derivative rightholder investing in the work’s exploitation. In fact, unless the parties have agreed on a particular distribution rule, the payment of the fair compensation settled in the InfoSoc Directive should logically be granted to the actual rightholder “in his capacity as holder of the reproduction right” (as confirmed by the CJEU in the *Luksan* decision; see para. 2 above). This means that the author, by assigning the reproduction right to the derivative rightholder in the first instance, ensures that the latter receives the related fair compensation. But the author does not necessarily

give up his own entitlement to remuneration in case of use of his work made under an exception or limitation. And the legislature may even go one step further and prohibit a waiver or transfer of such remuneration.

This reasoning underlies the approach established in Article 5 of the **Rental Directive** ensuring that authors (and performers) who have transferred or assigned their rental right to derivative rightholders exploiting their rights will “retain the right to obtain an equitable remuneration for the rental”. This right to remuneration of authors in principle is directed against the actual derivative rightholder. If collective rights management is involved (see Article 5(3) of the Rental Directive), however, this leads to the result that the collecting management organisation (CMO) has to split the distribution between authors and exploiters. Such a distribution rule may apply regardless of the various legal ways in which the administration of rights may be carried out by the CMOs in the Member States. 20

These are issues that the proposed Article 12 should address – but it entirely fails to do so. The Commission misses the opportunity to shed light on the darkness created by the CJEU in a number of cases dealing with fair compensation. Beyond that, it maintains the undesirable fragmentation of the Internal Market that existed prior to the *Reprobel* decision. 21

### III. Alternative regulatory approach

First the EU legislature should **clarify the notion of “rightholders”**. As mentioned above, the CJEU’s decision in the *Reprobel* case is not convincing. However, even though it is crystal clear that the EU legislature – not least in light of international copyright law – in the InfoSoc Directive referred not only to authors but to rightholders, including derivative rightholders, who take the risk and make the investment needed for the work to yield revenues, at this point this should be made clear by the European legislature. 22

In view of the inconsistent use of terminology within the *acquis* (see para. 4 above) the EU legislature should clarify the concepts of “fair compensation” and “(equitable) remuneration”. In the long run it would even be advisable to ensure harmonisation of the criteria used to quantify the amount to be collected in the context of exceptions and limitations. Such amount should include a share for both authors and derivative rightholders who take the risk and make the investment needed for the work to yield revenues. 23

Indeed, it is reasonable to **divide the amount collected** for use of works made under an exception or limitation between original and derivative rightholders, a **practice** that was **common** in a number of **Member States** prior to the *Luksan* and *Reprobel* decisions of the CJEU. In fact, whereas authors and derivative rightholders who invest in works’ exploitation should 24

get a proportional share of the fair compensation for harm, authors should get remuneration (based on the value of use of a work) for the use of the works (irrespective of an actual harm or of whether they still are owners of the economic rights of the related copyright).

- 25 At the same time, the EU legislature in regulating this matter should consider that CMOs may play various roles in the different settings of Member States, especially where the exclusive rights are assigned to them.
- 26 Finally, it is worth noting that performers likewise should get a proportionate share of fair compensation if they suffer harm from the use of their performances made under an exception or limitation requiring that the rightholders be fairly compensated.

#### **IV. Proposal**

##### **Article 12**

- (1) Where the author and performer has transferred or assigned, in whole or in part, his rights to a publisher or producer, or to whomever makes the work available to the public through customary channels of commerce, and where a use of that work made under an exception or limitation requires fair compensation, Member States shall ensure that each party concerned obtains a share of that compensation in proportion to the harm resulting from the use of the work.
- (2) The author shall in any case obtain remuneration for the use of his work according to paragraph 1. This remuneration shall not be assignable to the publisher or producer, or to whomever made the work available to the public through customary channels of commerce.

### Table of Equivalences

Old Numbering of Paragraph, Part F (Version 1.0)	Old Numbering of Paragraph, Part F (Version 1.1)	New Numbering of Paragraph, Part F (Version 1.2)
1	1 (amended in version 1.2)	<b>1</b>
2	2 (amended in version 1.2)	<b>2</b>
		<b>3</b>
		<b>4</b>
		<b>5</b>
		<b>6</b>
		<b>7</b>
		<b>8</b>
3	3 (amended in version 1.2)	<b>9</b>
		<b>10</b>
4	4 (amended in version 1.2)	<b>11</b>
5	5 (amended in version 1.2)	<b>12</b>
6	6 (amended in version 1.2)	<b>13</b>
7	7	<b>14</b>
8	8 (amended in version 1.2)	<b>15</b>
9	9	<b>16</b>
10	10 (amended in version 1.2)	<b>17</b>
		<b>18</b>
11 and 13	11 and 13 (amended in version 1.2)	<b>19</b>
15	15 (amended in version 1.2)	<b>20</b>
		<b>21</b>
14	14 (amended in version 1.2)	<b>22</b>
		<b>23</b>
12	12 (amended in version 1.2)	<b>24</b>
		<b>25</b>
	16a (amended in version 1.2)	<b>26</b>
16	16 (deleted from version 1.2)	
17	17 (deleted from version 1.2)	



## PART G

### Use of Protected Content on Online Platforms

(Article 13 COM(2016) 593 final)

[Version 1.1]

*Reto M. Hilty, Andrea Bauer*

#### Executive summary

The proposed Article 13 COM(2016)593 final is to be criticised regarding its approach and substance.

- Article 13 of the proposed Directive creates legal uncertainty, in particular by its use of undefined legal concepts and barely understandable formulations.
- As the proposal leaves existing EU law unaffected, it is unclear how the proposed Article 13 fits into and aligns with the *acquis* (i.e., Directive 2000/31/EC and 2001/29/EC). Beyond that, the provision would be inconsistent with Directive 2000/31/EC.
- Some requirements contained in Article 13 can enable abusive behaviour, thereby threatening freedom of expression and information (Article 11 of the Charter of Fundamental Rights of the European Union).

Therefore, it is inadvisable to adopt Article 13 of the proposed Directive and its respective Recitals, 38 and 39.

Alternatively, a comprehensive approach is suggested, including:

- specification of provider liability;
- harmonisation of the “notice and take down procedure”;
- introduction of a “counter notice procedure”;
- implementation of a mandatory exception for private, non-commercial exploitation of works in social networks not affecting the rightholder’s normal exploitation of works;
- establishment of mandatory remuneration for the exploitation of works in social networks, payable by platform providers; and
- simplification of trans-European licensing mechanisms.

## I. Background and objectives

- 1 Access and the dissemination of copyright protected material occur mostly through the internet nowadays. Online services play an important role in this process. A **participation of rightholders** in the profits generated through this is not self-evident (Communication of the Commission COM(2016) 529 final, p. 7; Proposal for a Directive on Copyright in the Digital Market COM(2016) 539 final (proposed Directive), p. 3 and Recital 37). This is especially so in the case of services, which save on their servers content uploaded by their users so it can be subsequently retrieved by the public (Impact Assessment, pp. 132, 137 et seq., 142 et seq.).
- 2 A Supreme Court decision regarding the scope of Article 14(1) of Directive 2000/31/EC (E-Commerce Directive) as well as whether and when providers themselves fulfil the requirements in Article 3(1) of Directive 2001/29/EC (InfoSoc Directive) has not yet been issued (Impact Assessment, p. 143). In this **unclear legal situation**, service providers can either fully refuse the conclusion of a licensing agreement with rightholders or more or less enforce their one-sided conditions (Impact Assessment, p. 139, 142 et seq.).
- 3 The objective of the Commission's proposed regulation is to **improve** this (negotiating) **position of the rightholders**. In particular, they should be able to better control and determine whether their works are available on online platforms or rather negotiate licensing agreements and remuneration for the use and publication of their works on the internet (proposed Directive, p. 3). From a technical perspective, this should be achieved through a reinforced and improved adoption of "suitable and adequate" measures (e.g. content recognition technologies, which prevent or at least reduce the accessibility of content made available illegally).
- 4 This way, **equal conditions and competition requirements** should be created also for all providers (content service providers) of copyright protected contents on the internet without penalising those who obtain a licence (Impact Assessment, p. 141 et seq.; COM(2015) 626 final, p. 9).

## II. Regarding the Commission's proposal

### 1. Content

- 5 In order to achieve these objectives, the Commission proposes specific obligations for online services within the scope of Article 13 of the proposed Directive. In particular, "information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users" should be obligated to **take measures** that guarantee that

their agreements concluded with rightholders concerning the use of their works or other subject-matter will be complied with (1<sup>st</sup> alternative);

via their services, no access to works or other subject-matter identified by rightholders in cooperation with them exists (2nd alternative).

These measures (“**such as the use of effective content recognition technologies**”) must be “appropriate and proportionate” in accordance with the second sentence the first paragraph of Article 13 of the proposed Directive, whereby certain support obligations are attributed to the service providers in favour of the rightholders (third sentence of the first paragraph of Article 13 of the proposed Directive). Conversely, Member States must ensure that service providers put in place complaints and redress mechanisms that are available to affected users (Article 13(2) of the proposed Directive). Furthermore, they should promote stakeholder dialogues to define best practices (Article 13(3) of the proposed Directive). 6

## 2. Conceptual critique

### a) Overall

If Article 13 of the proposed Directive became applicable law, such would lead to new, considerable **legal uncertainty**. 7

*Whether* those service providers that save content uploaded by their users and make it available to the public, carry out an **act in light of Article 3(1) InfoSoc Directive** themselves, does not clearly result from Recital 38 of the proposed Directive. Recital 38(1) of the proposed Directive merely indicates *that* those service providers that go beyond the simple provision of the physical infrastructure and carry out an act according to Article 3(1) InfoSoc Directive are obligated to conclude licensing agreements. Such does not clarify the current legal situation. Provided that service providers for certain do not want to commit any liability causing rights infringement, they must conclude licensing agreements already in accordance with current law. 8

Article 13 of the Directive proposed by the European Commission contains furthermore a series of undefined legal concepts, apart from the fact that it is **barely understandably** formulated. In particular, the proposal does not contain any explanation or definition concerning which service providers are to be qualified as “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”. What importance is given to the criterion “large amounts” is especially questionable: for instance, whether it is of relevance whether commercial (e.g. YouTube) or non-commercial platforms (e.g. Wikipedia) offer services. 9

Moreover, it is unclear what importance should be given to the requirement “**provide to the public access**” in the first sentence of the first paragraph of 10

Article 13 of the proposed Directive. This question concerns two aspects. The first is what is meant by this with regard to Article 3(1) InfoSoc Directive. The second is whether this requirement aims at a demarcation in regard to the E-Commerce Directive.

**b) In regard to the German and English version**

- 11 Numerous **discrepancies between the German and the English version** make the comprehension of the first sentence of the first paragraph of Article 13 of the proposed Directive even more difficult. The English version mentions for example “information society service providers that store and provide to the public access...”, whereas the German version mentions “information society service providers that store or provide to the public access...”. This difference can also be found in other passages, for example in Recital 38. Given the subject-matter, only the English version can be correct.
- 12 Both **alternatives of the first sentence of the first paragraph of Article 13 of the proposed Directive** mentioned under point 5 differ in the English version in that
- In the first alternative, agreements between rightholders and service providers concerning the use of works or other subject-matter already exist; the specific matter concerns their compliance;
  - In accordance with the second alternative, rightholders and service providers identify together which works or other subject-matter should not be accessible.

In contrast, the German version seems to require **agreements** between the rightholders and the service providers also concerning the second alternative. However, this makes no sense – on the contrary. This alternative must also be applicable to those service providers which haven’t concluded any licence agreement with the rightholders. Such results not only from Recital 38 of the proposed Directive; it is also supported by the detailed explanation of certain provisions of the proposal (p. 10) and, in particular, the wording in the English version (pp. 10, 29), while the wording of the second alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive in the German version greatly differs from the explanation (pp. 12, 31). Only the English version correlates to the spirit and purpose of the proposed rule, to create incentives to the conclusion of licence agreements. Such incentives would be destroyed if those of all service providers, which already have licence agreements with the rightholders, would be obligated to the further measures under alternative No. 2.

### 3. Substantive objections

#### a) **Alternative with licence agreement (first alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive): “pacta sunt servanda”**

13

The **first alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive** focuses on service providers that have concluded agreements with the rightholders for the use of their works or other subject-matter. Indeed, only service providers that do not fall under the liability exemption of Article 14(1) of the E-Commerce Directive are required to conclude such licence agreements (Recital 38 of the proposed Directive). However, also service providers that conclude voluntarily licence agreements with the rightholders fall under the scope of the first sentence of the first paragraph of Article 13 of the proposed Directive.

This requirement does not constitute an additional burden either in one or in the other case, since the service providers are not required to do more than what is already applicable: “**pacta sunt servanda**”. As contracts are to be met in any case according to general applicable (contract) law, the first alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive is simply superfluous. To the extent that it (falsely) may suggest that service providers that venture licence agreements may be subject to additional obligations, the norm may even have a dissuasive effect.

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#### b) **Alternative without licence agreement (second alternative of the first sentence of the first paragraph of Article 13): Notice and take down?**

The **second alternative** aims at preventing access to certain contents, which have been identified by the rightholders in cooperation with the service providers. The question that arises here is to which extent the first sentence of the first paragraph of Article 13 of the proposed Directive should complete or extend the “notice and take down procedure” (NTD procedure) provided for in Article 14(1)(b) of the E-Commerce Directive.

15

In accordance with this “**NTD procedure**” (which does not coincide with the one foreseen in § 512 of the U.S. Copyright Act), the rightholder must first notify the service provider of a rights infringement and request the provider to remove the illegal content. In order to not lose its exemption from liability in accordance with Article 14(1) of the E-Commerce Directive, the service provider must comply with this request.

16

In addition to this, according to Supreme Court case-law in Germany, **specific, situation-related monitoring obligations** are required in order to avoid repeated infringements of the same type (BGH GRUR 2013, 370, 371 – Alone in the Dark; BGH GRUR-RS 2013, 15388 Recital 38 –

17

*Prüfpflichten*), which fall under the scope of what is permissible under European Law (C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*; C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL*; C-324/09, *L'Oréal SA and Others v eBay International AG and Others*). De facto, this case-law compels those service providers that desire to guarantee the availability of content on their platforms in the future to conclude licence agreements with the rightholders.

- 18 If Article 14(1) of the E-Commerce Directive is interpreted in accordance with the German case-law, the norm fulfils comparable objectives to the proposed first sentence of the first paragraph of Article 13 of the proposed Directive. In this respect, a **norm valid for all of Europe** would be welcome since national case-law concerning Article 14(1) of the E-Commerce Directive is inconsistent. However, as the type of cooperation between rightholders and service providers is not further specified in the first sentence of the first paragraph of Article 13 of the proposed Directive, it remains dubious whether further harmonisation would really be achieved through it.

**c) Compatibility with other EU law**

- 19 The new directive leaves existing EU Law **unaffected**, in line with Article 18(3) of the proposed Directive. In regard to Article 13 of the proposed Directive, and according to the Impact Assessment (pp. 147, 154) and Recital 38, such concerns especially the scope of the **E-Commerce Directive**. Under certain circumstances, service providers would thus fall under the liability exemption of Article 14 of the E-Commerce Directive, regardless of whether they adopt any measures in accordance with Article 13 of the proposed Directive.
- 20 **A general monitoring obligation wouldn't be compatible with Article 15(1) of the E-Commerce Directive.** Consequently, the first sentence of the first paragraph of Article 13 of the proposed Directive cannot introduce at the outset any substantial new obligations. In any case, service providers, which fall under the liability privilege of Article 14 of the E-Commerce Directive, cannot be obligated to proactively monitor all data of all clients indefinitely. General monitoring obligations would furthermore be incompatible with Article 3 of the Directive 2004/48/EC (Enforcement Directive) (see, *SABAM*).
- 21 Moreover, directives are to be interpreted and applied in accordance with the rights and principles of the **Charter of Fundamental Rights of the European Union** (the Charter of Fundamental Rights) (Recital 45). This means that copyright protection (Article 17(2) of the Charter of Fundamental Rights) on the one hand, and the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the protection of personal data, as well as the freedom of expression and information

(Articles 8 and 11 of the Charter of Fundamental Rights) on the other, must be fairly balanced (see the CJEU case *SABAM*, p. 261, 263).

#### d) Content recognition technologies and procedures

All **further requirements contained in Article 13 of the proposed Directive** – in particular the EU Commission’s attempt to introduce by law obligatory content recognition technologies and procedures – are ultimately related to the first sentence of the first paragraph of Article 13 of the proposed Directive. Thus, also they cannot lead to any changes of the current legislation worthy of mention. 22

On the contrary, precisely such content recognition technologies and procedures also entail risks. For example, content pertaining to political opinions or admissible parody are not to be recognised (Article 5(3)(k) of the InfoSoc Directive). Furthermore, they enable **abuse**. Because it does not necessarily have to be rightholders requesting the service providers to remove content; also competitors, for example, could do this (e.g. <https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/>). The victims would not only be the (legally acting) users, but also the consumers. Conflicting with Article 11 of the Charter of Fundamental Rights, their freedom of information would be hindered without such being required by legitimate interests of the rightholders. 23

Precisely because **content recognition technologies and procedures** can lead to a sensitive limitation of the fundamentally protected freedom of expression and information (Article 11 of the Charter of Fundamental Rights), it must remain reserved to legally authorised judges to decide on the legality of content (see also the CJEU cases *Scarlet and SABAM*). Consequently, the fundamental principle contained in Article 15(1) of the E-Commerce Directive, that providers have **no general filtering or monitoring obligation in regards to pure user content**, must be maintained – also in favour of platform operators. 24

### III. Suggestions for improvement

#### 1. Specification of provider liability

The **specification of the liability rules for platform operators** seems advisable - however, without increase in relation to the current liability exemption. Because with that, each platform operator would be de facto forced – even without a legal obligation – to apply said content recognition technologies and procedures, which should be rejected on the abovementioned grounds. In order to avoid the consequences of liability, they would have to adjust these technologies so that potentially illegal content is blocked at the outset. Even with such “over blocking”, however, it 25

would remain dubious whether copyright infringements could be systematically and extensively prevented.

- 26 A specification of the liability rules must rather mean to extend the principle already reflected in the *acquis* that providers are **not liable for users' actions, which they cannot reasonably control** (Articles 12-14 of the E-Commerce Directive), to the situation nowadays primarily at hand, that service providers merely place the infrastructure at the disposal of their users in order for them to be able to carry out acts of exploitation exempted within the scope of legal exceptions. By implication, a liability exemption can only exist as long as the service providers haven't or couldn't have **any knowledge** of the illegal users' actions. Should the provider be made aware of possibly illegal content (especially when made aware by a rightholder), it must initiate the NTD procedure described under point III 3., in order to avoid liability.
- 27 Essentially, this rule could already be interpreted from the current Article 14 of the E-Commerce Directive. However, as long as the CJEU does not address the question of the norm's extent, a **uniform application** throughout the internal market isn't ensured – apart from the fact that interpretations can differ from case to case. It thus seems indicated to extend the norm by adding a respective paragraph 1a. Such could be formulated as follows: “Paragraph 1 is also applicable to the provision of an infrastructure for saving content with the objective of making it available to the public without assistance of the service provider”.
- 28 The **liability exemption must cease** as soon as a service evidently intends to enable users to illegally upload copyright protected content. To absolve service providers of responsibility in such cases is also not in accordance with the freedom of expression and information (Article 11 of the Charter of Fundamental Rights). More than ever, a service provider must be responsible for its own acts; such also includes the non-authorised use of third-party content in a way that makes it seem like it is part of the provider's own service (in the sense of an appropriation).
- 29 If the E-Commerce Directive is complemented as abovementioned, this demarcation could simultaneously be made even clearer by way of an **addition to Recital 44**. A possible wording could be, for example: “The same applies to the intentional induction or support of illegal user actions by third-parties.” It goes without saying that own illegal actions are deprived of the exemption. What is to be considered appropriating use seems, however, still unclear; such is particularly shown by the debates concerning the extent of permissible linking.
- 30 If the necessity of this delimitation is acknowledged and the focus is limited to service providers beyond the liability exemption, i.e. it is unquestionable that they must be liable for infringements – in particular for their own acts –, a provision concerning the application of certain content recognition

technologies and procedures is at least in principle justified. In this respect, certain approaches of Article 13 of the proposed Directive shouldn't be categorically rejected; what is worthy of critique is first and foremost the **lack of differentiation**. Also the concerns expressed under point II.3.d against such technologies and procedures also in the realm of illegal behaviour are not void. Rather, the concomitant risks should be taken into account in an improved liability rule as proposed.

## 2. Consideration of the users' interests

The interests of today's users often go beyond the exchange of opinions. Publishing audio data, videos, photos, etc. – partially self-edited or made using pre-existing works (so-called *user generated content*) – constitutes for many people a daily activity. This user behaviour constitutes a reality that can barely be prohibited but isn't reflected in current copyright law. However, for its effective enforcement and implementation, **society's acceptance** of copyright law is of crucial importance. 31

The German legislature recognised this already in 1965 and found a long-lasting solution by implementing an **exception with obligatory remuneration** in favour of the private copy, in order to bring about a balance of interests. The sustainability of this approach has been proven true up to today; in particular in Europe, most States have adopted this model. It is now time for the European legislator to take a respective step in the internet age. 32

It is decisive that the legitimate interests of the rightholders are taken into account with this model. Therefore, **only that private exploitation** that corresponds to the usual practice in social networks should be legalised. Exploitation attaining a commercial degree or serving commercial objectives from the outset are not to be allowed. But also for private exploitation per se, the limit is when the possibilities of a normal exploitation become distinctly affected. Such is arguably the case with pure file sharing, the publication of a complete movie or an entire album. Time also plays a role: the longer a work is available, the less potential there is of damage for the rightholder, and all the more can more extensive uses be allowed. 33

Developing the case-law, in accordance to which a use permission only relates to works that do not originate from an obvious illegal source (see CJEU case C-463/12 *Copydan Bandkopi v Nokia Danmark*, p. 351, 357), content available online should only be allowed to be used when it has been **uploaded legally**. Thereby, a private user action may build upon previous acts of exploitation from third-parties that are covered by an exemption, however not through the exploitation of illegal file sharing. 34

- 35 With criteria such as the abovementioned, national legislators and courts obtain sufficient but not too broad leeway for solutions fair to all interests. In order to nevertheless bring about a certain legal certainty for the users, certain positive or negative **examples** could be included in the recitals.
- 36 If the proposal to allow normal exploitation subject to payment instead of prohibiting is implemented also in the context of social networks, an adequate payment should be secured for the **upload** itself – regardless of the question whether the legally uploaded content remains unchanged or whether the user has introduced creative or non-creative changes. (See part F as to the splitting of the payment between creators and subsequent rightholders.)
- 37 Individual billing of each user would admittedly be far too complex and costly for the rightholders. It thus seems inevitable to collect the reasonable remuneration centrally and supported by the established mechanisms of **collective rights management**. Here, the service provider comes into play, since it enables such user conduct to start with – to a certain extent, similar to the producer of blank recording media that enables private copies. This service provider should, of course, not be liable for the user’s conduct, especially not when the user acts within the scope of an exception. However, it seems reasonable and fair that, as **paying agents**, an action can be brought against the **platform providers**. Thereby, costs arise for them, however they can shift them directly or indirectly to the users similarly to how the producers of blank media burden them with the copyright levies. How this payment mechanism is implemented in practice can be left up to the Member States; the Directive can limit itself to laying down the principle of collective rights management and at most, determine certain parameters for it in a recital.
- 38 How an exception subject to payment for private conduct in social networks is implemented legislatively is, however, a fundamental question. It must be noted that there are two issues here. Firstly, the **upload of works** or parts of works in social networks according to the abovementioned criteria should be allowed. Secondly, **such uses of the work**, which are carried out within the scope of *user generated content* **before uploading**, should, however, also be covered by this permission. Although copyright law does not prohibit such actions as long as they occur in private, the user abandons this realm, however, when such content is administered to a social network. To this extent, it is ultimately the act of uploading in each case that must be permitted.
- 39 If this permission would be implemented by simply complementing the current Article 5 of the **InfoSoc Directive** with a further offense, this exception would be optional for the Member States in accordance with the current concept; only an order (as is the case currently with, for example, Article 5(2)(a),(b) and (e)) could be made mandatory – should this exception be transposed into national law. Should the Member States

instead be obligated to take up such an exception, such would be as equally possible with a new, independent Directive such as how the Commission proposes this for a series of new exception provisions within the scope of a Directive on copyright in the digital internal market. In contrast, with a regulation in the InfoSoc Directive, a new norm category for **mandatory exceptions** would have to be created; other use permissions – currently of facultative transposition – could then be transferred to such.

The **core elements** of such a statutory exemption – in addition to possibly other specifications, which could be explained in recitals – would essentially have to be the following: 40

- Exploitation by a private person
- Unchanged or changed by the private person
- Usual practice in social networks
- No commercial extent
- No noticeable impairment of the possibility of a normal work exploitation
- The rightholders obtain remuneration.

The mandatory remuneration obligation may represent a significant burden for platforms, which are not directly or indirectly (e.g. advertising based) profit-oriented. However, copyright doesn't traditionally apply to profit orientation; also the use of the work for a benefit concert requires licence payments. Such circumstances can be taken into account, however, when **setting the fees**; such lies within the Members States discretionary power. 41

### 3. Measures against illegal uploads (NTD procedure)

#### a) Harmonisation of the NTD procedure

The currently existing possibilities for rightholders to proceed against unauthorised user actions within the scope of the NTD procedure (see above, point II. 3. b)) are not affected by the here proposed exception for private user conduct in social networks, but simply limited substantively: the possibility to prohibit certain work uses is converted into a right to remuneration. Indeed, the service providers will have the new function of paying agents by way of such an exception. However, **no new monitoring obligations** are related to it. In order to not lose the liability exemption of Articles 12-14 of the E-Commerce Directive, they will not have to act preventively, for instance when a user acts beyond the exception, but rather upon actual or possible knowledge, for instance after respective notice from a rightholder. 42

- 43 Substantially, the shift of the limit between admissible and inadmissible exploitations concomitant with the here proposed changes leads, however, to increased requirements in the management of the NTD procedure. In the interest of legal certainty, but also in order to achieve a higher level of harmonisation within the EU, an **elaborate legislative design of the NTD procedure** is imposed. In particular, measures to contain potential abuse of NTD seem particularly sensible. Precisely because the here proposed exception could increase the incentives to remove legally published content based on an NTD procedure.
- 44 Not only the user's interests deserve closer attention; also the duties of the rightholders should be substantiated. Specifically, in particular certain requirements for the **legitimacy of those rightholders** who want to remove certain protected content should be regulated by law (see, for example, the respective provision in section 191 of the Finnish Information Society Code (917/2014)). This could be done, for example, by them having to reveal their identity. Also a precise identification of the (alleged) illegally published content as well as the respective unlawful user seems reasonable. Mandatory disclosure as to why the publication of the content is illegal or not covered by an exception could also be worth considering.

#### **b) Counter notice procedure**

- 45 In order to counteract a disproportionate restriction of the freedom of expression and information (Article 11 of the Charter of Fundamental Rights), but also to prevent a circumvention of the here proposed or of other exceptions, the introduction of so-called **counter notice procedures** seems the obvious way forward (see, for example, the respective provision in section 192 of the Finnish Information Society Code (917/2014)). Such opens up the possibility for users who use content unapparent illegally, to react to a respective complaint of the rightholder, provided that they are informed by the service provider upon the initiation of a NTD procedure.
- 46 In order to attain a level of harmonisation as high as possible, certain requirements for this counter notice procedure on an EU level appear desirable. The objective must be to facilitate **communication between rightholders and users** and, at the same time, to relieve service providers of the obligation to decide on the illegality of content. Here, Member States can retain certain flexibility in the transposition in order to take into account national parameters.

#### **4) Licensing simplification**

- 47 The proposed Article 13(3) of the proposed Directive aims for cooperation and dialogue between service providers and rightholders, while, however, only focussing on the measures planned in paragraph 1, which should be turned down, at least for the liability exemption, based on the abovementioned grounds. Whereas the problematic that the necessary

licences are, in practice, not at all available or only difficult to obtain, isn't addressed. For those service providers wishing to act legally, this leads to **substantial transaction costs**, which can constitute actual market entry barriers especially for start-ups as well as burden smaller companies with disproportionate costs.

Interests that would justify such costs are hardly evident – on the contrary: 48  
simple licencing possibilities should be a wish especially for rightholders wanting to prevent illegal uses. Being their interests normally oriented to the monetisation of the economic value of copyrights, licence grants constitute the actual basis for this. To this extent, measures, which simplify licensing, contradict the **interests of rightholders** at most when they wish to achieve preferably high margins by way of unlimited exclusivity; whether such would be worthy of protection is, however, another question.

The interests in preferably accessible licences are reflected also in the 49  
system of collective rights management, insofar as the collecting society has the **obligation to cover those seeking a licence**. This mechanism presupposes, however, that the rights are not exercised by the rightholder himself. But even when rights are self-administrated, copyright law has mechanisms to prevent escalating consequences from exclusivity. For instance, Article 13(1) of the Revised Berne Convention – already taken up in 1908 – allows its contracting parties under certain conditions to grant compulsory licences in favour of recording companies.

Whether one wishes to go as far as this, obligating rightholders in certain 50  
circumstances to grant licences to certain service providers is ultimately a political question. Such is not necessary when the rights clearance can be carried out without great expense and the conclusion of contracts between licence seekers and rightholders is as simple as possible. For this, the basis must be established in European Law. Because if the digital internal market is to be achieved, **trans-European licensing** plays a central role. Isolated measures of individual States would barely have any effect to facilitate activities of service providers beyond the country's own borders.

An important step in this direction was given with Directive 2014/26/EU on 51  
collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The scope of application of this Directive is, however, comparatively narrow and the Directive is also limited to constellations in which rights are managed by collecting societies. As such, it is able to promote the digital internal market in certain segments only. If, in comparison, the proposed **Article 13(1) of the proposed Directive** aims at bringing service providers to conclude licences in order to achieve an adequate remuneration of the rightholders, then it is going in the right direction. In its proposed form, however, it **will not achieve those objectives**.

#### IV. Conclusion

- 52 The European legislature is strongly discouraged from adopting the proposed Article 13 of the proposed Directive in its proposed form. Instead of adding an inconsistent facet in itself and in relation to current law, it seems more reasonable to first start with the existing *acquis*. Certain adjustments are recommended in particular concerning the **E-Commerce Directive**. Also certain interventions in the **InfoSoc Directive** would allow specific improvements. Depending on the concept and subject to other adjustments, a new directive may have its justification as long as it is carefully concerted with remaining EU Law.
- 53 A rejection of the proposed Article 13 of the proposed Directive (and its respective Recitals 38 and 39) thus does not mean that it is not the right moment to free current law of uncertainties and to improve it in light of the developments that have occurred in the meantime. It also does not mean that new – and in particular technology-based – obligations cannot be imposed on service providers, which act beyond the liability exemption. Such **legislative measures should simply be better coordinated**; an isolated approach, as attempted with Article 13 of the proposed Directive, is not promising.

## **PART H**

### **Intra-European content circulation**

(COM(2016) 594 final)

[Version 1.1]

*Reto M. Hilty, Moritz Sutterer*

#### **Executive summary**

Proposal COM(2016) 594 final contains two regulatory areas:

- facilitation of the acquisition of rights for cross-border services offered by broadcasting organisations by means of a territorial fiction (country-of-origin principle);
- facilitation of cross-border retransmission in certain closed networks by means of mandatory collective management.

The Commission's initiative is in principle advocated. However, the proposal suffers from ambiguities, concerning, amongst others:

- the choice of the legislative instrument (Regulation), which is detached from Directive 93/83/EEC and nevertheless creates certain needs for transposition into national law;
- the scope of the proposed Regulation;
- the impact of the proposed Regulation on international jurisdiction;
- uncertainties as to antitrust law and the fundamental freedoms regarding territorial limitations.

Three possible alternatives are suggested:

- Option 1: Repeal Directive 93/83/EEC and adopt a joint Regulation.
- Option 2: Transfer the proposed Regulation into Directive 93/83/EEC or, at most, adopt another Directive complementing the existing Directive.
- Option 3: Separate the issues. The retransmissions could be regulated uniformly by a Directive, while the original transmission via satellite and parallel transmission over the Internet by means of "ancillary online services" could be addressed in one common Regulation. This Regulation should include the content of the portability regulation.

## I. Objective

- 1 In the context of its programme for the modernisation of European copyright law of the 14<sup>th</sup> of September 2016, the European Commission presented a proposal for a Regulation on the exercise of copyright and related rights with regard to certain online transmissions of broadcasting organisations and the retransmission of television and radio programmes (COM(2016) 594 final). The proposal provides for **further development of the satellite broadcasting and cable retransmission Directive** (Directive 93/83/EEC, SatCab Directive). Like the SatCab Directive, this proposal also contains two regulatory areas, which must be distinguished from one another.
- 2 Firstly, the **acquisition of rights** (so-called rights clearance) is to be facilitated for cross-border services offered by radio broadcasters themselves. Today it is common for broadcasting organisations to offer their programmes simultaneously over the Internet (**simulcasts**). In addition, media services enabling the time-shifted retrievability of broadcasts over the Internet and also providing background information (**catch-up services**), have become established. The SatCab Directive does not apply to either type of offer. This gap is intended to be closed by the proposed Regulation. The proposal takes up the country-of-transmission principle of the SatCab Directive and transforms it into a **country-of-origin principle for ancillary online services** (see Article 1(a) of the proposal). Relevant provisions are therefore Articles 1(a) and 2 of the proposed Regulation.
- 3 Secondly, the aim is **to facilitate the cross-border retransmission** of the initial transmission by third parties. Operators of retransmission services do not create their own broadcasts, but bundle the channels of television and radio stations to make them available to a wider audience. In this regard, the proposed Regulation is intended to overcome technical limitations resulting from the SatCab Directive. Specifically, the system of mandatory collective management **is to be extended to certain cross-border online retransmissions**. The relevant provisions can be found in Articles 1(b), 3 and 4 of the proposal for a Regulation.
- 4 The need for regulation is recognised and the Commission's initiative to simplify the cross-border availability of broadcasts over the Internet is to be welcomed. The SatCab Directive considerably facilitated the cross-border availability of media content in the 1990s. However, it is far more than twenty years old, and its regulatory content is limited to the transmission technologies of that time. The Internet has since revolutionised cross-border access to information and media content. The proposed Regulation is intended to **close the regulatory gaps** that have arisen through technical development and to **facilitate the legal cross-border distribution of broadcasts over the Internet**.

However, the Commission's proposal suffers from a number of **ambiguities**. They concern the **scope of the proposed Regulation** and its **impact on international jurisdiction**; it is also unclear to what extent **territorial limitations on a contractual basis** are permissible with regard to antitrust law and the fundamental freedoms. Further areas appear to be incoherent and, in the view of the Institute, require correction. This mainly concerns the **choice of the legislative instrument**. The main points of the proposal are briefly described below and are placed in the context of European copyright law. Subsequently, the criticisms are discussed. 5

## II. Content of the Regulation

### 1. Ancillary online services

The first part of the proposed Regulation refers to the making available of broadcasting content across borders over the Internet by the broadcasters themselves. The territoriality of copyright and the application of the *lex loci protectionis* doctrine as a conflict of law rule, as also described in Article 8 of the Rome II Regulation, results in the parallel applicability of every national copyright regime within the scope of which copyright-protected content is made available. Accordingly, there is no unitary copyright, but a set of national copyrights. This means that broadcasters must observe all those national copyright regimes, and, above all, acquire copyrights for all areas, in which their broadcast can be received. 6

In order to facilitate cross-border satellite broadcasts, the SatCab Directive introduced the country-of-transmission principle in Article 1(2)(b). On the basis of this, **only the input of the signals to the satellite is relevant** from a copyright perspective. Only where the input is made does the “communication to the public” take place. This ensured that the rights had to be cleared only for one Member State. However, this facilitation for broadcasters is, in technical terms, restricted to transmission via satellite. The SatCab Directive does not apply to the online transmission of content. A corresponding facilitation for this is therefore provided for in Article 2 in conjunction with Article 1(a) of the proposed Regulation. 7

The proposed Regulation – like the SatCab Directive and the proposal for a Portability Regulation (COM (2015) 627 final) before it – uses the means of a **territorial fiction**. This is not a provision of private international law, as the term employed, *country-of-origin principle*, implies. Rather, **the copyright-relevant act is located in only one country**. In less technical terms, online broadcasting (communication to the public, making available and reproduction) takes place only in the Member State in which the broadcaster has its main establishment. 8

## 2. Retransmission of third-party content over the Internet

- 9 The second part of the proposed Regulation relates to the retransmission of content by third parties. Here the proposal intends to overcome the technical limitations of the SatCab Directive. The rights to grant or refuse authorisation for retransmissions carried out in certain closed online networks such as **Internet Protocol Television (IPTV)** and not transmitted by wire or microwave systems are also to be subject to mandatory collective management. However, as is the case with Articles 9(1) and 1(3) of the SatCab Directive, the scope of the proposed Regulation is limited to the **retransmission of programmes “from another Member State”**. Thus, purely national retransmissions are subject to national legislation.

### III. The proposal in the context of European copyright law

- 10 The Commission’s proposal for a Regulation cannot be considered in isolation. It is one piece in the puzzle of the overall policy for developing a digital internal market. An overview of the proposed rights package and its references to the existing *acquis communautaire* can be found in Part A of this Position Statement.

Specifically, the following relationships are to be emphasised:

- The proposal is an extension of the **SatCab Directive**, which is technically limited to transmission via satellite by broadcasters and to the retransmission via cable networks and microwave systems.
- There also is a close link with the Commission’s proposal for a **portability regulation**. The latter focuses on cross-border portability for the use of online content services purchased by consumers in their Member State of residence. Such online content services are intended to be accessible to consumers even if they are temporarily abroad. However, the scope of the proposed Regulation is limited to services provided within a **subscriber relationship**. Its scope is thus narrowly circumscribed and does not include services provided by broadcasters outside a subscriber relationship. Here, too, the Commission employs a territorial fiction.
- Of importance for the proposed Regulation is also the legal basis for **collective rights management**. With regard to the retransmission of broadcast content, this is made evident by the fact that a system of mandatory collective management is to be established. This **requires a functioning collective rights management system**. But also the rights for the primary transmission and ancillary online services are partly licensed by collecting societies. For this purpose, Directive 2014/26/EU (Collective Rights Management Directive) establishes

minimum standards. Its aim is, among other things, to encourage collecting societies to grant pan-European licences for online music rights.

- Unlike the other Commission proposals on the modernisation of copyright, this proposal for a Regulation does not directly define the subject matter of copyright. While the Proposal for a Directive on copyright in the internal digital market (**COM (2016) 593 final**) is intended to augment the harmonisation of national copyright laws – for instance through the implementation of mandatory exceptions and limitations – the country-of-origin principle aims to preclude the parallel application of several national copyright regimes and to concentrate the assessment of cross-border use of copyright within a single legal system. At the same time, a widespread harmonisation of substantive law can mitigate the disruptions caused by such concentration on a single legal regime. This is reflected in the second part of the proposed Regulation, which provides for a system of mandatory collective management for the purpose of exercising retransmission rights. It is closely **related to the provisions** of the proposed Directive **implementing exceptions and limitations**, and therefore has an influence on the design of substantive copyright law.
- Finally, the proposed Regulation is to be distinguished from Directive 2010/13/EU (**Audiovisual Media Services**) (). The latter is to be amended by the proposed Directive COM (2016) 287 final. It focuses on the establishment of the country-of-origin principle, supplemented by the implementation of uniform minimum standards regarding **content offered by media service providers**. Substantive copyright is not a subject of the Directive.
- The same applies to the proposed **Geo-Blocking Regulation** (COM (2016) 289 final). It aims to improve **access to goods and services in the internal market**. The proposal prohibits inter alia the restriction of access to websites and other online interfaces on the basis of the nationality or place of residence of the consumer. According to Recital 6 of the proposal, audiovisual services are, for the time being, excluded from the scope of the Geo-Blocking Regulation.

#### IV. The legislative instrument

The context in which the Commission proposal is put forward illustrates the complexity of existing European copyright law, with essential elements of the *acquis communautaire* being left unmentioned, notably the InfoSoc Directive. However, the Commission's proposals are a far cry from the urgently needed **systematisation of copyright**. This is mainly due to its choice of legislative instrument.

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- 12 The Commission proposes the adoption of a **Regulation**, which is clearly **linked to the SatCab Directive**, as it incorporates the two main mechanisms of the SatCab Directive. Firstly, it is based on the country-of-transmission principle; secondly, the system of mandatory collective management is introduced for the purpose of exercising retransmission rights.
- 13 Against this background, it is hard to understand why the Commission chose to propose an act of law which is substantially and formally detached. If a regulatory framework already exists for a given subject matter, this framework should first be adapted to fit new requirements. The reasons given by the Commission in Recital 17 for adopting a Regulation, in contrast, are not at all convincing. While regulations do offer the advantage of a direct and uniform application of the law – implementation problems do not apply – this argument is of a general nature and would, if at all, have to apply to European copyright as a whole. Approaches to realise a **unitary European copyright system** are conceivable; they are also addressed by the Max-Planck-Institute in its general remarks on the Commission's proposals (see Part A.). As long as the European copyright model is, however, fragmentary, the best possible integration must be ensured within the existing legal instruments. This objective is not achieved by the Commission's approach.
- 14 In support of the proposal for a Regulation, the Commission relies on the argument of **avoiding fragmentation**. The opposite is the case. Fragmentation is almost provoked if a regulatory matter which constitutes a cohesive whole is not connected in a single legal act. The same applies if the regulation addresses only cross-border constellations. If purely national issues are thus subject to national, but transnational (directly applicable) issues subject to European law, the result is the epitome of fragmentation.
- 15 Furthermore, in Articles 3(3) and (4) the Member States are urged to indicate a collecting society which is deemed to be mandated to manage the rights of the rights holders who do not exercise their right to choose, and to specify a specific period within which outsiders are entitled to claim their rights against those collecting societies. If this is not already regulated in the national law on collective rights management, Article 3(3) and (4) thus creates a **need for transposition** for the Member States, which hardly accords with the nature of a Regulation.
- 16 **Systematic considerations** also do not justify the Commission's approach (see Sections VI and IX of Part A of the Position Statement). The proposed Regulation is based on subject matter of the SatCab Directive. This Directive was already transposed into national law in the 1990s. If a Regulation is now put on top of this already transposed law – and its statutory basis in the Directive – systematic problems are inevitable.

There are three alternative regulatory methods promising a systematic approach: 17

- **Option 1:** Repeal of the SatCab Directive and the adoption of a joint Regulation.
- **Option 2:** Transfer of the proposed Regulation into the SatCab Directive or, at most, another Directive that complements the latter.
- **Option 3:** The separation of retransmission on the one hand and original transmission by the broadcasting companies on the other. The retransmission could be regulated uniformly by a Directive (linking the corresponding provisions of the SatCab Directive and the proposed Regulation), while the original transmission via satellite and a parallel transmission over the Internet by means of media services (“the ancillary online services”) would be addressed in one common Regulation. This Regulation should, at the same time, include the content of the Portability Regulation.

Option 1 has the advantage of containing the related regulatory subject matter in a single legal act. The instrument of a **Regulation ensures uniformity**. A transposition into national law is not necessary. With regard to the rules on satellite broadcasting, this would be quite feasible considering the crucial role of the country-of-transmission principle. However, the transfer of further areas of the SatCab Directive appears to be more problematic. Thus, in Article 2, broadcasting rights are implemented as independent exploitation rights. Exploitation rights themselves have never been implemented by directly applicable European law. They are deeply rooted in the national structures of copyright law and may be harmonised, but need adaptation to their own system. As long as the foundation for a unitary copyright title is not created at European level, this is only possible through harmonisation by means of Directives. 18

With regard to **retransmission** – both according to the SatCab Directive and in the sense of the proposed Regulation – the transfer of the normative content into a Regulation appears to be impractical. Retransmission within the meaning of Article 1 No. 3 SatCab Directive – i.e. via cable and microwave systems – **refers exclusively to cross-border retransmission**. The same applies to retransmission within the meaning of Article 1(b) of the proposed Regulation. Only programmes “from another Member State” are covered here. There is, however, a corresponding **need for regulation of retransmission** via cable and microwave or in the sense of Article 1(b) **of national programmes on the national level**. As a rule, however, the Member States do not distinguish between national and cross-border retransmission when transposing the Directive (see, for example, Sec. 20b Copyright Act for German law). The creation of a uniform legal framework for cross-border and national retransmission, therefore, is only possible by addressing the European part in a Directive. 19

- 20 **Option 2** is based on these considerations. Option 2 has the **advantage that the proven SatCab Directive remains unchanged** while options 1 and 3 would result in a repeal or at least a substantial modification of the SatCab Directive. Option 2, on the other hand, would allow for retransmission, as currently provided for in the proposed Regulation, to be incorporated into the national regulatory model through the transposition of a Directive. At the national level, therefore, both the retransmission via cable and microwave systems and the online retransmission of national and foreign programmes could be regulated exhaustively and embedded in the national framework. The territorial fiction contained in Article 1(2)(b) of the SatCab Directive, which underlies the regulatory mechanism currently governing communication to the public by satellite, could also be laid down in a Directive addressing communication to the public and the making available of the original broadcast through an ancillary online service. It would even be possible to bring the European legal framework together into a **single Directive for all relevant acts**. Certainly, the disadvantage of a Directive is that national implementation is not always successful, especially since national and European law overlap. However, such disadvantages are of a general and structural nature. To remove them from the system of European copyright law would presuppose an overarching approach and a true paradigm shift, while ultimately nothing can be achieved with selective interventions.
- 21 Option 3 calls for the greatest legislative effort, but offers the greatest possible systematic advantages. Option 3 follows the principle **everything that can be regulated in a uniform and exclusively European way** is placed within a **Regulation**. On the other hand, **everything that needs to be regulated at national level**, but at the same time shows a European dimension, is addressed through the means of the **Directive**. In this model, the SatCab Directive remains largely intact. Insofar as it contains provisions on the broadcasting right and retransmission, the instrument of a Directive indeed appears to be coherent. However, all those areas which introduce a **territorial fiction** and thus constitute “quasi conflict of law” rules **should be addressed in a single Regulation**. In concrete terms, this means that Articles 1(a) and 2 of the proposed Regulation and Article 1(2) (b) of the SatCab Directive and the content of the proposal for the portability of online content services (COM(2015) 627 final), with Article 4 as the most relevant provision, are transferred into a single Regulation. This Regulation also contains the exceptions to the territoriality of the law in a bundled form.

## V. Specific issues

### 1. Regarding the ancillary online services (Articles 2 and 1(a))

In Article 2, the scope of the proposed Regulation covers exclusively the distribution of content through **simulcasts and catch-up TV** by broadcasting organisations. 22

#### a) Limitation to additional online services

It is to be welcomed that the proposal is limited to ancillary online services, which depend on an original broadcast by the broadcasting organisations. This **excludes original webcastings and podcasts**, which are independent of a primary transmission. Without this restriction, distortions of competition would arise because platforms that are not also broadcasting organisations would not benefit from simplified rights clearing for similar offers. In addition, the link to the existence of a primary transmission allows a clear application of this Regulation, whereas decoupling would lead to its dilution. 23

#### b) The “limited period of time”

Subsequent or ancillary online services, such as the catch-up services of broadcasters, should only fall within the scope of the Regulation if their availability is temporary (Article 1(a) of the proposed Regulation). Some criticise this criterion as too vague and instead demand a legally defined time limit, so as to clarify the scope of the Regulation. 24

These concerns are not to be shared for two reasons. Firstly, these services offered by the broadcasting organisations are still developing and a usual time frame has yet to be established. Introducing a strict legal rule could disrupt this process. Secondly, the question of whether and for what time period media content should be available online is, in fact, **up to the parties**. Rightholders are not obliged to allow broadcasters to make their content available online at all. Consequently, they are also free to limit the time period for which broadcasters are permitted to provide online access the content. Thus there is no need for a legal restriction on this freedom of contract. 25

If the time criterion is abandoned and the agreement on the period of availability of individual content is left to the contracting parties, the proposed Regulation can be adapted as follows: 26

- In Article 1(a): “... simultaneously or not simultaneously to with or for a defined period of time after their broadcast ...”.
- In Recital 8: “They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast

and services giving access, ~~within a defined time period~~ after the broadcast, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services).”

## 2. Regarding retransmission (Articles 3 and 1(b))

- 27 The limitation of mandatory collective management to the rights for retransmission over closed networks like IPTV appears to be reasonable. An extension of the facilitated rights clearance to open systems such as OTT services is not desirable, as they compete with the business models of paid video-on-demand services, such as Netflix, Amazon Lovefilm and Maxdome. This could hamper the development of the latter. However, an extension of the facilitation of the rights clearance should not be ruled out in the future if the actual developments can be estimated more clearly.

## VI. Questions of international jurisdiction

- 28 A key question which the Commission has not taken into account concerns the effects of the country-of-origin principle on issues of international jurisdiction. The place of general international jurisdiction (*forum generale*) of Article 4(1) and Article 63 Brussels Regulation (2012) always leads to the jurisdiction of the courts of the domicile of the defendant. By way of derogation from this, the place of jurisdiction in matters of tort or delict – according to Article 7(2) of the Brussels Regulation – provides the plaintiff with an additional forum at the place where the harmful event occurred or may occur. This **additional forum at the place where the event occurred could now be dispensed with by concentrating the relevant copyright act in the country where the broadcasting organisation has its principal establishment.**
- 29 The same has recently been decided by the Vienna Court of Appeal (judgement of 27 April 2016 in Case No. 5 R 182/15V) regarding the effects of the country-of-transmission principle of the SatCab Directive. According to the Vienna Court, the alternative ground of jurisdiction based on the unlawful act regarding an infringement by means of satellite broadcasting is only set in the Member State which is regarded as the country of transmission within the meaning of the Directive. According to the Court, this results from the **effect of the country-of-transmission principle**, which deems the entire copyright-relevant act as taking place in the country of transmission. The same threatens to apply to the distribution of relevant content through ancillary online services. Here, too, it is to be assumed that the copyright-relevant act takes place solely in the country of principle establishment of the broadcasting organisation.

However, the exclusion of the additional forum in matters of tort or delict constitutes an unnecessary **obstacle to the enforcement of rights at the expense of the rightholders**. This must be changed. Article 7(2) of the Brussels Regulation pursues not only the idea that the Court at the place where the harmful event occurred is the most appropriate because of the proximity to the subject matter of the dispute and better possibilities of taking evidence (close connection); the provision also realises general thoughts originating in the principle of effect. Where an alleged infringement produces harmful effects a court should be able to examine the infringement. This is increasingly the case in commercial law, especially as companies choose the market place themselves; there the defence is reasonable and to be expected. Where the proposed Regulation **shifts the market place, this is merely a legal fiction**. The more important actual effects, namely, the reception of the programme at the place concerned, do not change. By contrast, the concentration of jurisdiction at the place where the broadcasting organisation has its principle establishment would reduce its risk of being sued at the place where its actual business is focused. There is no reasonable justification for this. 30

This consequence likewise cannot be justified on the grounds of facilitated rights clearance. The facilitation of rights clearance – and thus, ultimately, **facilitation of cross-border activities – does not require an artificial transfer of jurisdiction**. For the rightholders, on the other hand, the curtailment of the forum at the market place entails considerable additional expenses and is associated with a high cost risk, particularly where the party concerned is compelled to bring an action abroad. It is true that the court at the place where the harmful event occurred is only competent to decide on the compensation for the damage caused in the state of the court seised, and it can also order an injunction only in that regard. In many cases, however, an exemplary court decision may suffice to resolve the legal dispute entirely. 31

Admittedly, the Commission proposal does not ignore these contexts entirely, proposing as it does to limit the effects of Article 2, in that it applies only “for the purposes of exercising copyright”. However, this restriction does **not** appear to be **sufficiently clear** with regard to the provisions of the Brussels Regulation. Recital 19 also indicates that the Commission does not intend to exert an influence on questions of jurisdiction. However, this should be clarified in the proposal. To this end, Article 2 should be amended by the addition of a further paragraph with the following provision: 32

*The country of origin principle referred to in paragraph 1 shall not apply to questions regarding international jurisdiction.*

Annexes

**Synopsis German – English:**

**Part B (Chapters 1 and 2) as well as Part G and Part H were initially written in German and subsequently translated into English.**

**A German/English parallel version of these texts has been attached as an Annex.**

**PART B**  
**Kapitel 1 Text und Data-Mining**

**PART B**  
**Chapter 1 Text and data mining**

**Stellungnahme**

**Position Statement**

**I. Einführung**

I. Introduction

1

**Text- und Data-Mining (TDM)** bezeichnet vergleichsweise neue Analysetechniken, große Mengen digitaler Informationen automatisiert mit Hilfe von Computern auszuwerten, um dadurch neues Wissen (insbesondere durch die Identifikation von Zusammenhängen oder Trends) zu erzeugen. TDM findet Anwendung in verschiedensten Feldern: in den Sozial-, Geistes- und Naturwissenschaften, so etwa in der pharmazeutischen und medizinischen Forschung, im Journalismus, aber auch in der Privatwirtschaft, etwa im Finanzsektor oder zu Zwecken der Marktforschung.

Text and data mining (TDM) refers to comparatively new analysis techniques to automatically assess large amounts of digital information by means of computers, thereby generating new knowledge (in particular by identifying correlations or trends). TDM is applied in a wide range of fields: in the social sciences, humanities and natural sciences, such as pharmaceutical and medical research, and in journalism, but also in the private sector, for example in financial industries or for the purpose of market research.

Das Anliegen der Kommission, TDM zu Forschungszwecken lizenzfrei zu stellen, ist **grundsätzlich zu begrüßen**. Ein eindeutiger Rechtsrahmen erspart eine komplizierte Rechtklärung zwischen den beteiligten Akteuren und reduziert Investitionsunsicherheit. Der Innovationseffekt dürfte angesichts der rapide wachsenden Bedeutung von Daten-Analysetechniken als immens einzustufen sein. Ebenfalls ist begrüßenswert, dass gerade der europäische Gesetzgeber die Initiative ergreift, was einer Rechtszersplitterung vorbeugt.

The Commission's intention to exempt TDM from licensing for research purposes is, in principle, to be welcomed. A clear legal framework avoids the complicated rights clearance between the parties involved and reduces investment risks. The innovation effect will likely be immense in view of the rapidly growing importance of data analysis techniques. It is also positive to see the European legislature taking the initiative, as this prevents a fragmentation of the law.

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### 3 II. Zum Vorschlag der Kommission

#### 1. Inhalt

Art. 3 Abs. 1 RL-Entwurf verlangt eine Ausnahme für Vervielfältigungen nach Art. 2 der RL 2001/29 (InfoSoc-RL) sowie Entnahmen nach Art. 7 Abs. 1 der RL 96/9 (Datenbank-RL) sofern dies im Rahmen von TDM erfolgt, das zu Zwecken der wissenschaftlichen Forschung eingesetzt wird (definiert in Art. 2 Abs. 1). Voraussetzung ist, dass die jeweilige Forschungsorganisation rechtmäßig Zugang zu den durchsuchten Quellen hat. Die Ausnahme beschränkt sich auf **nicht-gewinnorientierte Forschung** und auf solche, die der Erfüllung eines staatlich anerkannten Auftrages dient. Entgegenstehende Vertragsbestimmungen sind nach Art. 3 Abs. 2 unwirksam. Ferner ist die Anwendung von technischen Schutzmaßnahmen durch die Rechteinhaber möglich, welche die Sicherheit und Integrität der Netze und Datenbanken gewährleisten (Art. 3 Abs. 3). Hier sollen sich Rechteinhaber und Forschungsorganisationen auf bewährte Verfahren einigen (Art. 3 Abs. 4).

- 4 Eine **ähnliche Regelung** wurde bereits u.a. im Vereinigten Königreich im Jahr 2014 für nicht-kommerzielle Forschung umgesetzt. In Deutschland werden im Rahmen der Debatte über die Wissenschaftsschranke entsprechende Vorschläge diskutiert (*de la Durantaye*, Allgemeine Bildungs- und Wissenschaftsschranke, 2014; für einen weitergehenden Anwendungsbereich indes *Schack*, ZUM 2016, 266,

### II. The Commission's proposal

#### 1. Content

Article 3(1) of the proposed Directive provides for an exception for reproductions pursuant to Article 2 of Directive 2001/29/EC (InfoSoc Directive) and extractions pursuant to Article 7(1) of Directive 96/9/EC (Database Directive) in order to carry out TDM for the purposes of scientific research (defined in Article 2(1)). The prerequisite is that the respective research organisation has lawful access to the sources searched. The exception is limited to not-for-profit research and research with a public interest objective. According to Article 3(2), contrary contractual provisions are unenforceable. Furthermore, rightholders shall be allowed to apply technical measures to ensure the security and integrity of networks and databases (Article 3(3)). Rightholders and research organisations should agree on good practices (Article 3(4)).

Similar regulation has already been enacted, inter alia, in the United Kingdom in 2014 for non-commercial research. In Germany, corresponding proposals are discussed in the context of the debate on the research exemption (*de la Durantaye*, Allgemeine Bildungs- und Wissenschaftsschranke, 2014; in favour of a broader scope, however, *Schack*, ZUM 2016, 266, 269; about

269; über die Rechtslage zu TDM insgesamt *Spindler*, GRUR 2016, 1112, 1117).

the general legal situation of TDM *Spindler*, GRUR 2016, 1112, 1117).

Der Entwurf knüpft an Vervielfältigungen (Art. 2 Info-Soc-RL) und Entnahmen (Art. 7 Abs. 1 Datenbank-RL) als betroffene **Verwertungsrechte** an. Würde man TDM als urheberrechtlich relevant erachten (vgl. hierzu etwa *Spindler*, „Text und Data Mining – urheber- und datenschutzrechtliche Fragen“, GRUR 2016, 1112; *Stamatoudi*, „Text and Data Mining“, in: *Stamatoudi* (Hrsg.), *New Developments in EU and International Copyright Law*, 2016, 253; *Triaille et al.*, *Study on the legal framework of text and data mining (TDM)*, 2014), so wäre dies konsequent. Tatsächlich erfordert TDM in der Regel eine nicht lediglich temporäre Vervielfältigung, für welche Art. 5 Abs. 1 a) InfoSoc-RL nicht greifen würde.

The proposal refers to reproductions (Article 2 InfoSoc Directive) and extractions (Article 7(1) Database Directive) as affected exploitation rights. If TDM were considered to be relevant for copyright (see, for example, *Spindler*, „Text und Data Mining – urheber- und datenschutzrechtliche Fragen“, GRUR 2016, 1112; *Stamatoudi*, „Text and Data Mining“, in: *Stamatoudi* (ed.), *New Developments in EU and International Copyright Law*, 2016, 253; *Triaille et al.*, *Study on the legal framework of text and data mining (TDM)*, 2014), then this would be consistent. In fact, TDM usually requires a not merely temporary reproduction, for which Article 5(1)(a) InfoSoc Directive would not apply.

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## 2. Regelungstechnische Bedenken

## 2. Concerns regarding the regulatory method

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Die vorgeschlagene Regelung **suggeriert allerdings zu Unrecht**, dass die Handlung des TDM an sich urheberrechtlich relevant ist. Zu pauschal sind die Ausführungen in ErwGr. 8, wonach mangels Geltendmachung von Ausnahmen oder Beschränkungen eine Genehmigung vom Rechteinhaber für TDM eingeholt werden müsse. Denn gerade dann, wenn der Nutzer auf Inhalte bereits rechtmäßig zugreifen kann (er die betreffenden Daten also als solche oder Zugang zu ihnen vertraglich erworben hat), muss das automatisierte Auswerten dieser

However, the proposed rule wrongly suggests that carrying out TDM is per se of relevance to copyright. The explanations given in Recital 8, according to which an authorisation to undertake such acts must be obtained from rightholders if no exception or limitation applies, are too sweeping. Especially in the case that a user has lawful access to contents (the user has acquired the relevant data as such or has acquired access to them on a contractual basis), the automated analysis of these contents must be permitted, just as reading by the human being

Inhalte ebenso erlaubt sein, wie das Lesen durch den Menschen keiner gesonderten Erlaubnis des Rechteinhabers bedarf.

does not require any separate consent by the rightholder.

7 Der damit suggerierte **illusionäre Schutz** wirkt sich insbesondere in denjenigen Fällen aus, in denen die Vertragsvereinbarung zwischen Rechteinhaber und Nutzer keine ausdrücklichen Bestimmungen zu TDM enthalten. Denn die vorgeschlagene Schrankenregelung ließe den Umkehrschluss zu, dass TDM eine aufspaltbare Nutzungsart darstellt. Ein Schweigen im Vertrag wäre folglich dahingehend zu interpretieren, dass sich die vertragliche Berechtigung eben *nicht* auf TDM beziehe.

The illusionary protection thus suggested has an effect, in particular, in those cases in which the contractual agreement between the rightholder and the user does not contain any express provisions on TDM. The proposed limitation would allow for the conclusion *e contrario* that TDM is a separable type of use. An omission in a contract would therefore have to be interpreted in the sense that the contractually granted right does not refer to TDM.

8 Die **Folgen** eines solchen Fehlschlusses reichen deswegen weit, weil die vorgeschlagene Regelung TDM nur nicht gewinnorientierten bzw. im unmittelbaren öffentlichen Interesse tätigen Forschungsorganisationen gestatten soll. Damit würden Nutzer von TDM für kommerzielle bzw. nicht im öffentlichen Interesse liegende Forschung zum Abschluss vertraglicher Vereinbarungen mit den Rechteinhabern gezwungen. Dies entbehrt einer sachlichen Rechtfertigung (dazu Ziff. 10-12) und führt darüber hinaus zu komplexen Abgrenzungsfragen in der Rechtspraxis. Durch zu erwartende Unterschiede in der nationalen Umsetzung würde die Rechtszersplitterung im Binnenmarkt gegenüber heute noch forciert, was dem erklärten Ziel der unionsweiten Rechtsharmonisierung zuwiderliefe.

The consequences of such a wrong conclusion are far-reaching, since the proposed rule allows TDM to be carried out only by not-for-profit research organisations and research organisations acting directly in the public interest. This would force users of TDM to conclude contractual agreements with the rightholders for commercial purposes and for research not in the public interest. This lacks a substantive justification (see paras. 10-12) and also leads to complex questions of demarcation in the legal practice. As a result of the different national implementations to be expected, the fragmentation of law in the internal market would be pushed even further, which is contrary to the declared objective of the Union-wide harmonisation of the law.

Mit Skepsis zu betrachten ist darüber hinaus die generelle **Vorbildwirkung** einer solchen Regelung für die Entwicklung der datengetriebenen Wirtschaft: Bei TDM dürfte es sich lediglich um eine erste, wenn auch wichtige Datenanalysetechnik handeln. Diese isoliert einer urheberrechtlichen Regelung zu unterwerfen, führte zu einer bruchstückhaften und längerfristig inkohärenten Rechtsfortentwicklung. Stattdessen vermögen nur ganzheitliche, übergeordnete Interessenzusammenhänge berücksichtigende Regulierungsansätze der gesellschaftlichen und wirtschaftlichen Bedeutung von Datenanalysen Rechnung zu tragen.

### 3. Inhaltliche Bedenken

Der RL-Entwurf geht davon aus, dass TDM für die wissenschaftliche Forschung von besonderem Nutzen ist und namentlich Innovationsanreize schafft. Dies trifft zu, darf aber nicht zu dem Schluss führen, dass TDM für Zwecke jenseits der wissenschaftlichen Forschung nicht ebenso **hohes Innovations- und Entdeckungspotential** birgt, etwa für Startups, Journalisten oder Informations-intermediäre.

Selbst **innerhalb der Forschung** will die Kommission die Reichweite der vorgeschlagenen Regelung jedoch auf nicht-gewinnorientierte Forschungsorganisationen sowie auf solche beschränken, die in staatlich anerkanntem Auftrag im öffentlichen Interesse handeln. Letzteres wirft ebenso Abgrenzungsprobleme auf wie das spezifische Anliegen, auch Public Private Partnerships der

In addition, the general role model effect of such a rule is to be viewed with scepticism regarding the development of the data-driven economy: TDM is to be considered only as a first, albeit an important, data analysis technique. Submitting TDM to an isolated copyright rule would lead to a fragmentary and incoherent legal development in the longer run. Instead, only holistic regulatory approaches that accommodate overarching interrelations of interests can account for the societal and economic significance of data analyses.

### 3. Concerns regarding the content

The proposed Directive assumes that TDM is of particular benefit to scientific research and, in particular, creates incentives for innovation. While this is true, this must not, however, lead to the conclusion that TDM does not bear the same high potential for innovation and discovery for purposes beyond scientific research, e.g. for start-ups, journalists or information intermediaries.

Even within the field of research, however, the Commission intends to limit the scope of the proposed provision to not-for-profit research organisations and to those pursuing a public-interest objective recognised by a Member State. The latter raises delimitation problems and so does the specific goal to submit public-private partnerships to the provision. Although the

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Regelung zu unterstellen. Der Entwurf ist zwar um eine Konturierung durch Definition bemüht (Art. 2 Abs. 1); diese verwendet allerdings eine Vielzahl unbestimmter bzw. konkretisierungsbedürftiger Rechtsbegriffe, was langwierige Prozesse unter Involvierung des EuGH als Auslegungsinstanz erwarten lässt.

proposal aims to add contour to the rule by giving a definition (Article 2(1)), this definition uses a large number of legal terms that are vague or to be further defined, which will most likely lead to lengthy court procedures involving the CJEU as an interpreting instance.

- 12 Ein Einbezug auch gewinnorientierter – und auch **rein privatwirtschaftlicher** – Forschung in eine Regelung zu TDM vermeidet nicht nur die besagten Abgrenzungsprobleme. Noch viel wichtiger ist, dass dies die Position forschender Unternehmen in der Europäischen Union gegenüber Wettbewerbern stärken wird, die entsprechenden Restriktionen nicht unterworfen sind.

Including profit-oriented – and also purely private – research in a provision on TDM would avoid not only the aforementioned delimitation problems. More importantly, this would strengthen the position of research-based companies in the European Union against their competitors who are not subjected to similar restrictions.

13 **III. Alternativer  
Regelungsvorschlag**

III. Alternative regulatory proposal

**1. TDM als bestimmungsgemäßer  
Gebrauch**

1. TDM as normal use

Vor dem Hintergrund dieser Bedenken wird hier ein alternativer Regelungsvorschlag unterbreitet. Dieser beruht zunächst darauf, dass die Durchführung von TDM an sich – wie eingangs beschrieben (Ziff. 6) – ebenso wenig eine urheberrechtliche Relevanz entfaltet wie ein sonstiger, irgendwie gearteter Werkgenuss, namentlich das Lesen und Erfassen von Zusammenhängen durch einen Menschen. Genauso wie die Lektüre dem bestimmungsgemäßen Gebrauch analoger Schriftwerke entspricht, das Urheberrecht der Kenntnisnahme von Inhalten also nicht

Against the background of these concerns, an alternative regulatory proposal is presented here. In the first place, the proposal is based on the fact that the performance of TDM as such – as described at the outset (see para. 6) – has no more relevance under copyright than any other kind of use of the work, in particular the reading and comprehension of connections by a human being. Just as reading corresponds to the normal use of analogue written works (this awareness of contents does not conflict with copyright), the normal use of digitally stored content lies –

entgegensteht, liegt der **bestimmungsgemäße Gebrauch digital gespeicherter Inhalte** im Lichte der heutigen Technologien darin, enthaltene Informationen automatisiert aufzufinden und in eine Korrelation zu stellen. In gewissem Sinne vergleichbar definiert etwa Art. 5 Abs. 3 der RL 2009/24 (Software-RL) den bestimmungsgemäß Gebrauch von Computerprogrammen dahingehend, dass die zur Nutzung berechtigten Person eine Programmkopie „ohne die Genehmigung des Rechtsinhabers [...] das Funktionieren dieses Programms beobachten, untersuchen oder testen [darf], um die einem Programmelement zugrundeliegenden Ideen und Grundsätze zu ermitteln“ (s.a. ErwGr. 13).

Das Besondere an TDM liegt allerdings darin, dass dem eigentlichen Vorgang an sich regelmäßig ein **Vervielfältigungsprozess vorgeschaltet** werden muss, da die einbezogenen Datensätze üblicherweise in unterschiedlichen Formaten vorliegen und daher zum Zwecke des übergreifenden automatisierten Durchsuchens zuerst normalisiert werden müssen (und je nachdem auch einer Taxonomie zu unterziehen sind). Dieser Vorgang ist auf den ersten Blick vergleichbar mit dem sog. „format-shifting“ (etwa von einem analogen auf einen digitalen Träger), welches unweigerlich zu einer Vervielfältigung führt.

Je nachdem, auf welche Quellen das TDM zurückgreift, können darüber hinaus durch die Datenbank-RL geschützte Datenbanken betroffen sein. Mit der erwähnten Normali-

in the light of today’s technologies – in automatically finding and correlating the information it contains. In a sense comparable, Article 5(3) of Directive 2009/24 (Software Directive) defines the normal use of computer programs such that “[t]he person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program“ (see also Recital 13).

However, the special feature of TDM is that the actual process of TDM itself is usually preceded by a reproduction, since the datasets involved are usually available in different formats and must therefore be normalised for the purpose of the comprehensive automated search (and, as the case may be, undergo a taxonomy). At first sight, this process is comparable to so-called “format-shifting” (for example, from an analogue to a digital carrier), which inevitably leads to a reproduction.

Depending on the sources on which the TDM is based, databases that are protected subject-matter under the Database Directive can also be affected. The stated normalisation

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sierung kann je nachdem eine zustimmungsbedürftige **Entnahme** einhergehen, die Art. 7 Abs. 2 a) der Datenbank-RL definiert als „ständige oder vorübergehende Übertragung der Gesamtheit oder eines wesentlichen Teils des Inhalts einer Datenbank auf einen anderen Datenträger, ungeachtet der dafür verwendeten Mittel und der Form der Entnahme“.

might constitute an extraction, which requires consent, and is defined as “the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form” (Art. 7(2)(a) Database Directive).

- 16 Weder die erforderliche Entnahme aus Datenbanken noch die im Rahmen der erforderlichen Normalisierung entstehende Vervielfältigung eröffnet dem Nutzer jedoch – anders als z.B. beim „format-shifting“ – eine eigenständige Nutzungsmöglichkeit. Vielmehr sind diese Vorgänge **technisch notwendig**, um TDM überhaupt durchzuführen, wie auch etwa für die Nutzung von Software eine Vervielfältigung unausweichlich ist. Aus diesem Grunde bestimmt Art. 5 Abs. 1 der Software-RL, dass für eine dauerhafte oder vorübergehende Vervielfältigung von Software i.S.v. Art. 4 Abs. 1 a) derselben RL „nicht der Zustimmung des Rechtsinhabers [bedarf], wenn sie für eine bestimmungsgemäße Benutzung des Computerprogramms [...] notwendig sind“. Damit wird im Verhältnis zum sehr weit gefassten Vervielfältigungsbegriff in Art. 2 der InfoSoc-RL eine spezifische Bereichsausnahme geschaffen, die über den von seinem Zweck her sehr viel engeren Art. 5 Abs. 1 der InfoSoc-RL hinausgeht.

Neither the necessary extraction from databases nor the reproduction resulting from the required normalisation allows the user an independent use, however (unlike e.g. format-shifting). Rather, these processes are technically necessary in order to carry out TDM at all, just as, for example, a reproduction is unavoidable for the use of software. For this reason, Article 5(1) of the Software Directive provides that a permanent or temporary reproduction of software according to Article 4(1)(a) of the same Directive “shall not require authorisation by the rightholder where they are necessary for the use of the computer program”. Thus, in relation to the very broad concept of reproduction in Article 2 of the InfoSoc Directive, a specific field exemption is created that goes beyond the much narrower rationale of Article 5(1) of the InfoSoc Directive.

- 17 Bezogen auf TDM gilt nichts anderes, soweit es sich um Inhalte handelt, zu denen die durchfüh-

Nothing else applies regarding TDM, as far as concerns content to which the persons performing the

den Personen rechtmäßigen Zugang haben. Das hier vorgeschlagene **Regelungsmodell** läuft m.a.W. auf eine weitere, spezifische Bereichsausnahme hinaus, die daran anknüpft, dass das Durchführen von TDM als solches der Zustimmung des Rechteinhabers ebenso wenig bedarf wie Handlungen i.S.v. Art. 5 Abs. 3 der Software-RL. Um TDM überhaupt vornehmen zu können, sind indessen ebenso Vervielfältigungen notwendig, wie sie dem rechtmäßigen Nutzer von Software nach Art. 5 Abs. 1 der Software-RL erlaubt sind. Das bedeutet, dass Art. 2 der InfoSoc-RL solche Vervielfältigungen nicht erfasst. Gleiches gilt mit Bezug auf gewisse Entnahmen von Datenbankinhalten, die zum Zwecke des TDM erforderlich sind.

Das vorgeschlagene Regelungsmodell ermächtigt nicht jeden Dritten zu TDM, sondern allein jenen Nutzer, dem der Rechteinhaber selbst **Zugang** zu den davon erfassten Quellen gewährt hat. Genauso wie ein Rechteinhaber, der Nutzern Software zum Gebrauch überlässt, davon ausgehen muss, dass anlässlich der Nutzung Vervielfältigungen und Handlungen i.S.v. Art. 5 Abs. 1 bzw. Abs. 3 der Software-RL erfolgen, muss der Rechteinhaber dann von der Durchführung von TDM ausgehen, wenn er dergestalt den Zugang zu Quellen ermöglicht, dass TDM möglich ist. Mithin ist – vergleichbar mit der Regelung in der Software-RL – im Prinzip von einer „implied licence“ auszugehen (Grützmaker, in: Wandtke/Bullinger, UrhR, 4. Aufl., § 69d, Rn. 3 m.w.N.).

mining have lawful access. In other words, the regulatory model suggested here constitutes another specific field exemption based on the fact that the performance of TDM as such, like acts under Article 5(3) of the Software Directive, does not require the consent of the rightholder. In order to be able to carry out TDM at all, however, reproductions are just as necessary as they are permitted to the lawful user of software pursuant to Article 5(1) of the Software Directive. This means that Article 2 InfoSoc Directive does not cover such reproductions. The same applies with regard to certain extractions from database contents that are necessary for the purposes of TDM.

The proposed regulatory model does not entitle any third party to carry out TDM, but only the user to whom the rightholder has granted access to the sources affected by it. Just as a rightholder who allows users to use software must assume that reproductions and other actions according to Article 5(1) and (3) of the Software Directive are performed, the rightholder must assume that TDM is carried out if he allows access to sources in a manner that enables TDM. Therefore, in principle, an “implied licence” is to be assumed – comparable to the provision in the Software Directive (Grützmaker, in: Wandtke/Bullinger, UrhR, 4th edition, § 69d, para. 3 with further references).

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- 19 Damit liegt der Sinn der vorgeschlagenen gesetzlichen Regelung in erster Linie darin, die zulässige Reichweite **abweichender vertraglicher Absprachen** – namentlich solcher, die TDM verbieten würden – zu bestimmen. Aus der Regelung folgt ein unabdingbarer Kern zulässiger Handlungen des bestimmungsgemäßen Nutzers, indem entgegengesetzte Vertragsbestimmungen unwirksam sein müssen (in diesem Sinne schon Art. 8 Abs. 2 der Software-RL). Genau dieses Anliegen spiegelt sich auch in Art. 3 Abs. 2 des RL-Entwurfs der Kommission.
- 20 Entscheidender Grund dafür, dass jene Nutzer, die rechtmäßigen Zugang zu den verwendeten Quellen haben, TDM ohne Zustimmung des Rechteinhabers durchführen können müssen, ist der Umstand, dass von dessen Seite **keine spezifischen Vorkehrungen erforderlich** sind, um TDM zu ermöglichen. Vielmehr kann der Nutzer die vorstehend genannte Normalisierung grundsätzlich selbst durchführen, auch wenn dies weder zwingend ist noch unbedingt sinnvoll bzw. effizient erscheint.
- 21 **2. Weitführende Geschäftsmodelle auf vertraglicher Basis**
- Rechteinhabern (wie z.B. Wissenschafts-verlegern) stehen gerade vor diesem Hintergrund **neue Geschäftsmodelle** offen, die sie bislang eher vereinzelt im Verhältnis zu gewissen, TDM betreibenden Industrien nutzen. Für
- Thus, the purpose of the proposed rule is primarily to determine the permissible range of divergent contractual arrangements, in particular those which would prohibit TDM. The rule constitutes an indispensable core of permitted acts of the intended user, as it renders contrary contractual terms void (in this sense, Article 8(2) of the Software Directive). Article 3(2) of the Commission's proposed Directive also reflects this concern.
- The decisive reason for the fact that those users who have legal access to the sources used must be able to carry out TDM without the consent of the rightholder lies in the fact that the rightholder does not need to take any specific actions to enable TDM. Rather, the user can basically perform the above-mentioned normalisation himself, even if this is neither necessary nor particularly meaningful or efficient.
2. Advanced business models on a contractual basis
- Against this background, new business models are available to the rightholders (such as scientific publishers), who have so far used them in rather isolated cases in relation to certain TDM-driven industries. Such industries, as well

diese wie auch für Forscher kann es von Interesse sein, den vorgelagerten Schritt der Normalisierung nicht selbst vorzunehmen, sondern einen spezialisierten Dritten hinzuzuziehen. Denn versuchen es jene nicht darauf spezialisierten Nutzer selbst, die rechtmäßigen Zugang zu den erfassten Inhalten haben, führt dies keineswegs ohne weiteres zu einem Datensatz, der erforderlich ist, um optimale Ergebnisse des TDM zu erzielen. Dies eröffnet in erster Linie den Rechteinhabern selbst die Möglichkeit, von Nutzern bezeichnete Inhalte technisch so aufzubereiten, dass das TDM von diesen dann ohne weiteres unmittelbar durchgeführt werden kann.

Solche Dienstleistungen beziehen sich aber nur auf die **notwendigen Vorbereitungsmaßnahmen**, d.h. auf die Normalisierung und die damit einhergehenden Vervielfältigungen. Insoweit kommt die vorstehend genannte Bereichsausnahme zugunsten der rechtmäßigen Nutzer zwar nicht zum Zug. Dies ändert aber nichts daran, dass das eigentliche TDM keiner Einwilligung des Rechteinhabers bedarf, weil dieses von vornherein keine urheberrechtlich relevante Nutzung von Werken darstellt (dazu vorstehend Ziff. 6). Wohl wird ein Rechteinhaber für die Normalisierung von Daten eine Vergütung verlangen; diese bezieht sich aber nicht etwa auf das TDM an sich. Mit andern Worten bedeutet die Inanspruchnahme der Dienstleistung des Rechteinhabers lediglich, dass der Nutzer, der rechtmäßig Zugang zu den erfassten Inhalten hat, darauf verzichtet, die erforderlichen Vervielfältigungen

as researchers, may prefer not to undertake the normalisation step themselves, but to involve a specialised third party. Should those users who are not specialised and who have lawful access to the recorded content perform the normalisation themselves, this does not simply produce a dataset that is necessary to achieve optimal results of TDM. This primarily opens up the possibility for the rightholders to technically process content designated by users, who can then directly carry out TDM.

Such services, however, relate only to the necessary preparatory measures, namely to the normalisation and the corresponding reproductions. In this respect, the abovementioned field exemption for the benefit of legitimate users does not come into play. However, this does not alter the fact that the actual TDM does not require the consent of the rightholder, since this does not constitute a copyright-relevant use of works from the outset (on this, see para. 6). It is true that a rightholder will demand compensation for the normalisation of data; but such compensation does not refer to the TDM itself. In other words, the use of the service of the rightholder simply means that the user who has lawful access to the contents covered does not make the necessary reproductions himself, but this does not change the principle that TDM in itself is permitted without the need for consent.

22

selbst vorzunehmen, ohne dass sich am Grundsatz, dass TDM an sich zustimmungsfrei erlaubt ist, etwas ändert.

- 23 Rechteinhabern bleibt es unbenommen, die **Preise** für solche auf vertraglicher Basis erbrachte Dienstleistungen zu differenzieren. Dies kann sich dann rechtfertigen, wenn TDM von kommerziellen Nutzern dazu eingesetzt wird, Wettbewerbschancen zu erhöhen und damit entsprechende Gewinne zu erzielen. Gerade solche Nutzer arbeiten teilweise heute schon mit Rechteinhabern (z.B. mit Wissenschaftsverlagen) zusammen, womit entsprechende Geschäftsmodelle in der Entwicklung begriffen sind. Auch vor diesem Hintergrund ist nicht ersichtlich, wieso kommerzielle Nutzer nicht ebenfalls in die vorgeschlagene Regelung einzubeziehen sein sollen. Gewinnorientierte Nutzer werden primär nach Effizienz Gesichtspunkten entscheiden, wie sie TDM durchführen. Oft werden sie angemessenen Angeboten von Rechteinhabern gegenüber aufwendigeren eigenen Normalisierungen von Inhalten – auch wenn sie selbst Zugang zu diesen hätten – oft den Vorzug geben.
- Rightholders still remain free to differentiate the prices for such services provided on a contractual basis. This can be justified in situations where commercial users perform TDM to increase their chances in competition and to achieve corresponding profits. Such users in particular are already working together with rightholders (for example with scientific publishers), with corresponding business models under development. Against this background as well, it is not clear why commercial users should not be included in the proposed provision. Profit-oriented users will primarily follow efficiency considerations for deciding how to carry out TDM. They will often prefer appropriate services of rightholders to their own, more complex normalisations of content, even if they have access to it.
- 24 Rechteinhaber sind nach der vorgeschlagenen Regelung auch **nicht übermäßiger Konkurrenz ausgeliefert**. Die für das TDM erforderlichen Vervielfältigungen sind nämlich nur jenem Nutzer erlaubt, der eigenen rechtmäßigen Zugang zu den erfassten Inhalten hat und das eigentliche TDM selbst durchführen will. Dies schließt aus, dass Dritte entsprechende Dienstleistungen anbieten und insoweit in
- Under the proposed rules, rightholders are also not exposed to excessive competition. Only the user who has his own lawful access to the recorded content and who wants to carry out the actual TDM himself is allowed to make the reproductions required for TDM. This excludes the possibility for third parties to offer similar services and to thus compete with the rightholders. Though third parties

einen Wettbewerb mit den Rechteinhabern eintreten könnten. Wohl mögen Dritte ihrerseits Zugang zu einer breiten Palette von Inhalten erlangen, doch ohne anschließendes eigenes TDM fallen sie nicht unter die hier vorgeschlagene Bereichsausnahme zum allgemeinen Vervielfältigungs- und Entnahmerecht.

may gain access to a wide range of content, they do not fall under the field exemption from the general rights of reproduction and extraction proposed here as long as they do not carry out TDM themselves.

### 3. TDM bezogen auf Inhalte, zu denen kein Zugang besteht

### 3. TDM related to non-accessible content 25

Ein Problem, mit dem sich insbesondere Forschungsorganisationen konfrontiert sehen, besteht in Bezug auf TDM über Inhalte, zu denen **kein (rechtmäßiger) Zugang** besteht. Gerade kleinere Forschungsorganisationen, die kostenbedingt nur eingeschränkten Zugang zu Inhalten haben, stehen bereits heute vor der Herausforderung, im internationalen Wettbewerb mithalten zu können. Dieses Problem wird sich noch dadurch verschärfen, dass die Bereichsausnahme für TDM rechtmäßigen Zugang voraussetzt und somit den Vorsprung der wenigen, großen, finanzkräftigen Forschungsorganisationen effektiv noch vergrößern würde.

A particular problem faced by research organisations relates to TDM of content to which there is no (lawful) access. Smaller research organisations, in particular, with only limited access to content, are already facing the challenge of being able to compete internationally. This problem will be exacerbated by the fact that the field exemption for TDM requires lawful access, thus effectively increasing the lead of the fewer, large and financially strong research organisations.

**Forschungsorganisationen** muss es daher möglich sein, TDM auch durchführen zu können, ohne Zugang zu den Inhalten selbst erwerben zu müssen. Tatsächlich besteht seitens gewisser Anbieter von Inhalten bereits heute die Praxis, auf den Zweck des TDM normalisierte Datensätze bereitzustellen, ohne dass den Nutzern damit gleichzeitig Zugang zu den einbezogenen Inhalten gewährt wird. Vielmehr muss der eigentliche

Research organisations must therefore also be able to carry out TDM without having to acquire access to the content themselves. In fact, in practice certain providers of content already provide normalised datasets for the purpose of TDM without giving the users access to the content. Rather, the actual access to scientific content must be acquired (and paid for) separately. Indeed, the provision of normalised data solely for the purpose of TDM 26

Zugang zu wissenschaftlichen Inhalten gegebenenfalls separat (kostenpflichtig) erworben werden. Dabei stellt die Bereitstellung normalisierter Daten allein zum Zwecke des TDM durchaus ein Geschäftsmodell dar, zumal ein Rechteinhaber diese Dienstleistung naturgemäß entweder gegen Entgelt anbieten wird oder sich andere, indirekte Gewinnchancen daraus erhofft. Flächendeckend existiert diese Praxis indessen keineswegs, und zugunsten von Forschungsorganisationen ist sie, soweit ersichtlich, überhaupt noch nicht entwickelt (vgl. für eine aktuelle Übersicht der TDM-Politiken von Wissenschaftsverlagen Caspers/Guibault, *Baseline report of policies and barriers of TDM in Europe*, 2016, S. 84 ff.). Gerade hier wäre sie aufgrund des genannten beschränkten Zugangs zu wissenschaftlicher Information aber von besonderem Interesse und Nutzen.

- 27 Entsprechend verpflichtet die hier vorgeschlagene Regelung Rechteinhaber, Forschungsorganisationen (wie sie Art. 2 des RL-Entwurfs bereits definiert) **Datensätze bereitzustellen**, die ihnen ausschließlich TDM ermöglichen. Diese Pflicht trifft freilich nur solche Rechteinhaber, die Inhalte überwiegend zu Forschungszwecken vermarkten. Dabei schreibt die Norm nicht vor, wie genau diese Bereitstellung zu verwirklichen ist. Vielmehr reicht es, wenn durch die Verpflichtung Anreize zur Selbstregulierung geschaffen werden. Je offener die Norm ist, desto eher ermöglicht sie auch Kooperationen zwischen Rechteinhabern komplementärer Inhalte mit Bezug auf derartige Geschäftsmodelle.

is a business model, especially since a rightholder will either offer this service for payment or hopes for other, indirect profit opportunities. However, this practice is far from being comprehensive, and – as far as can be seen – it has not yet been developed with research organisations in mind at all (see for a recent overview of the TDM policies of scientific research publishers Casper/Guibault, “Baseline report of policies and barriers of TDMs in Europe”, 2016, p. 84 et seq.). However, such a practice would be of particular interest and benefit, given the stated limited access to scientific research information.

Accordingly, the proposed provision obliges rightholders to provide datasets to research organisations (as defined in Article 2 of the proposed Directive) that exclusively allow them to carry out TDM. This obligation applies, of course, only to those rightholders who market content primarily for research purposes. The provision does not stipulate how this provision of datasets is to be implemented in particular. Rather, it is sufficient if the obligation creates incentives for self-regulation. The more open the provision is, the more likely it is to allow co-operation between rightholders of complementary content with regard to such business models.

Rechtfertigen lässt sich eine solche Verpflichtung nicht nur dadurch, dass die Rechteinhaber für die Bereitstellung ihrer normalisierten Daten ein angemessenes Entgelt verlangen können. Entscheidend ist vielmehr, dass bereitgestellte normalisierte Daten **nur beschränkt als Substitute für den Zugang** zu den eigentlich Inhalten dienen können. Die bloße Möglichkeit des TDM ersetzt die Kenntnisse über den Forschungsstand einer bestimmten Disziplin aber nicht. TDM stellt lediglich einen möglichen Forschungsansatz dar, der allerdings deswegen besonders wichtig ist, weil die daraus gewonnen Erkenntnisse ihrerseits Gegenstand neuer Publikationen sein können. Soll dieser zeitgemäße Forschungsansatz nicht durch fehlende faktische Verfügbarkeit normalisierter Daten behindert werden, ist eine Pflicht zur Bereitstellung dahingehend unumgänglich, dass TDM auch mit Bezug auf Inhalte ermöglicht wird, zu denen kein rechtmäßiger Zugang besteht. Zwar mag man ein Restrisiko darin sehen, dass TDM-fähige Datensätze so verwendet (und z.B. „rückkonvertiert“) werden könnten, dass sich damit der Zugang zu den Inhalten substituieren ließe. Dies setzt allerdings nicht nur einen gewissen Aufwand voraus; mit einer Rückkonvertierung verbunden wäre letztlich auch wiederum eine Vervielfältigung seitens jener Partei, der rein TDM-fähige Datensätze zur Verfügung gestellt werden. Für eine solche Vervielfältigung fehlte aber nicht nur naturgemäß die vertragliche Zustimmung der betroffenen Rechteinhaber, sondern auch eine gesetzliche Ermächtigung.

Such an obligation can be justified by the fact that the rightholders are entitled to request a reasonable payment for the provision of their normalised data. What is crucial is that the normalised data provided can only serve as a substitute for access to the actual content to a limited extent. The mere possibility to perform TDM does not, however, replace the knowledge of a particular research discipline's current state. TDM is merely a possible research approach, which, however, is particularly important because the knowledge gained can be the subject of new publications. If this modern research approach is not to be hampered by a lack of factual availability of normalised data, it is indispensable that TDM also be made possible with respect to content that is not lawfully accessible. A residual risk may be seen in the fact that TDM-capable data sets could be used (and e.g. “converted back”) in a way that would allow for the substitution of access to the content. However, this does not only require a certain amount of effort; the back-conversion would ultimately also constitute a reproduction on the part of the party to which the TDM-capable data sets have been made available. However, such a reproduction lacks not only the contractual consent of the concerned rightholders, but also a statutory authorisation. A back-conversion of purely TDM-capable data sets would therefore be illegal.

28

Eine Rückkonvertierung von rein TDM-fähigen Datensätzen wäre mithin illegal.

29 **4. Notwendigkeit und Bedeutung technischer Schutzmaßnahmen**

Es versteht sich von selbst, dass ein Zugriff zum Zwecke des TDM auf Netze und Datenbanken von Rechteinhabern mit gewissen Gefahren verbunden ist. Dies gilt im Prinzip unabhängig davon, ob der Nutzer rechtmäßigen Zugang zu den Inhalten hat oder nicht, denn die Vermarktung gerade wissenschaftlicher Information erfolgt heute ohnehin oft nicht mehr dadurch, dass Daten dauerhaft transferiert werden. Entsprechend muss es einem Rechteinhaber möglich sein, seine berechtigten Interessen dadurch zu schützen, dass er gewisse **technische Maßnahmen** ergreift. Allerdings dürfen diese nicht weiter reichen als erforderlich, d.h. es ist zu vermeiden, dass technische Schutzvorkehrungen TDM unnötig erschweren oder gar *de facto* unmöglich machen.

30 **5. Aufbewahrung und Zugänglichmachung**

Soweit die Rechteinhaber selbst die Normalisierung der Daten vornehmen und diese lediglich zum Zwecke des TDM bereitstellen, haben sie es in der Hand, nicht autorisierte Verwendungen dieser Daten auszuschließen. Erfolgt die Normalisierung hingegen durch jene, die TDM durchführen, bleibt der betreffende Datensatz – soweit er nach erfolgtem TDM nicht vernichtet wird – unter deren Kontrolle. Handelt es sich dabei im

4. The need and importance of technical protection measures

It goes without saying that access to the networks and databases of rightholders for the purpose of TDM is associated with certain risks. This applies in principle irrespective of whether the user has lawful access to the content or not, since the marketing of scientific information in particular nowadays often no longer requires permanent data transfers. Accordingly, a rightholder must be able to protect his legitimate interests by taking certain technical measures. However, such measures must not go beyond what is required, i.e. technical protection measures must be precluded from making TDM unnecessarily more difficult or even *de facto* impossible.

5. Storage and accessibility

In so far as the rightholders themselves carry out the normalisation of the data and only provide them for the purpose of the TDM, they have the power to exclude unauthorised uses of these data. If, on the other hand, normalisation is carried out by those users who carry out TDM, the dataset remains under their control, provided that it is not destroyed after the TDM has been carried out. If, in principle, this is a reproduction

Prinzip um eine Vervielfältigung (Ziff. 14), für welche die vorgeschlagene Norm zugunsten jener Partei, die TDM selbst durchführen will, eine Bereichsausnahme vorsieht, so folgt daraus, dass solche Datensätze nicht Dritten überlassen werden dürfen. Entsprechend sind sie so **aufzubewahren**, dass unautorisierte Nutzungen durch Dritte verhindert werden.

Umgekehrt stellt sich in beiden Fällen die für die Praxis sehr wichtige Frage, inwieweit überhaupt eine Verpflichtung besteht, entsprechende Datensätze aufzubewahren, nachdem das TDM durchgeführt worden ist. Gerade im Bereich der Forschung besteht **ein gesteigertes Interesse an der Verifizierbarkeit von Forschungsergebnissen**. Diese kann bedingen, dass die betreffenden Datensätze erhalten bleiben und für Zwecke der Nachprüfung verfügbar gemacht werden können, soweit nicht sichergestellt ist, dass eine erneute Normalisierung und wiederholtes TDM zu identischen Ergebnissen führt. Folgt daraus die Notwendigkeit einer Aufbewahrung verwendeter Datensätze, müssen in allen Mitgliedstaaten Einrichtungen bestehen, bei denen die betreffenden Datensätze dergestalt hinterlegt werden können, dass jedem Angehörigen der EU diskriminierungsfrei die erforderlichen Verifizierungen möglich sind.

(para. 14), for which the proposed standard provides for a field exemption for the benefit of the party that intends to carry out TDM, it follows that such datasets may not be left in the hands of third parties. Accordingly, they are to be stored in such a way as to prevent unauthorised uses by third parties.

Conversely, in both cases, a very important question for practice is whether there is any obligation to retain the corresponding datasets after TDM has been carried out. In the field of scientific research there is a particularly strong interest in the verifiability of research results. This may determine that the relevant datasets have to be retained and made available for the purpose of verification, unless it can be ensured that re-normalisation and repeated TDM leads to identical results. If it is necessary to store the datasets used in the research, all Member States must have facilities for storing the relevant datasets in such a way as to allow any EU national without discrimination to make the necessary verifications.

31

#### IV. Formulierungsvorschlag

#### IV. Proposal

##### Artikel 3

##### Article 3

##### *Text- und Data-Mining*

##### *Text and data mining*

(1) Wer rechtmäßig Zugang zu Werken oder sonstigen Schutzgegenständen hat, darf ohne Zustimmung des Rechteinhabers Text- und Data-Mining vornehmen. Das schließt die Befugnis mit ein, ausschließlich zum Zweck des Text und Data-Mining Inhalte aus Datenbanken zu entnehmen sowie Vervielfältigungen vorzunehmen.

(1) A person is allowed, without the rightholder's consent, to carry out text and data mining related to works or other subject-matter to which this person has lawful access. This includes, for the sole purpose of text and data mining, the permission to extract contents of databases and to make reproductions.

(2) Rechteinhaber, die Werke und sonstige Schutzgegenstände überwiegend zu Forschungszwecken vermarkten, sind gegenüber Forschungsorganisationen, die dazu keinen rechtmäßigen Zugang haben, verpflichtet, Datensätze bereit zu stellen, die ihnen ausschließlich Text- und Data-Mining ermöglichen. Sie können ein angemessenes Entgelt verlangen.

(2) Rightholders who market works or other subject-matter primarily for research purposes are obliged to provide research organisations not having lawful access with datasets that enable them to carry out text and data mining only. These rightholders may request a reasonable payment.

(3) Vertragliche Bestimmungen, die im Widerspruch zu Absatz 1 oder Absatz 2 stehen, sind unwirksam.

(3) Any contractual provision contrary to the rights and obligations provided for in paragraph 1 or paragraph 2 shall be unenforceable.

(4) Rechteinhaber sind berechtigt, die für die Gewährleistung der Sicherheit und Integrität der Netze und Datenbanken notwendigen Maßnahmen zu ergreifen. Solche Maßnahmen dürfen Text- und Data-Mining nicht unnötig erschweren.

(4) Rightholders shall be allowed to apply measures necessary to ensure the security and integrity of the networks and databases. Such measures shall not unnecessarily hamper text and data mining.

(5) Die Mitgliedstaaten bezeichnen eine Einrichtung, welche die für Text- und Data-Mining verwendeten Datensätze sicher und ausschließlich für Zwecke der Nachprüfung zugänglich aufbewahren kann.

(5) The Member States shall designate a facility to safely store datasets used for text and data mining and to make them accessible for verification purposes only.

**PART B**  
**Kapitel 2 Digitale und**  
**grenzübergreifende**  
**Lehrtätigkeiten**

**Stellungnahme**

**I. Hintergrund**

Mit Art. 5 Abs. 3 lit. a InfoSoc-RL existiert bereits eine **fakultative** Schrankenregelung für die Verwendung von Werken und sonstigen Schutzgegenständen in der Lehre. Für Datenbanken enthalten Art. 6 Abs. 2 lit. b, 9 lit. b Datenbank-RL vergleichbare Regelungen. Eine entsprechende Regelung für Computerprogramme gibt es nicht.

Art. 5 Abs. 3 lit. a InfoSoc-RL konnte kaum sein Ziel erreichen, die **digitale Lehre** zu erleichtern. Seine Umsetzung ins mitgliedstaatliche Recht führte zu einer erheblichen Unsicherheit der Lehrenden und Lernenden im Umgang mit geschützten Inhalten, da die Voraussetzungen zum Teil unklar waren und von einigen Mitgliedstaaten sehr eng interpretiert wurden. Zudem bereiten die enormen Unterschiede zwischen den Umsetzungen in den Mitgliedstaaten bei grenzüberschreitenden Lehraktivitäten Schwierigkeiten (Impact Assessment, S. 79). Der vorgeschlagene Art. 4 bezweckt die Rechtssicherheit bei der digitalen Nutzung urheberrechtlich geschützter Inhalte im Bildungsbereich zu erhöhen und insbesondere grenzübergreifende Lehrtätigkeiten zu erleichtern.

**PART B**  
**Chapter 2 Digital and cross-**  
**border teaching activities**

**Position Statement**

**I. Background**

An **optional** exemption for the use of works and other subject-matter for teaching already exists in Article 5(3)(a) of Directive 2001/29/EC (InfoSoc Directive). Articles 6(2)(b) and 9(b) of Directive 96/9/EC (Database Directive) contain similar rules for databases. There is no corresponding exemption for computer programs.

Article 5(3)(a) InfoSoc Directive has hardly been able to achieve its objective of facilitating **digital teaching**. Its implementation into Member States' laws has led to considerable insecurity on the part of teachers and learners concerning the use of protected content, since the prerequisites were partially unclear and too narrowly interpreted by some Member States. In addition, the enormous differences between the implementations in the Member States have created difficulties in cross-border learning activities (Impact Assessment, p. 79). The proposed Article 4 aims at increasing the legal certainty in the digital use of copyright-protected content in the field of education and, in particular, facilitating cross-border teaching activities.

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### 3 II. Zum Vorschlag der Kommission

#### 1. Inhalt

Der Anwendungsbereich des vorgeschlagenen Art. 4 schließt Datenbanken und Computerprogramme ein und sieht die **zwingende** Umsetzung der Regelung ins nationale Recht der Mitgliedstaaten vor. Die Mitgliedstaaten haben jedoch nach Art. 4 Abs. 2 UA 1 die Möglichkeit, den Anwendungsbereich der Schranke einzugrenzen. Dies setzt nach Art. 4 Abs. 2 UA 2 voraus, dass auf dem Markt angemessene Lizenzen für die Genehmigung der von Art. 4 privilegierten Handlungen leicht verfügbar sind.

- 4 Wie bereits Art. 5 Abs. 3 lit. a InfoSoc-RL setzt Art. 4 weiter voraus, dass die geschützten Inhalte „for the sole purpose of illustration for teaching“ und einen „non-commercial purpose“ verwendet werden. Zusätzlich begrenzt Art. 4 die Nutzung auf die Räumlichkeiten einer Bildungseinrichtung oder ein gesichertes elektronisches Netz. Die **bedeutendste Änderung** für grenzüberschreitende Sachverhalte enthält Art. 4 Abs. 3. Dieser fingiert bei einer Nutzung, die über gesicherte elektronische Netze erfolgt und im Einklang mit der auf Art. 4 beruhenden mitgliedstaatlichen Regelung steht, dass die Handlung allein in dem Mitgliedstaat erfolgt, in dem die Bildungseinrichtung ihren Sitz hat.

### II. The Commission’s proposal

#### 1. Content

The scope of the proposed Article 4 includes databases and computer programs and provides for **mandatory** implementation of the rule in the Member States’ national laws. However, according to Article 4(2)(1), the Member States have the option of narrowing the scope of the limitation. According to Article 4(2)(2), this requires that adequate licensing authorising the acts privileged by Article 4 is easily available in the market.

As already provided for in Article 5(3)(a) InfoSoc Directive, Article 4 further requires that the protected content is used “for the sole purpose of illustration for teaching” and for a “non-commercial purpose”. In addition, Article 4 restricts the use to the premises of an educational establishment or a secured electronic network. The **most important modification** concerning cross-border situations is found in Article 4(3). It creates the fiction, in the case of a use made via secure electronic networks and in accordance with the Member States’ provisions based on Article 4, that the act takes place solely in the Member State in which the educational establishment is established.

## 2. Harmonisierungsgrad

Die **Harmonisierung** des rechtlichen Rahmens für die Verwendung von geschützten Inhalten in der digitalen Lehre ist unabdingbar, um das Potenzial der technischen Entwicklungen für den Bildungsbereich ganz auszuschöpfen. Eine sinnvolle Nutzung digitaler Bildungsangebote ist zumeist nur grenzüberschreitend möglich. Die Einführung einer zwingenden Schrankenregelung ist daher begrüßenswert.

Die Harmonisierungswirkung der Regelung wird jedoch durch Art. 4 Abs. 2 unnötig **abgeschwächt**. Es ist zu erwarten, dass die Mitgliedstaaten von dieser Möglichkeit in unterschiedlichem Ausmaß Gebrauch machen und zahlreiche unterschiedliche einzelstaatliche Regelungen existieren werden. Die digitalen Lehrmöglichkeiten werden somit weiterhin stark zwischen den Mitgliedstaaten divergieren.

## 3. Inhaltliche Bedenken

### a) Anwendungsbereich

Der Anwendungsbereich des Art. 4 wird den Bedürfnissen einer modernen Lehre nicht ausreichend gerecht. Nicht erfasst werden die **neuen Formen des Lehrens und Lernens**, die in den letzten Jahren durch die fortschreitenden technischen Möglichkeiten entstanden sind und weit über eine Ergänzung des traditionellen Unterrichts in der Schule durch digitale Medien hinausgehen (vgl. Impact Assessment, S. 81). Diese

## 2. Degree of harmonisation

The **harmonisation** of the legal framework regarding the use of protected content in digital education is vital in order to fully exploit the potential of technological advances for education. In most cases, a meaningful use of digital educational offers is only possible in a cross-border context. The introduction of a mandatory limitation is therefore to be welcomed.

However, Article 4(2) unnecessarily **mitigates** the harmonisation effect of the provision. The Member States will most likely use this option to varying degrees, and different national regulations will ensue. Digital learning opportunities will therefore continue to diverge significantly among the Member States.

## 3. Concerns regarding content

### a) Scope of application

The scope of Article 4 does not sufficiently meet the needs of modern teaching. The **new forms of teaching and learning** that have emerged over the past few years due to advances in technology, which extend far beyond supplementing traditional teaching at schools with digital media, are not covered (see Impact Assessment, p. 81). This restriction is especially regrettable since for the first time the limitation also

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Beschränkung ist insbesondere bedauerlich, da die Schranke richtigerweise auch Datenbanken und erstmalig Computerprogramme einschließt.

rightly includes databases and computer programs.

- 8 Nach den Erwägungen der Kommission im Impact Assessment soll Art. 4 insbesondere keine Anwendung auf Nutzungen im offenen Internet finden. Dies soll auch sog. **Massive Open Online Courses** (MOOCs) einschließen (Impact Assessment, S. 82). Diese Einordnung stimmt mit der wörtlichen Bedeutung und dem Ursprung der MOOCs überein. Inzwischen hat sich „MOOC“ aber zu einem Oberbegriff für eine Vielzahl unterschiedlicher Lehrangebote entwickelt, die auch in dem Grad ihrer Offenheit divergieren. Solche Angebote gestützt auf die Interessen der Rechteinhaber und den Anforderungen klassischer Lehrformen pauschal von der Privilegierung auszuschließen, greift daher zu kurz. Stattdessen muss das Urheberrecht anpassungsfähig sein an die „neuen technologischen Realitäten“ (Schritte zu einem modernen, europäischeren Urheberrecht, COM(2015) 626 final, S. 3).
- 9 Diesen Anforderungen genügt der Anwendungsbereich des Art. 4 nicht. Die Begrenzung auf die Räumlichkeiten einer Bildungseinrichtung oder ein gesichertes elektronisches Netz, zu dem nur die Schülerinnen oder Schüler, die Studierenden und das Personal der Bildungseinrichtung Zugang haben, ist insofern zu eng, als damit nur Lehraktivitäten erfasst werden, die diesen **starren Rahmen** einhalten.
- According to the Commission’s considerations in the Impact Assessment, Article 4 is not intended to apply in particular to use in the open internet. This should also include so-called **massive open online courses** (MOOCs) (Impact Assessment, p. 82). This classification corresponds to the literal meaning and origin of MOOCs. Meanwhile, “MOOC” has developed into an umbrella term for a variety of teaching offers, which also diverge in the degree of their openness. Therefore, excluding such offers altogether from the privilege based on the interests of the rightholders and the needs of classical teaching methods falls short. Instead, copyright must adapt to the “new technological realities” (see, Commission Communication “Towards a modern, more European copyright framework”, COM(2015) 626 final, 9 Dec. 2015 p. 3).
- The scope of application of Article 4 does not meet these requirements. The restriction to the premises of an educational establishment or a secure electronic network, which is only accessible to the pupils, students and staff of an educational establishment, is too narrow insofar as only learning activities that comply with this **rigid framework** are covered. In turn, linking the limitation to the location of the

Die Anknüpfung an den Ort der Nutzungs-handlung ist wiederum insofern zu weit, als sie lediglich eine formelle Zugehörigkeit der potenziellen Rezipienten an die Bildungseinrichtung voraussetzt, ohne diesen Kreis funktional einzugrenzen.

Der Richtlinienvorschlag definiert – anders als die in Art. 3 und Art. 5 erwähnten „Forschungsorganisationen“ und „Einrichtungen des Kulturerbes“ – die „Bildungseinrichtungen“ nicht. Art. 2 sollte daher um die Definition einer „Bildungseinrichtung“ ergänzt werden. Um **Flexibilität** im vorstehend genannten Sinne zu gewährleisten, ist dieser Begriff weit zu fassen. Hierauf deutet auch Erwägungsgrund 15 hin. Zu berücksichtigen ist dabei insbesondere, dass ein Bedürfnis für die grenzüberschreitende Nutzung digitaler Technologie gerade bei Hochschulen sowie im Bereich des lebenslangen Lernens in besonderem Maße bestehen wird.

#### b) Lizenzvorrang

Art. 4 Abs. 2 erlaubt den Mitgliedstaaten, für alle oder bestimmte Arten von Werken oder sonstigen Schutzgegenständen einen Lizenzvorrang im nationalen Recht vorzusehen. Die Schranke findet dann keine Anwendung, wenn auf dem Markt angemessene Lizenzen leicht verfügbar sind. Wie Art. 4 Abs. 2 UA 2 zeigt, sind unter „Lizenzen“ – entgegen der zu Art. 5 Abs. 3 lit. n InfoSoc-RL ergangenen Entscheidung des EuGH *Technische Universität Darmstadt/Eugen Ulmer KG* (C-

usage goes too far, since it requires merely a formal affiliation of the potential recipients with the educational establishment, without functionally restricting this circle.

The proposal for a Directive does not define “educational institutions”, in contrast to “research organisations” and “cultural institutions”, which are referred to in Article 3 and Article 5. Therefore a definition of “educational institution” should be added to Article 2. In order to ensure **flexibility** in the aforementioned sense, this term should be interpreted broadly. Recital 15 also indicates such an interpretation. In particular, it must be taken into account that there will be a definite need for the cross-border use of digital technology for universities and in the field of lifelong learning.

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#### b) Licence priority

Article 4(2) allows the Member States to provide for a licence priority in national law for all or certain types of works or other subject-matter. The limitation is then not applicable if adequate licences are easily available on the market. As Article 4(2)(2) shows, “licences” – contrary to Article 5(3)(n) InfoSoc Directive – are to be understood as **licensing offers** (see, C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG*).

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117/13) – **Lizenzangebote** zu verstehen.

- 12 Der Ausschluss der von der Schranke erfassten Nutzungshandlungen bei Vorliegen eines bloßen Lizenzangebots ist jedoch zu **weitreichend**. Bei einem bloßen Lizenzangebot kann der Rechteinhaber durch eine einseitige Handlung den Vertragsschluss ohne weiteres noch verhindern. Es ist daher nicht gewährleistet, dass geschützte Werke tatsächlich für Handlungen nach Art. 4 Abs. 1 genutzt werden können.
- 13 Zudem bleiben die Anforderungen an die „Angemessenheit“ eines Lizenzangebots ungeklärt. Dies erhöht die Gefahr, dass durch einen umfassenden Lizenzvorrang der Anwendungsbereich der Schranke **ausgehöhlt** wird. Darüber hinaus steigt das Risiko, dass Bildungseinrichtungen hohe Transaktionskosten entstehen. Die Verpflichtung der Mitgliedstaaten nach Art. 4 Abs. 2 UA 2, die „notwendigen“ Maßnahmen für eine angemessene Verfügbarkeit und Sichtbarkeit der Lizenzen zu ergreifen, ist demgegenüber zu unspezifisch, um prohibitive Kosten für die Nutzung der Schranke auszuschließen.
- 14 **c) Vergütung**
- Gerade vor dem Hintergrund, dass die (jedenfalls die originären) Rechteinhaber von einer vergütungspflichtigen Schranke monetär profitieren können (s. dazu auch nachstehend Ziff. 15 u. 27), erscheint der bloß fakultative gerechte Ausgleich des Art. 4 Abs. 4 **unzureichend**. Abgesehen von
- However, the exclusion of the uses covered by the exemption in the case of a mere licensing offer is too **far reaching**. In the case of a mere licence offer, the rightholder can still prevent the conclusion of the contract by means of a unilateral act. It is therefore not guaranteed that protected works can actually be used for acts pursuant to Article 4(1).
- In addition, the requirements regarding the “adequacy” of a licensing offer remain unclear. This increases the risk that the scope of the limitation will be **undermined** by an extensive licence priority. In addition, there is a growing risk that institutions of higher education will have to face high transaction costs. The obligation of the Member States under Article 4(2)(2) to take “necessary” measures for adequate availability and visibility of the licences is, on the other hand, too vague to eliminate prohibitive costs for the use of the limitation.
- c) Remuneration**
- Taking into consideration that the rightholders (at least the original ones) can benefit monetarily from a limitation that requires remuneration (see also below paras 15 and 27), the merely optional fair compensation contained in Article 4(4) appears to be **insufficient**. Apart from this factual justification

dieser sachlichen Rechtfertigung für einen obligatorischen gerechten Ausgleich verringert deren fakultative Anordnung den Harmonisierungsgrad innerhalb der EU und begründet die Gefahr, dass die Kompensation der Rechteinhaber zwischen den Mitgliedstaaten zu Verwerfungen führt. Dies ist insbesondere im Hinblick auf die Fiktion des Art. 4 Abs. 3 bedenklich, nach welcher eine Nutzung über gesicherte elektronische Netze allein als in dem Mitgliedstaat erfolgt gilt, in dem die Bildungseinrichtung ihren Sitz hat. Dies wäre dann nämlich auch für die Vergütung entscheidend, womit ein und derselbe Rechteinhaber für identische Nutzungshandlungen einmal vergütet würde, das andere Mal nicht.

Der Anspruch auf eine „fair compensation“ nach dem vorgeschlagenen Art. 4 Abs. 4 sei – der Entscheidung des EuGH „*Hewlett-Packard Belgium SPRL/Reprobel SCRL*“ (C-572/13) entsprechend – auf die originären Rechteinhaber beschränkt. Dies ergibt sich schon im Umkehrschluss aus dem vorgeschlagenen Art. 12 (s. dazu ausführlich Part F); denn die dort den Mitgliedstaaten eingeräumte Möglichkeit, Verleger an einem gerechten Ausgleich zu beteiligen, wäre nicht erforderlich, wenn diesem als derivativem Rechteinhaber ohnehin ein Ausgleich aus Art. 4 Abs. 4 zustünde. Eine solche Begrenzung des Ausgleichs auf originäre Rechteinhaber überzeugt jedoch nicht. Werden die Verwertungsrechte einem Intermediär eingeräumt, entstehen die ökonomischen Nachteile aus der

for a compulsory obligation of fair compensation, its optional nature reduces the degree of harmonisation within the EU and brings forth a risk that the compensation of rightholders may lead to disruptions between the Member States. This is of particular concern in view of the fiction of Article 4(3), according to which the use through secured electronic networks is deemed to occur solely in the Member State in which the educational establishment is established. Specifically, this would also be decisive concerning the remuneration; whereby, the same rightholder would be remunerated once for identical usage transactions, and not for another one.

The right to fair compensation pursuant to the proposed Article 4(4) may be – in line with the decision of the CJEU C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL* – limited to the original rightholders. This restriction follows from a conclusion *e contrario* from the proposed Article 12 (see Part F in detail), since the option granted to the Member States to give publishers a share of the fair compensation would not be necessary if they were, as derivative rightholders, entitled to a compensation pursuant to Article 4(4) anyway. However, such a restriction of the compensation of the original rightholders remains unconvincing. When exploitation rights are assigned to an intermediary, the economic loss resulting from performing the use

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Vornahme der nach Art. 4 Abs. 1 erlaubten Nutzungshandlungen – regelmäßig auch oder sogar ausschließlich – dem **derivativen** Rechteinhaber (dazu näher Part F, Ziff. 10). Diesen Sachverhalt vermag auch der auf Verleger begrenzte, vorgeschlagene Art. 12 aufgrund seiner strukturellen Defizite nicht angemessen auszugleichen (dazu näher Part F).

permitted pursuant to Article 4(1) is incurred – regularly as well or even exclusively – by the **derivative** rightholder (for details, see Part F). This fact cannot even be adequately balanced out by the proposed Article 12 due to its structural deficits (see further Part F).

- 16 Der EuGH-Entscheidung „*Padawan/ SGAE*“ (C-467/08) folgend knüpft der gerechte Ausgleich nach Art. 4 Abs. 4 an einen Schaden an (s. auch Part A, Ziff. 22). Dies vermöchte freilich nur dann zu überzeugen, wenn Art. 4 Abs. 4 – entgegen der vorgeschlagenen Konzeption (s. Ziff. 15) – auch zugunsten jener derivativen Rechteinhaber einen Ausgleich vorsähe, bei denen die Nutzung der Werke oder sonstigen Schutzgegenstände auf einer Inanspruchnahme ihrer Investitionen beruht; denn dies würde tatsächlich – zu ihren Lasten – zu einer Schädigung führen. Demgegenüber ist das Kriterium eines Schadens im Hinblick auf die Urheber als originäre Rechteinhaber **zweifelhaft**. Ihnen mag eine angemessene Vergütung („equitable remuneration“) für die Verwendung ihrer Werke zugestanden werden, dies dann allerdings unabhängig vom Vorliegen eines konkreten Schadens (zu dieser Differenzierung im Hinblick auf den vorgeschlagenen Art. 12 s. Part F, Ziff. 11). Zudem wäre die explizite Aufnahme des Kriteriums eines Schadens in Art. 4 Abs. 4 unter den Gesichtspunkten der Kontinuität und Einheitlichkeit be-

In line with the CJEU decision in C-467/08, *Padawan SL v SGAE*” fair compensation pursuant to Article 4(4) is linked to damage (see also Part A). This would, of course, only be convincing if Article 4(4), contrary to the proposed concept (see para. 15), would also provide for compensation for those derivative rightholders, for whom the use of the works or other subject-matter is based on a use of their investment. Such would actually lead to a damage – a result to their detriment. On the other hand, the criterion of damage with regard to authors as original rightholders is **doubtful**. They may be granted an equitable remuneration for the use of their works, but this only independently of the existence of a concrete damage (on this distinction considering the proposed Article 12, see Part F). Moreover, the explicit inclusion of the criterion of damage in Article 4(4) would be of concern with regard to continuity and consistency. The criterion was introduced by the CJEU, but neither one of the previous Directives nor any other provisions within the proposed Directive explicitly

denklich. Eingeführt wurde dieses durch den EuGH, doch wird ein Schaden weder in einer der bisherigen Richtlinien noch in einer anderen Regelungen innerhalb des Richtlinienvorschlags ausdrücklich vorausgesetzt.

presuppose damage.

#### 4. Verhältnis zu bisherigen Schrankenregelungen

Die ergänzende Anwendung der Art. 6 Abs. 2 lit. b, 9 lit. b Datenbank-RL und Art. 5 Abs. 3 lit. a InfoSoc-RL (Erwägungsgrund 5) erhöht die **Komplexität** des urheberrechtlichen Regelungsrahmens für Lehrtätigkeiten auf unionsrechtlicher Ebene (s. auch Part A, Ziff. 10). Zudem besteht die Gefahr divergierender mitgliedstaatlicher Regelungen, da der Regelungsgehalt jener Vorschriften nicht klar vom neu vorgeschlagenen Art. 4 abgegrenzt ist.

#### 4. Relation to previous limitations 17

The complementary application of Articles 6(2)(b) and 9(b) Database Directive and Article 5(3)(a) InfoSoc Directive (Recital 5) increases the **complexity** of the legal framework of copyright law at the EU level regarding teaching activities (see Part A, para. 10). Moreover, there is a risk of divergent rules among Member States since the regulatory content of those provisions is not clearly delineated from the newly proposed Article 4.

Es erscheint daher vorzugswürdig, den Anwendungsbereich der bisherigen Schrankenregelungen anzupassen und auf die wissenschaftliche Forschung zu beschränken, um die Privilegierung von Nutzungen im Rahmen von Lehrtätigkeiten in einer **einzig**, neuen Vorschrift zusammenzufassen. Hierfür ist der vorgeschlagene Art. 4 um eine Regelung für jene analogen Nutzungen zu ergänzen, statt – wie im Impact Assessment hervorgehoben – den bisherigen Art. 5 Abs. 3 lit. a InfoSoc-RL im Bereich der Lehre auf diese hauptsächliche Bedeutung zu beschränken (S. 82). Die Reichweite dieser Ergänzung ist freilich gering, beschränken sich analoge Nutzungen doch auf den Aspekt des

It therefore appears to be preferable to adapt the scope of application of the existing limitations and to restrict them to scientific research in order to condense the privileges of use for teaching activities into a **single** new provision. To this end, the proposed Article 4 should be supplemented by a regulation concerning such analogue uses, rather than – as highlighted in the Impact Assessment – limiting the previous Article 5(3)(a) InfoSoc Directive regarding teaching to this primary purpose (p. 82). The amendment's scope is, of course, small, since analogue uses are limited to the aspect of the reproduction right, because neither the right of making available to the public nor the right of

Vervielfältigungsrechts, da für analoge Nutzungen weder das Recht der öffentlichen Zugänglichmachung noch der öffentlichen Wiedergabe relevant ist.

communication to the public is relevant with respect to analogue uses.

19 **5. Wortwahl (betrifft nur die deutsche Fassung)**

**5. Wording (concerns the German version only)**

Bei einer Einschränkung des Anwendungsbereichs der vorgeschlagenen Schranke auf den Unterricht an sich wäre sie für die digitale Lehre fast völlig **bedeutungslos**. Bereits bei Art. 5 Abs. 3 lit. a InfoSoc-RL wirft die Voraussetzung einer Veranschaulichung „im“ Unterricht Fragen hinsichtlich der räumlichen und zeitlichen Begrenzung der Regelung auf. Nach Erwägungsgrund 16 soll der neu vorgeschlagene Art. 4 neben dem Unterricht aber auch damit zusammenhängende Lern-tätigkeiten sowie Prüfungen erfassen. Zur Vermeidung von Unklarheiten sollte die deutsche Fassung des Art. 4 diesen Anwendungsbereich widerspiegeln und eine Veranschaulichung „des“ Unterrichts zu fordern (englisch: „for the sole purpose of“). Sollte Art. 5 Abs. 3 lit. A InfoSoc-RL – entgegen dem hier gemachten Vorschlag – nicht auf den Bereich der wissenschaftlichen Forschung begrenzt werden (s. Ziff. 18), drängt es sich auf, auch jene Regelung im Rahmen des vorgeschlagenen Art. 17 Abs. 2 lit. b entsprechend anzupassen.

Limiting the scope of the proposed exemption to teaching in a strict sense would have almost **no significance** with respect to digital teaching. In Article 5(3)(a) InfoSoc Directive, the German text of the prerequisite “for the sole purpose of teaching” (*Veranschaulichung “im” Unterricht*) already raises questions regarding the local and temporal limitation of the regulation. According to Recital 16, in addition to teaching in a strict sense, the newly proposed Article 4 is also intended to cover related learning activities and examinations. In order to avoid ambiguities, the German version of Article 4 should therefore reflect this scope (*Veranschaulichung “des” Unterrichts*). Should Article 5(3)(a) InfoSoc Directive – contrary to the proposal made here – not be limited to the field of scientific research (see para. 16), it seems obvious to adapt the provisions correspondingly within the proposed Article 17(2)(b).

20 Im Unterschied zu Art. 5 Abs. 3 lit. a InfoSoc-RL formuliert der deutsche Text des vorgeschlagenen Art. 4 „the sole purpose of“ nicht als eine Nutzung „ausschließlich“

The German text of the proposed Article 4 regarding “the sole purpose” is different from Article 5(3)(a) InfoSoc-Directive (“für den alleinigen Zweck” instead of

zur Veranschaulichung, sondern „für den alleinigen Zweck“. Eine inhaltliche Änderung scheint aber nicht beabsichtigt. Um die **Kontinuität** der Konkretisierung durch die Praxis und die Übereinstimmung mit dem ggf. ergänzend anzuwendenden Art. 5 Abs. 3 lit. a InfoSoc-RL zu gewährleisten (vgl. dazu vorn Ziff. 16), sollte auch in Art. 4 der Begriff „ausschließlich“ Verwendung finden.

Die Anforderung eines „non-commercial purpose“ bezeichnet die deutsche Fassung des Art. 4 als „nichtgewerblich“ und nicht wie in Art. 5 Abs. 3 lit. a InfoSoc-RL als „nicht kommerziell“. Eine Modifikation der Anforderungen soll damit aber wohl **nicht verbunden** sein. So bestimmt Erwägungsgrund 15 des Richtlinien-vorschlags wie bereits Erwägungsgrund 42 der InfoSoc-RL, dass die organisatorische Struktur und die Finanzierung der Einrichtung für die Einordnung unerheblich seien. Zwar wurde im Rahmen der deutschen Umsetzung (abgesehen von § 52a Abs. 1 UrhG) die Voraussetzung „kommerziell“ durch „gewerblich“ ersetzt, so etwa bei den auf Art. 9 lit. b Datenbank-RL beruhenden § 87c Abs. 1 S. 1 Nr. 2, 3 UrhG. Im Interesse der Klarheit sollte die vorgeschlagene Richtlinie den Begriff „nicht kommerziell“ aus der InfoSoc-RL aber beibehalten.

„*ausschließlich*“). However, a change regarding the content does not seem to be intended. In order to ensure the **continuity** of the concretisation in practice and the conformity with the possibly complimentary applicable Article 5(3)(a) (see also para. 16 above), the German version of Article 4 should also contain the term used in Article 5(3)(a) InfoSoc Directive (“*ausschließlich*”).

The requirement of a “non-commercial purpose” is indicated differently in the German versions of Article 4 (“*nichtgewerblich*”) and Article 5(3)(a) InfoSoc Directive (“*nicht kommerziell*”). However, a modification of the requirements is presumably **not associated** with this change. Recital 15 of the proposal for a Directive, as already set down in Recital 42 of the InfoSoc Directive, determines that the organisational structure and financing of the institution are irrelevant for the classification of the establishment. Admittedly in the context of the German implementation (apart from Article 52a(1) of the German Copyright Act (UrhG)), the term used in Article 5(3)(a) InfoSoc Directive (“*kommerziell*”) was replaced by the term applied in the proposed Article 4 (“*gewerblich*”), as for example in Article 87c(1) sentence 1 nos. 2 and 3 of the German Copyright Act (UrhG), which is based on Article 9(b) Database Directive. However, for the sake of clarity, the German text of the proposed Directive should retain the term used in the InfoSoc Directive (“*kommerziell*”).

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- 22 Anders als in der InfoSoc-RL fordert die deutsche Fassung des vorgeschlagenen Art. 4 für die „fair compensation“ nicht einen „gerechten“, sondern einen „fairen“ Ausgleich (vgl. Erwägungsgrund 35, 36 InfoSoc-RL). Anhaltspunkte für eine damit verbundene Änderung des Maßstabs sind jedoch **nicht erkennbar**. Um Unklarheiten zu vermeiden, sollte auch im vorgeschlagenen Art. 4 der Begriff des „gerechten“ Ausgleichs verwendet werden.
- Regarding “fair” compensation, the German version of the proposed Article 4 does not use the same term as the InfoSoc Directive (“*fairen*” instead of “*gerechten*” *Ausgleich*, see Recital 35, 36 InfoSoc Directive). However, there are **no indications** of a related change in the scale. In order to avoid ambiguities, the German text of the proposed Article 4 should contain the term used in the InfoSoc Directive (“*gerechten*” *Ausgleich*).

23 **III. Alternativer  
Regelungsvorschlag**

**1. Anwendungsbereich**

Die Beschränkung des Anwendungsbereichs des Art. 4 auf die Räumlichkeiten einer Bildungseinrichtung oder ein gesichertes elektronisches Netz begegnet insbesondere im Hinblick auf die neuen Formen des Lehrens und Lernens Bedenken (s. Ziff. 7). **Vorzugswürdig** ist das Kriterium, wonach eine Nutzung auf eine „bestimmt abgegrenzte Zahl von Unterrichtsteilnehmern“ gerichtet sein muss, wie dies das deutsche Recht bereits für das Eingreifen des § 52a UrhG voraussetzt. Dies schließt eine beliebige Erweiterung des Kreises der potenziellen Rezipienten aus und verhindert so eine Ausuferung des Anwendungsbereichs der Schranke. Gleichzeitig ist dieses Kriterium aber offen für die Entwicklung neuer Formen des Lehrens und Lernens. Davon nicht berührt ist die Möglichkeit, ein Authentifizierungsverfahren der Teilnehmer vorauszusetzen (vgl. Erwägungsgrund 16).

**III. Alternative regulatory  
proposal**

**1. Scope of application**

The restriction of the scope of application of Article 4 to the premises of an educational establishment or a secure electronic network raises concerns, in particular with regard to new forms of teaching and learning (see para. 8). The criterion according to which a use must be directed to a “specifically limited circle of those taking part in the teaching” as required by the German law for the application of Article 52a of the German Copyright Act (UrhG) is **preferable**. This excludes an arbitrary extension of the circle of potential recipients and thus prevents the scope of the limitation from expanding. However, at the same time this criterion is open to the development of new forms of teaching and learning. This does not affect the fact that an authentication procedure of the participants may be required (see Recital 16).

## 2. Lizenzvorrang

Der Lizenzvorrang nach Art. 4 Abs. 2 sollte im Einklang mit der EuGH-Entscheidung „*Technische Universität Darmstadt/Eugen Ulmer KG*“ (C-117/13) auf tatsächlich bestehende **Lizenzvereinbarungen** beschränkt werden, um die Effektivität der Regelung zu gewährleisten (vgl. Ziff. 12 f.). Sollte hingegen – trotz der damit einhergehenden Nachteile – ein Vorrang bloßer angemessener Lizenzangebote normiert werden, so ist diese Ausnahme von der Schranke zumindest auf bestimmte Bereiche zu begrenzen. Nur durch eine abschließende Vorgabe dieser Bereiche lässt sich einer Aushöhlung der Schranke durch die Einführung extensiver Ausnahmen seitens der Mitgliedstaaten vorbeugen.

## 3. Bereichsausnahme

Die Kommission begründete die Einführung des Art. 4 Abs. 2 im Impact Assessment u.a. damit, dass bei einer Einbeziehung von für den Unterricht bestimmten Inhalten in den Anwendungsbereich der Schranke eine Verringerung der Qualität und der Vielfalt der Bildungsressourcen zu erwarten sei (S. 86). Dies mag in gewissen Fällen zutreffen, doch kann dem **wirksamer** dadurch begegnet werden, dass die Regelung den Mitgliedstaaten ermöglicht, die überwiegend für den Unterricht bestimmten Inhalte ganz oder teilweise vom Anwendungsbereich der Schranke auszunehmen.

## 2. Licence priority

In accordance with the CJEU decision in *C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG* (), the licence priority under Article 4(2) should be limited to actual existing **licensing agreements** in order to ensure the effectiveness of the rule (see para. 11). Should, in spite of the associated disadvantages, a priority of adequate licensing offers be provided, this exemption of the limitation should at least be restricted to defined areas. It is only through a conclusive definition of these areas that the undermining of the limitation through the introduction of extensive exceptions on the part of the Member States can be prevented.

## 3. Exemption

The Commission justified the introduction of Article 4(2) in the Impact Assessment for among other reasons, that in the event of the inclusion of content primarily intended for use in teaching within the scope of the limitation, the quality and diversity of the educational resources will most likely decrease (p. 86). This may be true in certain cases, but this can be **more effectively** prevented by allowing the Member States to exclude all or part of the contents primarily intended for use in teaching from the scope of the limitation.

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- 26 Nicht zuzustimmen ist der Kommission hingegen darin, dass die Schranke die stärkste Auswirkung auf wissenschaftliche Urheber haben werde (Impact Assessment, S. 88) – jedenfalls dann nicht, wenn damit tatsächlich die Forscher gemeint sind. Denn wissenschaftliche Urheber profitieren an der Vermarktung ihrer Inhalte finanziell in aller Regel nicht, während ihnen eine vergütungspflichtige Schranke gewisse **Einnahmen** verschaffen kann (*Stellungnahme des MPI, Schranken im Bereich Bildung, Wissenschaft und Kopienversand, Anhörung vom 8. November 2006, S. 4 f.*). Vielmehr sind es – wenn schon – möglicherweise Wissenschaftsverleger, die von der Schranke betroffen wären, dies zumindest dann, wenn derivative Rechteinhaber an der Vergütung nicht partizipieren (s. Ziff. 15 und nachstehend Ziff. 27; zum vorgeschlagenen Art. 12: Part. F, Ziff. 6 ff.).

However, one cannot agree with the Commission that the exemption will have the greatest impact on scientific authors (Impact Assessment, p. 88), should researchers be meant at all. In fact, scientific authors generally do not profit financially from the commercialisation of their content, whereby a limitation requiring remuneration can provide them with a certain amount of **revenue** (Position Statement of Max Planck Institute for Intellectual Property, Competition and Tax Law (now, Max Planck Institute for Innovation and Competition), “Schranken im Bereich Bildung, Wissenschaft und Kopienversand”, Anhörung vom 8. November 2006, p. 4 f.). If at all, it is instead science publishers who would likely be affected by the limitation, at least if derivative rightholders do not participate in the remuneration (see para. 15 and below para. 27 on the proposed Article 12: Part F, paras. 6 ff.).

#### 27 4. Vergütung

Eine Vergütung für die Nutzungshandlungen gemäß dem vorgeschlagenen Art. 4 sollte sowohl aufgrund der größeren Harmonisierungswirkung als auch aus sachlichen Gründen (s. Ziff. 14) **zwingend** vorgeschrieben werden, auch wenn die konkrete Ausgestaltung den Mitgliedstaaten obliegt. Der derivative Rechteinhaber sollte von diesem Vergütungsanspruch nicht ausgeschlossen werden, da er der von den Schranken primär Betroffene ist. Entsprechend kommt zugunsten des Urhebers, der in Part F alternativ zu

#### 4. Remuneration

Remuneration for use pursuant to the proposed Article 4 should be **compulsory**, both on account of the greater harmonisation effect and on factual grounds (see para. 14), even if the specific expression is the responsibility of the Member States. Derivative rightholders should not be excluded from compensation since they are primarily impacted by the permitted use under Article 4 of the proposed Directive. Article 12, as drafted in Part F as an alternative to the proposal of the Commission, applies accordingly (for details, see

dem Vorschlag der Kommission entwickelte Art. 12 zur Anwendung (s. Ziff. 14 ff.). Wie in den entsprechenden Bestimmungen der InfoSoc-RL ist es nicht Sache dieser Vorschrift, eine Aufteilung zwischen verschiedenen Kategorien von Rechte-inhabern vorzunehmen.

Part F, paras. 14 ff.). As in the corresponding provisions of the InfoSoc Directive, it is not the function of this provision to undertake a distribution between different categories of rightholders.

#### IV. Formulierungsvorschlag

#### IV. Proposal

28

##### Artikel 4

##### Article 4

##### *Nutzung von Werken und sonstigen Schutzgegenständen für Lehrtätigkeiten*

##### Use of works and other subject-matter in teaching activities

(1) Die Mitgliedstaaten sehen eine Ausnahme oder Beschränkung von den in den Artikeln 2 und 3 der Richtlinie 2001/29/EG, in Artikel 5 Buchstabe a und Artikel 7 Absatz 1 der Richtlinie 96/9/EG, in Artikel 4 Absatz 1 der Richtlinie 2009/24/EG sowie in Artikel 11 Absatz 1 dieser Richtlinie festgelegten Rechten vor, damit Werke und sonstige Schutzgegenstände ausschließlich zur Veranschaulichung des Unterrichts in dem Maße genutzt werden dürfen, wie dies durch diesen nicht kommerziellen Zweck gerechtfertigt ist, sofern diese Nutzung

(1) Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow for the use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

(a) für eine bestimmte abgegrenzte Zahl von Unterrichtsteilnehmern

(a) is restricted to the specifically limited circle of those taking part in the teaching

(b) mit Quellenangaben erfolgt, indem u.a. der Name des Urhebers angegeben wird, sofern sich dies nicht als unmöglich erweist.

(b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

(2) Die Mitgliedstaaten können festlegen, dass die Ausnahme nach Absatz 1 für bestimmte Arten von Werken oder sonstige Schutzgegenstände nicht gilt, sofern

(2) Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-

angemessene Lizenzvereinbarungen für die Genehmigung der in Absatz 1 genannten Handlungen bestehen.

Die Mitgliedstaaten können festlegen, dass die Ausnahme nach Absatz 1 für einzelne oder alle Werke, die überwiegend für den Unterricht bestimmt sind, nicht gilt.

(3) Die Nutzung von Werken oder sonstigen Schutzgegenständen ausschließlich zur Veranschaulichung des Unterrichts im Einklang mit dem einzelstaatlichen Recht, das auf der Grundlage dieses Artikels erlassen wurde, gilt allein als in dem Mitgliedstaat erfolgt, in dem die Bildungseinrichtung ihren Sitz hat.

(4) Die Mitgliedstaaten sehen vor, dass die Rechteinhaber für die Nutzung ihrer Werke oder sonstigen Schutzgegenstände nach Absatz 1 einen gerechten Ausgleich erhalten.

matter to the extent that adequate licensing agreements authorising the acts described in paragraph 1 exist.

Member States may provide that the exception adopted pursuant to paragraph 1 does not apply to individual or all works primarily intended for use in teaching.

(3) The use of works and other subject-matter for the sole purpose of illustration for teaching in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

(4) Member States provide for fair compensation for the rightholders for the use of their works or other subject-matter pursuant to paragraph 1.

**PART G**  
**Use of Protected Content on**  
**Online Platforms (Article 13**  
**COM(2016) 593 final)**

**Stellungnahme**

**I. Hintergrund und Ziele**

Der Zugang zu und die Verbreitung von urheberrechtlich geschütztem Material erfolgt mittlerweile zu wesentlichen Teilen über das Internet. Online-Dienste spielen dabei eine wichtige Rolle. Eine **Beteiligung der Rechteinhaber** an den dadurch generierten Erträgen ist nicht selbst-verständlich (Mitteilung der Kommission COM(2016) 592 final, S. 7; Vorschlag für eine Richtlinie über das Urheberrecht im digitalen Binnenmarkt COM(2016) 593 final (RL-E), S. 3 und Erwägungsgrund 37). Dies trifft insbesondere auf Dienste zu, die von ihren Nutzern hochgeladene Inhalte auf ihren Servern speichern, damit diese anschließend von der Öffentlichkeit abgerufen werden können (Impact Assessment, S. 132, 137 ff., 142 f.).

**PART G**  
**Use of Protected Content on**  
**Online Platforms (Article 13**  
**COM(2016) 593 final)**

**Position Statement**

**I. Background and objectives**

1

Access and the dissemination of copyright protected material occur mostly through the internet nowadays. Online services play an important role in this process. A **participation of rightholders** in the profits generated through this is not self-evident (Communication of the Commission COM(2016) 529 final, p. 7; Proposal for a Directive on Copyright in the Digital Market COM(2016) 539 final (proposed Directive), p. 3 and Recital 37). This is especially so in the case of services, which save on their servers content uploaded by their users so it can be subsequently retrieved by the public (Impact Assessment, pp. 132, 137 et seq., 142 et seq.).

- 2 Eine höchstrichterliche Entscheidung zur Reichweite von Art. 14 I der Richtlinie 2000/31/EG (E-Commerce-RL) sowie dazu, ob und wann Provider selbst den Tatbestand von Art. 3 I der Richtlinie 2001/29/EG (InfoSoc-RL) erfüllen, steht aus (Impact Assessment, S. 143.). Bei dieser **ungeklärten Rechtslage** können Diensteanbieter den Abschluss von Lizenzverträgen mit Rechteinhabern entweder ganz verweigern oder mehr oder weniger einseitig ihre Bedingungen durchsetzen (Impact Assessment, S. 139, 142 ff.).

A Supreme Court decision regarding the scope of Article 14(1) of the Directive 2000/31/EC (E-Commerce Directive) as well as whether and when providers themselves fulfil the requirements in Article 3(1) of the Directive 2001/29/EC (InfoSoc Directive) has not yet been issued (Impact Assessment, p. 143). In this **unclear legal situation**, service providers can either fully refuse the conclusion of a licensing agreement with rightholders or more or less enforce their one-sided conditions (Impact Assessment, p. 139, 142 et seq.).
- 3 Ziel der von der Kommission vorgeschlagenen Regelung ist es, diese (Verhandlungs-) **Position der Rechte-inhaber zu verbessern**. Namentlich sollen sie besser kontrollieren und bestimmen können, ob ihre Werke auf Online-Plattformen zugänglich sind, bzw. für die Nutzung und Veröffentlichung ihrer Werke im Internet Lizenzverträge und damit Vergütungen aushandeln (RL-E, S. 3). In technischer Hinsicht soll dies durch den verstärkten und verbesserten Einsatz „geeigneter und angemessener“ Maßnahmen erreicht werden (z. B. Inhaltserkennungstechniken, die die Abrufbarkeit von widerrechtlich zugänglich gemachten Inhalten verhindern oder zumindest reduzieren).

The objective of the Commission’s proposed regulation is to **improve this (negotiating) position of the rightholders**. In particular, they should be able to better control and determine whether their works are available on online platforms or rather negotiate licensing agreements and remuneration for the use and publication of their works on the internet (proposed Directive, p. 3). From a technical perspective, this should be achieved through a reinforced and improved adoption of “suitable and adequate” measures (e.g. content recognition technologies, which prevent or at least reduce the accessibility of content made available illegally).

Dadurch sollen auch für alle Anbieter („Content Service Provider“) von urheberrechtlich geschützten Inhalten im Internet **gleiche Bedingungen und Wettbewerbsvoraussetzungen** geschaffen werden, ohne diejenigen, die Lizenzen erwerben, zu benachteiligen (Impact Assessment, S. 141 ff.; COM(2015) 626 final, S. 10 f.).

This way, **equal conditions and competition requirements** should be created also for all providers (content service providers) of copyright protected contents on the internet without penalising those who obtain a licence (Impact Assessment, p. 141 et seqq.; COM(2015) 626 final, p. 9).

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## II. Zum Vorschlag der Kommission

## II. Regarding the Commission's proposal

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### 1. Inhalt

### 1. Content

Um diese Ziele zu erreichen, schlägt die Kommission i. R. v. Art. 13 RL-E spezifische Pflichten für Online-Dienste vor. Namentlich sollen „Diensteanbieter der Informationsgesellschaft, die große Mengen der von ihren Nutzern hochgeladenen Werke und sonstigen Schutzgegenstände (...) speichern [und] öffentlich zugänglich machen“ dazu verpflichtet werden, **Maßnahmen zu ergreifen**, die sicherstellen, dass

In order to achieve these objectives, the Commission proposes specific obligations for online services within the scope of Article 13 of the proposed Directive. In particular, “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” should be obligated to **take measures** that guarantee that

1. Alt.: ihre Vereinbarungen mit den Rechteinhabern bezüglich der Nutzung von Werken oder sonstigen Schutzgegenstände eingehalten werden;

their agreements concluded with rightholders concerning the use of their works or other subject-matter will be complied with (1<sup>st</sup> alternative);

2. Alt.: über ihre Dienste kein Zugang zu Werken oder sonstigen Schutzgegenständen besteht, die sie gemeinsam mit den Rechteinhabern identifiziert haben.

via their services, no access to works or other subject-matter identified by rightholders in cooperation with them exists (2<sup>nd</sup> alternative).

- 6 Diese Maßnahmen („**beispielsweise wirksame Inhaltserkennungstechniken**“) müssen gem. Art. 13 I 2 RL-E „geeignet und angemessen“ („appropriate and proportionate“) sein, wobei den Diensteanbietern zugunsten der Rechte-inhaber gewisse Unterstützungspflichten zukommen (Art. 13 I 3 RL-E). Umgekehrt müssen die Mitgliedstaaten sicherstellen, dass Diensteanbieter betroffenen Nutzern Beschwerde-mechanismen und Rechtsschutz-möglichkeiten zur Verfügung stellen (Art. 13 II RL-E). Außerdem sollen sie Stakeholderdialoge fördern, um „best practices“ zu ermitteln (Art. 13 III RL-E).
- These measures („**such as the use of effective content recognition technologies**“) must be “appropriate and proportionate” in accordance with the second sentence the first paragraph of Article 13 of the proposed Directive, whereby certain support obligations are attributed to the service providers in favour of the rightholders (third sentence of the first paragraph of Article 13 of the proposed Directive). Conversely, Member States must ensure that service providers put in place complaints and redress mechanisms that are available to affected users (Article 13(2) of the proposed Directive). Furthermore, they should promote stakeholder dialogues to define best practices (Article 13(3) of the proposed Directive).
- 7 **2. Konzeptionelle Kritik**
- a) Allgemein**
- Würde Art. 13 RL-E geltendes Recht, führte dies zu neuer, erheblicher **Rechtsunsicherheit**.
- 2. Conceptual critique**
- a) Overall**
- If Article 13 of the proposed Directive became applicable law, such would lead to new, considerable **legal uncertainty**.
- 8 *Ob* diejenigen Diensteanbieter, die von ihren Nutzern hochgeladene Inhalte speichern und diese der Öffentlichkeit zur Verfügung stellen, dadurch selbst eine **Handlung gem. Art. 3 I InfoSoc-RL** vornehmen, geht aus Erwägungsgrund 38 des RL-E nicht eindeutig hervor. Erwägungsgrund 38 Abs. 1 des RL-E besagt lediglich, *dass* diejenigen Diensteanbieter, die über die bloße Bereitstellung der physischen Infrastruktur hinausgehen und selbst eine Handlung i.
- Whether* those service providers that save content uploaded by their users and make it available to the public, carry out an **act in light of Article 3(1) InfoSoc Directive** themselves, does not clearly result from Recital 38 of the proposed Directive. Recital 38(1) of the proposed Directive merely indicates *that* those service providers that go beyond the simple provision of the physical infrastructure and carry out an act according to Article 3(1) Infosoc

S. v. Art. 3 I InfoSoc-RL vornehmen, zum Abschluss von Lizenzverträgen verpflichtet sind. Dies klärt die bestehende Rechtslage nicht. Sofern Diensteanbieter mit Sicherheit keine haftungsbegründende Rechtsverletzung begehen wollen, müssen sie schon nach geltendem Recht Lizenzverträge abschließen.

Directive are obligated to conclude licensing agreements. Such does not clarify the current legal situation. Provided that service providers for certain do not want to commit any liability causing rights infringement, they must conclude licensing agreements already in accordance with current law.

Der von der EU-Kommission vorgeschlagene Art. 13 RL-E enthält zudem eine Reihe unbestimmter Rechtsbegriffe, davon abgesehen, dass er **kaum verständlich** formuliert ist. Namentlich enthält der Vorschlag keinerlei Erklärung oder Definition dazu, welche Online-Dienste als „Diensteanbieter der Informationsgesellschaft, die große Mengen der von ihren Nutzern hochgeladenen Werke und sonstigen Schutzgegenstände (...) speichern [und] öffentlich zugänglich machen“ zu qualifizieren sind. Fraglich ist insbesondere, welche Bedeutung dem Kriterium „große Mengen“ zukommt, etwa ob es dafür eine Rolle spielt, ob kommerzielle (z. B. YouTube) oder nicht kommerzielle Plattformen (z. B. Wikipedia) Dienste anbieten.

Article 13 of the proposed Directive proposed by the EU Commission contains furthermore a series of undefined legal concepts, apart from the fact that it is **barely understandably** formulated. In particular, the proposal does not contain any explanation or definition concerning which service providers are to be qualified as “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”. What importance is given to the criterion “large amounts” is especially questionable: for instance, whether it is of relevance whether commercial (e.g. YouTube) or non-commercial platforms (e.g. Wikipedia) offer services.

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Sodann erscheint unklar, welche Bedeutung dem Tatbestandsmerkmal „**öffentlich zugänglich machen**“ in Art. 13 I 1 RL-E zukommen soll. Diese Frage betrifft zwei Aspekte. Zum einen geht es darum, was damit im Verhältnis zu Art. 3 I InfoSoc-RL gemeint ist. Zum anderen fragt sich, ob diese Voraussetzung eine Abgrenzung im Verhältnis zur E-

Moreover, it is unclear what importance should be given to the requirement “**provide to the public access**” in the first sentence of the first paragraph of Article 13 of the proposed Directive. This question concerns two aspects. The first is what is meant by this with regard to Article 3(1) InfoSoc Directive. The second is whether this requirement aims at a demarcation in regard to

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Commerce-RL bezweckt.

the E-Commerce Directive.

11 **b) In Bezug auf die deutsche und die englische Sprachfassung**

**b) In regard to the German and English version**

Zahlreiche **Unstimmigkeiten zwischen der deutschen und der englischen Fassung** erschweren das Verständnis von Art. 13 I 1 RL-E zusätzlich. Die englische Fassung spricht z. B. von “Information society service providers that store and provide to the public access [...]”, wohingegen die deutsche Fassung von “Diensteanbieter der Informationsgesellschaft, die [...] speichern oder öffentlich zugänglich machen“ spricht. Dieser Unterschied findet sich auch in anderen Passagen, z. B. in Erwägungsgrund 38. Richtig sein kann von der Sache her nur die englische Fassung.

Numerous **discrepancies between the German and the English version** make the comprehension of the first sentence of the first paragraph of Article 13 of the proposed Directive even more difficult. The English version mentions for ex. “information society service providers that store and provide to the public access...”, whereas the German version mentions “information society service providers that store or provide to the public access...”. This difference can also be found in other passages, for example in Recital 38. Given the subject-matter, only the English version can be correct.

12 Die beiden in Ziff. 5 genannten **Alternativen in Art. 13 I 1 RL-E** unterscheiden sich in der englischen Fassung dadurch, dass

Both **alternatives of the first sentence of the first paragraph of Article 13 of the proposed Directive** mentioned under point 5 differ in the English version in that

bei der ersten Alternative Vereinbarungen zwischen Rechteinhabern und Diensteanbietern bezüglich der Nutzung von Werken oder sonstigen Schutzgegenstände vorliegen; konkret geht es darum, dass diese eingehalten werden;

In the first alternative, agreements between rightholders and service providers concerning the use of works or other subject-matter already exist; the specific matter concerns their compliance;

der zweiten Alternative zufolge Rechteinhaber und Diensteanbieter gemeinsam identifizieren, zu welchen Werken oder sonstigen Schutzgegenständen kein Zugang bestehen soll.

In accordance with the second alternative, rightholders and service providers identify together which works or other subject-matter should not be accessible.

In contrast, the German version seems to require **agreements**

Demgegenüber scheint die deutsche Fassung auch bezogen auf die zweite Alternative **Vereinbarungen** zwischen den Rechteinhabern und den Diensteanbietern vorauszusetzen. Das ergibt jedoch keinen Sinn – im Gegenteil. Diese Alternative muss gerade auch zulasten jener Diensteanbieter anwendbar sein, die keine Lizenzvereinbarungen mit den Rechteinhabern abgeschlossen haben. Dies geht nicht nur aus Erwägungsgrund 38 RL-E hervor; dafür spricht auch die ausführliche Erläuterung einzelner Bestimmungen des Vorschlags (S. 12) und namentlich die Wortwahl in der englischen Fassung (S. 10, 29), während der Wortlaut des Art. 13 I 1 Alt. 2 RL-E in der deutschen Fassung erheblich von der Erläuterung abweicht (S. 12, 31). Allein die englische Fassung entspricht Sinn und Zweck der vorgeschlagenen Regelung, Anreize für den Abschluss von Lizenzverträgen zu schaffen. Solche Anreize würden vernichtet, wenn ausgerechnet jene Diensteanbieter zu den zusätzlichen Maßnahmen gemäß Alternative 2 verpflichtet wären, die bereits Vereinbarungen mit den Rechteinhabern abgeschlossen haben.

between the rightholders and the service providers also concerning the second alternative. However, this makes no sense – on the contrary. This alternative must also be applicable to those service providers which haven't concluded any licence agreement with the rightholders. Such results not only from Recital 38 of the proposed Directive; it is also supported by the detailed explanation of certain provisions of the proposal (p. 10) and, in particular, the wording in the English version (pp. 10, 29), while the wording of the second alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive in the German version greatly differs from the explanation (pp. 12, 31). Only the English version correlates to the spirit and purpose of the proposed rule, to create incentives to the conclusion of licence agreements. Such incentives would be destroyed if those of all service providers, which already have licence agreements with the rightholders, would be obligated to the further measures under alternative No. 2.

### 3. Inhaltliche Bedenken

#### a) Alternative mit Lizenzvertrag (Art. 13 I 1 Alt. 1): „pacta sunt servanda“

Die erste Alternative von Art. 13 I 1 RL-E fokussiert auf Diensteanbieter, die mit den Rechteinhabern Vereinbarungen über die Nutzung ihrer Werke oder sonstigen Gegenstände abgeschlos-

### 3. Substantive objections

#### a) Alternative with licence agreement (first alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive): “pacta sunt servanda”

The first alternative of the first sentence of the first paragraph of Article 13 of the proposed

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sen haben. Zu solchen Lizenzvereinbarungen verpflichtet sind zwar nur Diensteanbieter, die nicht unter den Haftungsausschluss des Art. 14 I E-Commerce-RL fallen (Erwägungsgrund 38 RL-E). In den Anwendungsbereich von Art. 13 I 1 RL-E fallen aber auch Diensteanbieter, die freiwillig Lizenzvereinbarungen mit den Rechteinhabern abschließen.

**Directive** focuses on service providers that have concluded agreements with the rightholders for the use of their works or other subject-matter. Indeed, only service providers that do not fall under the liability exemption of Article 14(1) of the E-Commerce Directive are required to conclude such licence agreements (Recital 38 of the proposed Directive). However, also service providers that conclude voluntarily licence agreements with the rightholders fall under the scope of the first sentence of the first paragraph of Article 13 of the proposed Directive.

- 14 Eine zusätzliche Belastung stellt diese Vorgabe freilich weder im einen noch im anderen Fall dar, denn letztlich wird von Diensteanbietern nicht mehr als das verlangt, was ohnehin gilt: „**pacta sunt servanda**“. Sind Verträge nach allgemein geltendem (Vertrags-) Recht ohnehin einzuhalten, ist die erste Alternative von Art. 13 I 1 RL-E schlicht überflüssig. Insoweit, als sie (falsch) suggerieren mag, dass Diensteanbieter, die sich auf Lizenzverträge einlassen, zusätzlichen Pflichten unterliegen, mag die Norm sogar abschreckend wirken.

This requirement does not constitute an additional burden either in one or in the other case, since the service providers are not required to more than what is already applicable: “**pacta sunt servanda**”. As contracts are to be met in any case according to general applicable (contract) law, the first alternative of the first sentence of the first paragraph of Article 13 of the proposed Directive is simply superfluous. To the extent that it (falsely) may suggest that service providers that venture licence agreements may be subject to additional obligations, the norm may even have a dissuasive effect.

- 15 **b) Alternative ohne Lizenzvertrag (Art. 13 I 1 Alt. 2): notice and take down?**

**b) Alternative without licence agreement (second alternative of the first sentence of the first paragraph of Article 13): Notice and take down?**

Die **zweite Alternative** zielt darauf, den Zugang zu bestimmten Inhalten zu unterbinden, die seitens

The **second alternative** aims at preventing access to certain contents, which have been

der Rechteinhaber in Zusammenarbeit mit den Diensteanbietern identifiziert worden sind. Hier stellt sich die Frage, inwieweit Art. 13 I 1 RL-E das bereits in Art. 14 I b) E-Commerce-RL vorhergesehene sogenannte „notice and take down-Verfahren“ (NTD-Verfahren) ergänzen bzw. erweitern soll.

identified by the rightholders in cooperation with the service providers. The question that arises here is to which extent the first sentence of the first paragraph of Article 13 of the proposed Directive should complete or extend the “notice and take down procedure” (NTD procedure) foreseen in Article 14(1)(b) of the E-Commerce Directive.

Bei diesem „**NTD-Verfahren**“ (das nicht mit jenem nach § 512 des U.S. Copyright Act übereinstimmt) muss der Rechteinhaber den Diensteanbieter zunächst auf eine Rechtsverletzung hinweisen und diesen auffordern, die unzulässigen Inhalte zu entfernen. Um seine Haftungsfreistellung gem. Art. 14 I E-Commerce-RL nicht zu verlieren, muss der Diensteanbieter dieser Aufforderung Folge leisten.

In accordance with this “**NTD procedure**” (which does not coincide with the one foreseen in § 512 of the U.S. Copyright Act), the rightholder must first notify the service provider of a rights infringement and request the provider to remove the illegal content. In order to not lose its exemption from liability in accordance with Article 14(1) of the E-Commerce Directive, the service provider must comply with this request.

16

Nach höchstrichterlicher Rechtsprechung in Deutschland sind darüber hinaus **spezifische, anlassbezogene Überwachungspflichten** zur Vorbeugung erneuter gleichartiger Rechtsverletzungen erforderlich (BGH GRUR 2013, 370, 371 – Alone in the Dark; BGH GRUR-RS 2013, 15388 Rn. 38 – Prüfpflichten), was sich im Rahmen des europarechtlichen Erlaubten bewegt (EuGH EuZW 2012, 261, 262 – SABAM/Netlog; EuGH GRUR 2012, 265, 267 – Scarlet Extended/SABAM; EuGH GRUR 2011, 1025, 1034 – L'Oréal/eBay u.a.). Faktisch zwingt diese Rechtsprechung jene Diensteanbieter, die die Abrufbarkeit von Inhalten über ihre Plattform in die Zukunft ge-

In addition to this, according to Supreme Court case-law in Germany, **specific, situation-related monitoring obligations** are required in order to avoid repeated infringements of the same type (BGH GRUR 2013, 370, 371 – Alone in the Dark; BGH GRUR-RS 2013, 15388 Recital 38 – Prüfpflichten), which fall under the scope of what is permissible under European Law (C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*; C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL*; C-324/09, *L'Oréal SA and Others v eBay International AG and Others*). De facto, this

17

richtet gewährleisten wollen, zu Lizenzvereinbarung mit den Rechteinhabern.

case-law compels those service providers that desire to guarantee the availability of content on their platforms in the future to conclude licence agreements with the rightholders.

- 18 Wird Art. 14 I E-Commerce-RL entsprechend der deutschen Rechtsprechung ausgelegt, verwirklicht die Norm vergleichbare Ziele wie der nun vorgeschlagene Art. 13 I 1 RL-E. Insoweit wäre eine **europaweit geltende Norm** begrüßenswert, nachdem die nationalen Rechtsprechungen zu Art. 14 I E-Commerce-RL uneinheitlich sind. Nachdem die Art der Zusammenarbeit zwischen Rechteinhabern und Diensteanbietern in Art. 13 I 1 RL-E jedoch nicht näher konkretisiert wird, bleibt zweifelhaft, ob damit tatsächlich eine weitergehende Harmonisierung bewirkt würde.

If Article 14(1) of the E-Commerce Directive is interpreted in accordance with the German case-law, the norm fulfils comparable objectives to the proposed first sentence of the first paragraph of Article 13 of the proposed Directive. In this respect, a **norm valid for all of Europe** would be welcome since national case-law concerning Article 14(1) of the E-Commerce Directive is inconsistent. However, as the type of cooperation between rightholders and service providers is not further specified in the first sentence of the first paragraph of Article 13 of the proposed Directive, it remains dubious whether further harmonisation would really be achieved through it.

- 19 **c) Vereinbarkeit mit anderweitigem EU-Recht**

**c) Compatibility with other EU law**

Nach Art. 18 III RL-E belässt die neue Richtlinie das bisherige EU-Recht **unberührt**. Bezogen auf Art. 13 RL-E gilt dies dem Impact Assessment (S. 147, 154) und Erwägungsgrund 38 zufolge insbesondere für den Anwendungsbereich der **E-Commerce-RL**. Diensteanbieter würden also unabhängig davon, ob sie im Sinne von Art. 13 RL-E Maßnahmen treffen, unter gegebenen Voraus-

The new directive leaves existing EU Law **unaffected**, in line with Article 18(3) of the proposed Directive. In regard to Article 13 of the proposed Directive, and according to the Impact Assessment (pp. 147, 154) and Recital 38, such concerns especially the scope of the **E-Commerce Directive**. Under certain circumstances, service providers would thus fall under the liability exemption of Article 14 of

setzungen unter die Haftungsfreistellung des Art. 14 E-Commerce-RL fallen.

the E-Commerce Directive, regardless of whether they adopt any measures in accordance with Article 13 of the proposed Directive.

Eine **generelle Überwachungs-pflicht wäre mit Art. 15 I E-Commerce-RL nicht vereinbar**. Damit kann Art. 13 I 1 RL-E von vornherein keine substantiellen neuen Pflichten einführen. Jedenfalls Diensteanbieter, die dem Haftungsprivileg nach Art. 14 E-Commerce-RL unterliegen, können nicht dazu verpflichtet werden, alle Daten sämtlicher Kunden zeitlich unbegrenzt proaktiv zu überwachen. Allgemeine Überwachungspflichten wären im Übrigen nicht mit Art. 3 der Richtlinie 2004/48 (Enforcement-RL) vereinbar (EuGH EuZW 2012, 261, 262 f. – SABAM/Netlog).

**A general monitoring obligation wouldn't be compatible with Article 15(1) of the E-Commerce Directive**. Consequently, the first sentence of the first paragraph of Article 13 of the proposed Directive cannot introduce at the outset any substantial new obligations. In any case, service providers, which fall under the liability privilege of Article 14 of the E-Commerce Directive, cannot be obligated to proactively monitor all data of all clients indefinitely. General monitoring obligations would furthermore be incompatible with Article 3 of the Enforcement Directive (see, SABAM).

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Richtlinien sind im Übrigen im Einklang mit den Rechten und Grundsätzen der **Charta der Grundrechte der europäischen Union** (GR-Charta) auszulegen und anzuwenden (Erwägungsgrund 45). Dies bedeutet, dass der Schutz des Urheberrechts (Art. 17 II GR-Charta) einerseits und der Schutz der unternehmerischen Freiheit (Art. 16 GR-Charta), der Schutz personenbezogener Daten sowie des freien Empfangs oder der freien Sendung von Informationen (Art. 8 und 11 GR-Charta) andererseits in Ausgleich zu bringen sind (siehe: EuGH EuZW 2012, 261, 263 – SABAM/Netlog).

Moreover, directives are to be interpreted and applied in accordance with the rights and principles of the **Charter of Fundamental Rights of the European Union** (the Charter of Fundamental Rights) (Recital 45). This means that copyright protection (Article 17(2) of the Charter of Fundamental Rights) on the one hand, and the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the protection of personal data, as well as the freedom of expression and information (Articles 8 and 11 of the Charter of Fundamental Rights) on the other, must be fairly balanced (see CJEU SABAM, p. 261, 263).

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22 **d) Inhaltserkennungstechniken und -verfahren**

Alle weiteren in Art. 13 RL-E enthaltenen Vorgaben – und namentlich der Versuch der EU-Kommission, gesetzlich verpflichtende Inhaltserkennungstechniken und -verfahren einzuführen – stehen letztlich in Relation zu Art. 13 I 1 RL-E. Auch sie können damit nicht zu nennenswerten Änderungen der geltenden Rechtslage führen.

23 Hingegen bringen gerade solche Inhaltserkennungstechniken und -verfahren auch Risiken mit sich. Nicht zu erkennen sind damit etwa Inhalte von meinungspolitischer Relevanz oder erlaubte Parodien (Art. 5 III k) InfoSoc-RL). Darüber hinaus eröffnen sie Möglichkeiten zum **Missbrauch**. Denn es müssen nicht zwingend Rechteinhaber sein, die Diensteanbieter zur Entfernung von Inhalte auffordern; auch z. B. Konkurrenten könnten das tun (s. z. B. <https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/>). Leidtragende wären nicht nur die (rechtmäßig handelnden) Nutzer, sondern namentlich die Verbraucher. Im Widerspruch zu Art. 11 GR-Charta würde ihr freier Informationszugang behindert, ohne dass berechnete Interessen von Rechteinhabern dies erfordern.

24 Gerade weil **Inhaltserkennungstechniken und -verfahren** zu einer empfindlichen Einschränkung der

**d) Content recognition technologies and procedures**

All further requirements contained in Article 13 of the proposed Directive – in particular the EU Commission’s attempt to introduce by law obligatory content recognition technologies and procedures – are ultimately related to the first sentence of the first paragraph of Article 13 of the proposed Directive. Thus, also they cannot lead to any changes of the current legislation worthy of mention.

On the contrary, precisely such content recognition technologies and procedures also entail risks. For example, content pertaining to political opinions or admissible parody are not to be recognised (Article 5(3)(k) of the InfoSoc Directive). Furthermore, they enable **abuse**. Because it does not necessarily have to be rightholders requesting the service providers to remove content; also competitors, for example, could do this (e.g. <https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/>). The victims would not only be the (legally acting) users, but also the consumers. Conflicting with Article 11 of the Charter of Fundamental Rights, their freedom of information would be hindered without such being required by legitimate interests of the rightholders.

Precisely because **content recognition technologies and procedures** can lead to a sensitive

grundrechtlich geschützte Informations- und Meinungsfreiheit (Art. 11 GR-Charta) führen können, muss es gesetzlich legitimierten Richtern vorbehalten bleiben, über die Rechtmäßigkeiten von Inhalten zu entscheiden (siehe auch: EuGH ZUM 2012, 29, 33 – Scarlet Extended/SABAM; ZUM 2012, 307, 311 – SABAM/Netlog). Entsprechend muss das in Art. 15 I E-Commerce-RL normierte Grundprinzip, dass Provider **keine allgemeine Filter- oder Überwachungspflicht für reine Nutzerinhalte** trifft, erhalten bleiben – dies auch zugunsten von Plattformbetreibern.

### III. Verbesserungsvorschläge

#### 1. Präzisierung der Providerhaftung

Die **Haftungsregeln für Plattformbetreiber zu präzisieren**, erscheint zwar ratsam – jedoch ohne Verschärfung im Verhältnis zur heutigen Haftungsprivilegierung. Denn damit würden jegliche Plattformbetreiber – selbst ohne gesetzliche Verpflichtung – faktisch gezwungen, jene Inhaltserkennungstechniken und –verfahren einsetzen, die aus den genannten Gründen abzulehnen sind. Um den Folgen einer Haftung zu entgehen, müssten sie diese Techniken so einstellen, dass potentiell rechtsverletzende Inhalte von vornherein blockiert werden. Selbst mit solchem „Overblocking“ bliebe aber zweifelhaft, ob sich Urheberrechtsverletzungen systematisch und flächendeckend verhindern ließen.

limitation of the fundamentally protected freedom of expression and information (Article 11 of the Charter of Fundamental Rights), it must remain reserved to legally authorised judges to decide on the legality of content (see also the CJEU cases Scarlet and SABAM). Consequently, the fundamental principle contained in Article 15(1) of the E-Commerce Directive, that providers have **no general filtering or monitoring obligation in regards to pure user content**, must be maintained – also in favour of platform operators.

### III. Suggestions for improvement

#### 1. Specification of provider liability

The **specification of the liability rules for platform operators** seems advisable - however, without increase in relation to the current liability exemption. Because with that, each platform operator would be de facto forced – even without a legal obligation – to apply said content recognition technologies and procedures, which should be rejected on the abovementioned grounds. In order to avoid the consequences of liability, they would have to adjust these technologies so that potentially illegal content is blocked at the outset. Even with such “over blocking”, however, it would remain dubious whether copyright infringements could be systematically and extensively prevented.

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- 26 Eine Präzisierung der Haftungsregeln muss vielmehr bedeuten, den schon im geltenden *Acquis* zum Ausdruck kommenden Grundsatz, Provider **für Handlungen** von Nutzern **nicht haften** zu lassen, **die sie vernünftigerweise nicht kontrollieren können** (Art. 12-14 E-Commerce-RL), auf den heute primär im Fokus liegenden Sachverhalt zu erstrecken, dass Diensteanbieter ihren Nutzern lediglich die Infrastruktur zur Verfügung stellen, damit diese durch Schrankenregelungen freigestellte Nutzungshandlungen vornehmen können. Im Umkehrschluss kann eine Haftungsprivilegierung nur bestehen, solange der Diensteanbieter von rechtswidrigen Nutzerhandlungen **keine Kenntnis** hat oder haben kann. Wird er auf einen möglicherweise rechtswidrigen Inhalt aufmerksam (insbesondere wenn er vom Rechteinhaber darauf hingewiesen wird), muss er das unter III. 3. beschriebene NTD-Verfahren einleiten, um einer Haftung zu entgehen.
- 27 Im Grunde ließe sich diese Regel schon in den geltenden Art. 14 E-Commerce-RL hinein interpretieren. Solange der EuGH nicht mit der Frage der Reichweite der Norm befasst wird, ist die **einheitliche Anwendung** im gesamten Binnenmarkt jedoch nicht sichergestellt – davon abgesehen, dass eine Auslegung je nach Sachverhalt so oder anders ausfallen könnte. Anzeigt es daher, die bestehende Norm um einen entsprechenden Absatz 1a zu erweitern. Lauten könnte dieser etwa wie folgt: „Absatz 1 gilt auch für das Be-
- A specification of the liability rules must rather mean to extend the principle already reflected in the *acquis* that providers are **not liable for users’ actions, which they cannot reasonably control** (Articles 12-14 of the E-Commerce Directive), to the situation nowadays primarily at hand, that service providers merely place the infrastructure at the disposal of their users in order for them to be able to carry out acts of exploitation exempted within the scope of legal exceptions. By implication, a liability exemption can only exist as long as the service providers haven’t or couldn’t have **any knowledge** of the illegal users’ actions. Should the provider be made aware of possibly illegal content (especially when made aware by a rightholder), it must initiate the NTD procedure described under point III 3., in order to avoid liability.
- Essentially, this rule could already be interpreted from the current Article 14 of the E-Commerce Directive. However, as long as the CJEU does not address the question of the norm’s extent, a **uniform application** throughout the internal market isn’t ensured – apart from the fact that interpretations can differ from case to case. It thus seems indicated to extend the norm by adding a respective paragraph 1a. Such could be formulated as follows: “Paragraph 1 is also applicable to the provision of an infrastructure for saving content

reitstellen einer Infrastruktur zur Speicherung von Inhalten, um diese der Öffentlichkeit ohne Zutun des Diensteanbieters zugänglich zu machen.“

with the objective of making it available to the public without assistance of the service provider.”

Die **Haftungsprivilegierung muss dort enden**, wo ein Dienst erkennbar darauf abzielt, Nutzern das rechtswidrige Hochladen urheberrechtlich geschützter Inhalte zu ermöglichen. Diensteanbieter in solchen Fällen der Verantwortung zu entziehen, verlangt auch die Meinungs- und Informationsfreiheit (Art. 11 GR-Charta) nicht. Erst recht muss ein Diensteanbieter für sein eigenes Handeln einstehen; dazu gehört auch die nicht autorisierte Nutzung fremder Inhalte in der Weise, dass diese als Teil eines eigenen Angebot des Dienstes erscheinen (im Sinne einer Aneignung).

The **liability exemption must cease** as soon as a service evidently intends to enable users to illegally upload copyright protected content. To absolve service providers of responsibility in such cases is also not in accordance with the freedom of expression and information (Article 11 of the Charter of Fundamental Rights). More than ever, a service provider must be responsible for its own acts; such also includes the non-authorized use of third-party content in a way that makes it seem like it is part of the provider’s own service (in the sense of an appropriation).

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Wird die E-Commerce-RL in Art. 14 im vorstehenden Sinne ergänzt, könnte diese Grenzziehung gleichzeitig durch eine **Ergänzung in Erwägungsgrund 44** noch verdeutlicht werden. Möglich wäre beispielsweise die Formulierung: „Gleiches gilt für das absichtliche Herbeiführen oder Fördern rechtswidriger Nutzerhandlungen durch Dritte.“ Von selbst versteht sich, dass eigene rechtsverletzende Handlungen der Privilegierung entzogen sind. Was als aneignende Nutzung zu beurteilen ist, erscheint allerdings noch nicht geklärt; das zeigen namentlich die Debatten über die Reichweite der erlaubten Linksetzung.

If the E-Commerce Directive is complemented as abovementioned, this demarcation could simultaneously be made even clearer by way of an **addition to Recital 44**. A possible wording could be, for example: “The same applies to the intentional induction or support of illegal user actions by third-parties.” It goes without saying that own illegal actions are deprived of the exemption. What is to be considered appropriating use seems, however, still unclear; such is particularly shown by the debates concerning the extent of permissible linking.

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- 30 Wird jedoch grundsätzlich anerkannt, dass diese Grenzziehung erforderlich ist, und beschränkt sich der Fokus auf Diensteanbieter jenseits der Haftungsprivilegierung, d. h. steht außer Frage, dass sie für Rechtsverletzungen – und namentlich für eigenes Handeln – einzustehen haben, so lässt sich eine Vorschrift zum Einsatz bestimmter Inhaltserkennungstechniken und -verfahren zumindest grundsätzlich rechtfertigen. Insoweit sind gewisse der Ansätze des vorgeschlagenen Art. 13 RL-E nicht pauschal abzulehnen; zu kritisieren ist vielmehr in erster Linie die **fehlende Differenzierung**. Auch sind die unter II.3.d geäußerten Bedenken gegen solche Techniken und Verfahren auch im Bereich illegalen Verhaltens nicht hinfällig. Vielmehr sind die damit einhergehenden Gefahren in einer gegenüber dem Vorschlag verbesserten Haftungsregelung angemessen zu berücksichtigen.

If the necessity of this delimitation is acknowledged and the focus is limited to service providers beyond the liability exemption, i.e. it is unquestionable that they must be liable for infringements – in particular for their own acts –, a provision concerning the application of certain content recognition technologies and procedures is at least in principle justified. In this respect, certain approaches of Article 13 of the proposed Directive shouldn't be categorically rejected; what is worthy of critique is first and foremost the **lack of differentiation**. Also the concerns expressed under point II.3.d against such technologies and procedures also in the realm of illegal behaviour are not void. Rather, the concomitant risks should be taken into account in an improved liability rule as proposed.

31 **2. Berücksichtigung der Nutzerinteressen**

Die Interessen heutiger Nutzer gehen oft über den Meinungsaustausch hinaus. Das Veröffentlichende von – zum Teil selbst bearbeiteten oder unter Verwendung vorbestehender Werke erstellten (sog. *user generated content*) – Audiodateien, Videos, Bildern etc. stellt inzwischen für eine Vielzahl von Menschen eine alltägliche Handlung dar. Dieses Nutzerverhalten stellt eine kaum noch zu unterbindende Realität dar, wird im geltenden Urheberrecht aber nicht reflektiert. Für dessen wirksame Durch- und Umsetzung

**2. Consideration of the users' interests**

The interests of today's users often go beyond the exchange of opinions. Publishing audio data, videos, photos, etc. – partially self-edited or made using pre-existing works (so-called *user generated content*) – constitutes for many people a daily activity. This user behaviour constitutes a reality that can barely be prohibited but isn't reflected in current copyright law. However, for its effective enforcement and implementation, **society's acceptance** of copyright law is of crucial importance.

ist die **gesellschaftliche Akzeptanz** des Urheber-rechts jedoch von entscheidender Bedeutung.

Der deutsche Gesetzgeber hat dies schon im Jahr 1965 erkannt und mit der Einführung einer **vergütungs-pflichtigen Schrankenregelung** zugunsten der Privatkopie eine nachhaltige Lösung entwickelt, um einen Interessenausgleich herbeizuführen. Die Tragfähigkeit dieses Ansatzes hat sich bis heute bewährt; namentlich in Europa hat die Mehrzahl der Staaten dieses Modell übernommen. Es ist nun an der Zeit, dass der europäische Gesetzgeber einen entsprechenden Schritt im Internetzeitalter unternimmt.

The German legislator recognised this already in 1965 and found a long-lasting solution by implementing an **exception with obligatory remuneration** in favour of the private copy, in order to bring about a balance of interests. The sustainability of this approach has been proven true up to today; in particular in Europe, most States have adopted this model. It is now time for the European legislator to take a respective step in the internet age.

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Entscheidend ist, dass in einem solchen Modell die berechtigten Verwertungsinteressen der Rechteinhaber Berücksichtigung finden. Deshalb dürfen **nur** solche **private Nutzungshandlungen** legalisiert werden, die den üblichen Gepflogenheiten in sozialen Netzwerken entsprechen. Nutzungshandlungen, die ein kommerzielles Ausmaß erreichen oder von vornherein zu gewerblichen Zwecken erfolgen, sind nicht zu erlauben. Aber auch bei an sich privaten Nutzungshandlungen besteht dort eine Grenze, wo die Möglichkeiten der normalen Verwertung eines Werks spürbar beeinträchtigt würden. Der Fall sein dürfte dies etwa bei reinem Filesharing, der Veröffentlichung eines kompletten Spielfilms oder eines vollständigen Albums. Auch die zeitliche Komponente mag eine Rolle spielen; je länger ein Werk erhältlich ist, desto kleiner ist das Schädigungspotential

It is decisive that the legitimate interests of the rightholders are taken into account with this model. Therefore, **only** that **private exploitation** that corresponds to the usual practice in social networks should be legalised. Exploitation attaining a commercial degree or serving commercial objectives from the outset are not to be allowed. But also for private exploitation per se, the limit is when the possibilities of a normal exploitation become distinctly affected. Such is arguably the case with pure file sharing, the publication of a complete movie or an entire album. Time also plays a role: the longer a work is available, the less potential there is of damage for the rightholder, and all the more can more extensive uses be allowed.

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zulasten des Rechteinhabers, und umso eher mögen auch umfassendere Nutzungen erlaubt sein.

- 34 In Fortentwicklung der Rechtsprechung, wonach sich eine Nutzungserlaubnis nur auf Werke bezieht, die nicht aus einer offensichtlich unrechtmäßigen Quelle stammen (EuGH, EuZW 2015, 351, 357 – Copydan Bandkopi/Nokia Danmark), sollten online verfügbare Inhalte sodann nur genutzt werden dürfen, wenn sie **rechtmäßig hochgeladen** worden sind. Damit darf eine private Nutzerhandlung zwar auch auf vorangehende Nutzungshandlungen Dritter aufbauen, die ihrerseits von einer Schrankenbestimmung gedeckt sind, nicht aber unter Ausnutzung von nicht rechtmäßigem Filesharing.
- 35 Mit Kriterien wie den genannten erhalten die nationalen Gesetzgeber und Gerichte einen ausreichenden, aber nicht zu weitgehenden Spielraum für interessengerechte Lösungen. Um dennoch eine gewisse Rechtssicherheit zugunsten der Nutzer herbeizuführen, könnten gewisse positive oder negative **Beispiele** in die Erwägungsgründe aufgenommen werden.
- 36 Wird der Ansatz, übliches Nutzerverhalten vergütungspflichtig zu erlauben statt es zu verbieten, auch im Kontext von sozialen Netzwerken verwirklicht, ist für das **Hochladen** an sich – unabhängig von der Frage, ob der erlaubterweise hochgeladene Inhalt unverändert bleibt, oder ob seitens des Nutzers schöpferische oder nicht
- Developing the case-law, in accordance to which a use permission only relates to works that do not originate from an obvious illegal source (CJEU case C-463/12 *Copydan Bandkopi v Nokia Danmark*, p. 351, 357), content available online should only be allowed to be used when it has been **uploaded legally**. Thereby, a private user action may build upon previous acts of exploitation from third-parties that are covered by an exemption, however not through the exploitation of illegal file sharing.
- With criteria such as the abovementioned, national legislators and courts obtain sufficient but not too broad leeway for solutions fair to all interests. In order to nevertheless bring about a certain legal certainty for the users, certain positive or negative **examples** could be included in the recitals.
- If the proposal to allow normal exploitation subject to payment instead of prohibiting is implemented also in the context of social networks, an adequate payment should be secured for the **upload** itself – regardless of the question whether the legally uploaded content remains unchanged or whether the user has

schöpferische Änderungen erfolgt sind – zugunsten der Rechteinhaber eine **angemessene Vergütung** zu zahlen (s. zur Aufteilung dieser Vergütung zwischen ursprünglichen und derivativen Rechteinhabern auch Part F Rn. 14 ff.).

Eine individuelle Abrechnung über den jeweiligen Nutzer wäre für die Rechteinhaber freilich viel zu komplex und aufwendig. Daher erscheint es unausweichlich, die angemessene Vergütung zentral und gestützt auf die etablierten Mechanismen der **kollektiven Rechtswahrnehmung** zu erheben. An dieser Stelle kommt der Diensteanbieter ins Spiel, indem er es ist, der solches Nutzerverhalten erst möglich macht – in gewisser Hinsicht vergleichbar mit dem Hersteller von Leerträgern, mit dessen Hilfe Privatkopien ermöglicht werden. Zwar soll dieser Diensteanbieter für das Nutzerverhalten nicht selber haften, zumal dann nicht, wenn der Nutzer im Rahmen einer Schranke handelt. Hingegen erscheint es sinnvoll und interessengerecht, die **Plattformbetreiber als Zahlstelle** ins Recht zu fassen. Dadurch entstehen ihnen zwar Kosten, doch können sie diese in ähnlicher Weise direkt oder indirekt auf ihre Nutzer umlegen, wie die Hersteller von Leerträgern jene mit der Urheberrechtsabgabe belasten. Wie dieser Zahlmechanismus konkret umgesetzt wird, kann den Mitgliedstaaten überlassen werden; die Richtlinie kann sich darauf beschränken, den Grundsatz der kollektiven Rechtswahrnehmung zu statuieren und allenfalls gewisse Eckwerte dafür in einem Erwägungsgrund festzulegen.

introduced creative or non-creative changes. (See part F paras 14 et seqq. as to the splitting of the payment between creators and subsequent rightholders.)

Individual billing of each user would admittedly be far too complex and costly for the rightholders. It thus seems inevitable to collect the reasonable remuneration centrally and supported by the established mechanisms of **collective rights management**. Here, the service provider comes into play, since it enables such user conduct to start with – to a certain extent, similar to the producer of blank recording media that enables private copies. This service provider should, of course, not be liable for the user's conduct, especially not when the user acts within the scope of an exception. However, it seems reasonable and fair that, as **paying agents**, an action can be brought against the **platform providers**. Thereby, costs arise for them, however they can shift them directly or indirectly to the users similarly to how the producers of blank media burden them with the copyright levies. How this payment mechanism is implemented in practice can be left up to the Member States; the Directive can limit itself to laying down the principle of collective rights management and at most, determine certain parameters for it in a recital.

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- 38 Wie eine vergütungspflichtige Schranke für privates Verhalten in sozialen Netzwerken gesetzestech- nisch umgesetzt wird, ist hingegen eine Grundsatzfrage. Zu beachten ist dabei, dass es um zwei Komponenten geht. Zum einen ist das **Hochladen** von Werken bzw. Werkteilen in sozialen Netzwerken nach Maßgabe der vorstehend genannten Kriterien zu erlauben. Zum andern sind von dieser Erlaubnis aber auch jene **Werk- verwendungen** zu erfassen, die im Rahmen des *user generated content* **vor dem Hochladen** vorgenommen werden. Zwar verbietet das Urheberrecht solche Handlungen nicht, solange sie im Privatbereich stattfinden; jedoch verlässt der Nutzer diesen Bereich, wenn er solche Inhalte einem sozialen Netzwerk zuführt. Insoweit ist es letztlich in jedem Fall der Akt des Hochladens, der erlaubt werden muss.
- How an exception subject to payment for private conduct in social networks is implemented legislatively is, however, a fundamental question. It must be noted that there are two issues here. Firstly, the **upload of works** or parts of works in social networks according to the abovementioned criteria should be allowed. Secondly, **such uses of the work**, which are carried out within the scope of *user generated content* **before uploading**, should, however, also be covered by this permission. Although copyright law does not prohibit such actions as long as they occur in private, the user abandons this realm, however, when such content is administered to a social network. To this extent, it is ultimately the act of uploading in each case that must be permitted.
- 39 Würde diese Erlaubnis dadurch verwirklicht, dass lediglich der heutige Art. 5 **InfoSoc-RL** um einen weiteren Tatbestand ergänzt wird, wäre diese Schranke nach der aktuellen Konzeption für die Mitgliedstaaten fakultativ; ver- pflichtend vorgeschrieben werden könnte dann – falls diese Schranke ins nationale Recht umgesetzt wird – nur eine Verfügung (wie dies gegenwärtig z. B. für Art. 5 II Bst. a, b und e der Fall ist). Sollen die Mitgliedstaaten stattdessen zur Aufnahme einer solchen Schranke verpflichtet werden, wäre das in einer neuen, eigenständigen Richt- linie ebenso möglich, wie die Kommission dies im Rahmen einer Richtlinie zum Urheberrecht im
- If this permission would be implemented by simply complementing the current Article 5 of the **InfoSoc Directive** with a further offense, this exception would be optional for the Member States in accordance with the current concept; only an order (as is the case currently with, for example, Article 5(2)(a),(b) and (e)) could be made mandatory – should this exception be transposed into national law. Should the Member States instead be obligated to take up such an exception, such would be as equally possible with a new, independent Directive such as how the Commission proposes this for a series of new exception provisions within the scope of a

digitalen Binnenmarkt für eine Reihe von neuen Schrankenbestimmungen vorschlägt. Demgegenüber müsste bei einer Regelung in der InfoSoc-RL eine neue Normenkategorie für **zwingende Schranken** geschaffen werden; in jene könnten dann weitere – heute fakultativ umzusetzende – Nutzungserlaubnisse transferiert werden.

Directive on copyright in the digital internal market. In contrast, with a regulation in the InfoSoc Directive, a new norm category for **mandatory exceptions** would have to be created; other use permissions – currently of facultative transposition – could then be transferred to such.

Die **Kernelemente** eines solchen Erlaubnistatbestandes müssten – nebst möglicherweise weiteren Spezifikationen, die auch in Erwägungsgründen erläutert werden könnten – im Wesentlichen die folgenden sein:

The **core elements** of such a statutory exemption – in addition to possibly other specifications, which could be explained in recitals – would essentially have to be the following:

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Werknutzung durch Privatperson

Exploitation by a private person

in unveränderter oder durch die Privatperson veränderter Form

Unchanged or changed by the private person

übliche Gepflogenheiten in sozialen Netzwerken

Usual practice in social networks

kein kommerzielles Ausmaß

No commercial extent

keine spürbare Beeinträchtigung der Möglichkeit einer normalen Werkverwertung

No noticeable impairment of the possibility of a normal work exploitation

die Rechteinhaber erhalten eine Vergütung.

The rightholders obtain remuneration.

Für Plattformen, die selbst weder direkt noch indirekt (z. B. werbebasiert) auf Gewinnerzielung ausgerichtet sind, mag die zwingende Vergütungspflicht eine erhebliche Belastung bedeuten. Allerdings stellt das Urheberrecht traditionellerweise nicht auf die Gewinnorientierung ab; auch bei Benefizkonzerten setzt die Werk-

The mandatory remuneration obligation may represent a significant burden for platforms, which are not directly or indirectly (e.g. advertising based) profit-oriented. However, copyright doesn't traditionally apply to profit orientation; also the use of the work for a benefit concert requires licence payments. Such

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nutzung Lizenzzahlungen voraus. Berücksichtigen lassen sich solche Umstände jedoch bei der **Tarifgestaltung**; diese liegt im Ermessen der Mitgliedstaaten.

circumstances can be taken into account, however, when **setting the fees**; such lies within the Members States discretionary power.

42 **3. Maßnahmen gegen rechtswidrige Uploads (NTD-Verfahren)**

**3. Measures against illegal uploads (NTD procedure)**

**a) Harmonisierung des NTD-Verfahren**

**a) Harmonisation of the NTD procedure**

Die heute bestehenden Möglichkeiten der Rechteinhaber, im Rahmen des NTD-Verfahrens gegen unautorisierte Nutzerhandlungen vorzugehen (s.o. II. 3. b)), werden durch die hier vorgeschlagene Schranke für privates Nutzerverhalten in sozialen Netzwerken nicht beeinträchtigt, sondern nur inhaltlich begrenzt: die Möglichkeit, bestimmte Werknutzungen zu verbieten, wird in einen Vergütungsanspruch umgewandelt. Den Diensteanbietern kommt durch eine solche Schranke zwar neu die Funktion der Zahlstelle zu. Damit verbunden sind aber **keine neuen Überwachungspflichten**. Um die Haftungsprivilegierungen der Art. 12-14 E-Commerce-RL nicht zu verlieren, müssen sie auch künftig nicht präventiv tätig werden, etwa wenn ein Nutzer jenseits der Schranke handelt, sondern erst nach tatsächlicher oder möglicher Kenntnis, etwa nach entsprechendem Hinweis eines Rechteinhabers.

The currently existing possibilities for rightholders to proceed against unauthorised user actions within the scope of the NTD procedure (see above, point II. 3. b)) are not affected by the here proposed exception for private user conduct in social networks, but simply limited substantively: the possibility to prohibit certain work uses is converted into a right to remuneration. Indeed, the service providers will have the new function of paying agents by way of such an exception. However, **no new monitoring obligations** are related to it. In order to not lose the liability exemption of Articles 12-14 of the E-Commerce Directive, they will not have to act preventively, for instance when a user acts beyond the exception, but rather upon actual or possible knowledge, for instance after respective notice from a rightholder.

43 In der Sache führt die mit den hier vorgeschlagenen Änderungen einhergehende Verschiebung der Grenze zwischen zulässigen und unzulässigen Nutzungshandlungen

Substantially, the shift of the limit between admissible and inadmissible exploitations concomitant with the here proposed changes leads, however, to

allerdings zu erhöhten Anforderungen bei der Handhabung des NTD-Verfahrens. Im Interesse der Rechtssicherheit, aber auch um einen höheren Harmonisierungsgrad innerhalb der EU zu erreichen, drängt sich daher eine **verfeinerte gesetzliche Ausgestaltung des NTD-Verfahrens** auf. Sinnvoll erscheinen namentlich Maßnahmen, um das Missbrauchspotential von NTD einzudämmen. Denn gerade die hier vorgeschlagene Schranke könnte die Anreize erhöhen, rechtmäßig veröffentlichte Inhalte gestützt auf ein NTD-Verfahren entfernen zu lassen.

Verstärkte Aufmerksamkeit verdienen aber nicht nur die Nutzerinteressen; auch die Obliegenheiten der Rechteinhaber sollten konkretisiert werden. Konkret sind insbesondere gewisse Anforderungen für die **Legitimierung jener Rechteinhaber** gesetzlich vorzuschreiben, die bestimmte geschützte Inhalte entfernen lassen wollen (siehe z.B. die entsprechende Regelung in Section 191 des finnischen Information Society Code (917/2014)). Dies könnte z.B. dadurch erfolgen, dass sie ihre Identität offenlegen müssen. Auch eine möglichst genaue Bezeichnung der (angeblich) rechtswidrig veröffentlichten Inhalte sowie der jeweiligen unrechtmäßigen Nutzer erscheint sinnvoll. Eine Erläuterungspflicht dazu, warum die Veröffentlichung des Inhalts rechtswidrig bzw. nicht von einer Schrankenregelung erfasst sei, wäre ebenfalls erwägenswert.

increased requirements in the management of the NTD procedure. In the interest of legal certainty, but also in order to achieve a higher level of harmonisation within the EU, an **elaborate legislative design of the NTD procedure** is imposed. In particular, measures to contain potential abuse of NTD seem particularly sensible. Precisely because the here proposed exception could increase the incentives to remove legally published content based on an NTD procedure.

Not only the user's interests deserve closer attention; also the duties of the rightholders should be substantiated. Specifically, in particular certain requirements for the **legitimacy of those rightholders** who want to remove certain protected content should be regulated by law (see, for example, the respective provision in section 191 of the Finnish Information Society Code (917/2014)). This could be done, for example, by them having to reveal their identity. Also a precise identification of the (alleged) illegally published content as well as the respective unlawful user seems reasonable. Mandatory disclosure as to why the publication of the content is illegal or not covered by an exception could also be worth considering.

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45 **b) Counter Notice Verfahren**

Um einer unverhältnismäßigen Einschränkung der Informations- und Meinungsfreiheit (Art. 11 GR-Charta) entgegenzuwirken, aber auch um ein Unterlaufen der hier vorgeschlagenen oder sonstiger Schrankenregelungen zu verhindern, drängt es sich auf, sogenannte **Counter Notice Verfahren** einzuführen (siehe z. B. die entsprechende Regelung in Section 192 des finnischen Information Society Code (917/2014)). Nutzern, die Inhalte nicht offensichtlich rechtswidrig nutzen, eröffnet dies die Möglichkeit, auf eine entsprechende Rüge des Rechteinhabers zu reagieren, sofern sie nach Einleitung eines NTD-Verfahrens zunächst vom Diensteanbieter informiert werden.

**b) Counter notice procedure**

In order to counteract a disproportionate restriction of the freedom of expression and information (Article 11 of the Charter of Fundamental Rights), but also to prevent a circumvention of the here proposed or of other exceptions, the introduction of so-called **counter notice procedures** seems the obvious way forward (see, for example, the respective provision in section 192 of the Finnish Information Society Code (917/2014)). Such opens up the possibility for users who use content unapparent illegally, to react to a respective complaint of the rightholder, provided that they are informed by the service provider upon the initiation of a NTD procedure.

46 Um einen möglichst hohen Harmonisierungsgrad zu erreichen, erscheinen gewisse Vorgaben für dieses Counter Notice Verfahren auf EU-Ebene wünschenswert. Ziel muss es sein, die **Kommunikation zwischen Rechteinhaber und Nutzer zu erleichtern**, und gleichzeitig Diensteanbieter aus der Pflicht zu entlassen, über die Rechtmäßigkeit eines Inhalts zu befinden. Dabei mag den Mitgliedstaaten ein gewisser Spielraum verbleiben, um bei der Umsetzung die nationalen Rahmenbedingungen zu berücksichtigen.

In order to attain a level of harmonisation as high as possible, certain requirements for this counter notice procedure on an EU level appear desirable. The objective must be to facilitate **communication between rightholders and users** and, at the same time, to relieve service providers of the obligation to decide on the illegality of content. Here, Member States can retain certain flexibility in the transposition in order to take into account national parameters.

47 **4. Erleichterung der Lizenzierung**

Der vorgeschlagene Art. 13 III RL-E zielt auf eine Zusammenarbeit und den Dialog zwischen

**4. Licensing simplification**

The proposed Article 13(3) of the proposed Directive aims for cooperation and dialogue between

Diensteanbietern und Rechteinhabern ab, fokussiert dabei aber einzig auf die im Absatz 1 anvisierten Maßnahmen, die aus den vorstehend genannten Gründen jedenfalls im Bereich der Haftungsprivilegierung abzulehnen sind. Nicht adressiert wird hingegen die Problematik, dass die notwendigen Lizenzen in der Praxis oft gar nicht oder nur schwierig erhältlich sind. Dies führt für jene Diensteanbieter, die sich legal verhalten wollen, zu **erheblichen Transaktionskosten**, welche gerade für Startups eigentliche Markteintrittsbarrieren bedeuten können sowie kleinere Unternehmen mit unverhältnismäßigen Kosten belasten.

Es sind kaum Interessen ersichtlich, welche solche Kosten rechtfertigen würden – im Gegenteil: gerade Rechteinhabern, die illegale Nutzungen verhindern wollen, müssten einfache Lizenzierungsmöglichkeiten ein Anliegen sein. Sind ihre Interessen normalerweise darauf gerichtet, den ökonomischen Wert von Urheberrechten zu monetarisieren, bilden Lizenzerteilungen die eigentliche Grundlage dafür. Insofern widersprechen Maßnahmen, die Lizenzierungen erleichtern, den **Interessen der Rechteinhaber** höchstens dann, wenn sie mit unbeschränkter Exklusivität möglichst hohe Margen erzielen wollen; inwieweit solches schützenswert wäre, ist aber eine andere Frage.

Die Interessenlage, dass Lizenzen möglichst verfügbar sein sollten, spiegelt sich auch im System der kollektiven Rechtswahrnehmung, soweit seitens einer Verwertungsgesellschaft ein **Abschlusszwang**

service providers and rightholders, while, however, only focussing on the measures planned in paragraph 1, which should be turned down, at least for the liability exemption, based on the abovementioned grounds. Whereas the problematic that the necessary licences are, in practice, not at all available or only difficult to obtain, isn't addressed. For those service providers wishing to act legally, this leads to **substantial transaction costs**, which can constitute actual market entry barriers especially for startups as well as burden smaller companies with disproportionate costs.

Interests that would justify such costs are hardly evident – on the contrary: simple licencing possibilities should be a wish especially for rightholders wanting to prevent illegal uses. Being their interests normally oriented to the monetisation of the economic value of copyrights, licence grants constitute the actual basis for this. To this extent, measures, which simplify licensing, contradict the **interests of rightholders** at most when they wish to achieve preferably high margins by way of unlimited exclusivity; whether such would be worthy of protection is, however, another question.

The interests in preferably accessible licences are reflected also in the system of collective rights management, insofar as the collecting society has the **obligation to cover those seeking**

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gegenüber Lizenzsuchern besteht. Dieser Mechanismus setzt allerdings voraus, dass die Rechte nicht vom Rechteinhaber selbst wahrgenommen werden. Doch selbst bei eigener Verwaltung der Rechte kennt das Urheberrecht Mechanismen, um ausufernden Konsequenzen von Exklusivität vorzubeugen. So erlaubt es der – bereits 1908 in die Revidierte Berner Übereinkunft aufgenommene – Art. 13 Abs. 1 RBÜ den Verbandsländern unter gewissen Voraussetzungen, eine Zwangslizenz zugunsten von Tonträgerherstellern zu erteilen.

**a licence.** This mechanism presupposes, however, that the rights are not exercised by the rightholder himself. But even when rights are self-administrated, copyright law has mechanisms to prevent escalating consequences from exclusivity. For instance, Article 13(1) of the Revised Berne Convention – already taken up in 1908 – allows its contracting parties under certain conditions to grant compulsory licences in favour of recording companies.

50 Ob man so weit gehen will, Rechteinhaber in bestimmten Konstellationen zur Erteilung von Lizenzen an gewisse Diensteanbieter zu verpflichten, ist letztlich eine politische Frage. Erforderlich ist dies dann nicht, wenn das sog. Rechteclearing ohne unnötigen Aufwand erfolgen kann und Vertragsschlüsse zwischen Lizenzsuchenden und Rechteinhabern so einfach wie möglich sind. Hierfür müssen die Grundlagen im europäischen Recht geschaffen werden. Denn soll der digitale Binnenmarkt verwirklicht werden, spielen **transeuropäische Lizenzerteilungen** eine zentrale Rolle. Isolierte Maßnahmen einzelner Mitgliedstaaten hätten damit kaum den Effekt, Diensteanbietern Aktivitäten über die eigenen Landesgrenzen hinaus zu erleichtern.

Whether one wishes to go as far as this, obligating rightholders in certain circumstances to grant licences to certain service providers is ultimately a political question. Such is not necessary when the rights clearance can be carried out without great expense and the conclusion of contracts between licence seekers and rightholders is as simple as possible. For this, the basis must be established in European Law. Because if the digital internal market is to be achieved, **trans-European licensing** plays a central role. Isolated measures of individual States would barely have any effect to facilitate activities of service providers beyond the country's own borders.

51 Ein wichtiger erster Schritt in diese Richtung wurde mit der RL 2014/26 über die kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen

An important step in this direction was given with Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works

für Rechte an Musikwerken für die Online-Nutzung im Binnenmarkt unternommen. Der Anwendungsbereich jener Richtlinie ist jedoch vergleichsweise eng, und sie ist auf Konstellationen beschränkt, in denen Rechte von Verwertungsgesellschaften wahrgenommen werden. Den digitalen Binnenmarkt vermag sie daher nur in Teilbereichen zu fördern. Zielt der vorgeschlagene **Art. 13 I RL-E** demgegenüber darauf ab, Diensteanbieter zu Lizenzvereinbarungen zu bewegen, um auf diese Weise eine angemessene Beteiligung der Rechteinhaber zu ermöglichen, so geht er an sich in die richtige Richtung. In der vorgeschlagenen Form **wird er solche Ziele aber nicht erreichen.**

#### IV. Ergebnis

Dem europäischen Gesetzgeber ist dringend davon abzuraten, den vorgeschlagenen Art. 13 RL-E in der vorgeschlagenen Form zu verabschieden. Statt eine weitere, weder in sich selbst noch im Verhältnis zum geltenden Recht konsistente Facette hinzuzufügen, erscheint es weit sinnvoller, zunächst beim bestehenden *Acquis* anzusetzen. Gewisse Anpassungen empfehlen sich namentlich bei der **E-Commerce-RL**. Auch gewisse Eingriffe in die **InfoSoc-RL** würden punktuell Verbesserungen erlauben. Je nach Konzeption und in Abhängigkeit sonstiger Anpassungen mag auch eine neue Richtlinie ihre Rechtfertigung haben, solange sie sorgsam auf das übrige EU-Recht abgestimmt ist.

for online use in the internal market. The scope of application of this Directive is, however, comparatively narrow and the Directive is also limited to constellations in which rights are managed by collecting societies. As such, it is able to promote the digital internal market in certain segments only. If, in comparison, the proposed **Article 13(1) of the proposed Directive** aims at bringing service providers to conclude licences in order to achieve an adequate remuneration of the rightholders, then it is going in the right direction. In its proposed form, however, it **will not achieve those objectives.**

#### IV. Conclusion

The European legislator is strongly discouraged from adopting the proposed Article 13 of the proposed Directive in its proposed form. Instead of adding an inconsistent facet in itself and in relation to current law, it seems more reasonable to first start with the existing *acquis*. Certain adjustments are recommended in particular concerning the **E-Commerce Directive**. Also certain interventions in the **InfoSoc Directive** would allow specific improvements. Depending on the concept and subject to other adjustments, a new directive may have its justification as long as it is carefully concerted with remaining EU Law.

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- 53 Eine Ablehnung des vorgeschlagenen Art. 13 RL-E (und der auf ihn bezogenen Erwägungsgründe 38 und 39) bedeutet also nicht, dass nun nicht der richtige Zeitpunkt wäre, das geltende Recht von Unklarheiten zu befreien und es im Hinblick auf die zwischenzeitlichen Entwicklungen zu optimieren. Es bedeutet auch nicht, dass Diensteanbietern, die jenseits der Haftungsprivilegierung operieren, nicht neue – und namentlich technikbasierte – Pflichten auferlegt werden könnten. Solche **gesetzgeberische Maßnahmen sind aber besser aufeinander abzustimmen**; ein isolierter Ansatz, wie er mit Art. 13 RL-E versucht wurde, ist nicht erfolgsversprechend.
- A rejection of the proposed Article 13 of the proposed Directive (and its respective recitals 38 and 39) thus does not mean that it is not the right moment to free current law of uncertainties and to improve it in light of the developments that have occurred in the meantime. It also does not mean that new – and in particular technology-based – obligations cannot be imposed on service providers, which act beyond the liability exemption. Such **legislative measures should simply be better coordinated**; an isolated approach, as attempted with Article 13 of the proposed Directive, is not promising.

**PART H**  
**Intra-European content**  
**circulation (COM(2016) 594**  
**final)**

**Stellungnahme**

**I. Zielsetzung**

Im Zusammenhang mit ihrem Programm zur Modernisierung des europäischen Urheberrechts vom 14. September 2016 legte die Europäische Kommission einen Vorschlag für eine Verordnung für die Wahrnehmung von Urheberrechten und verwandten Schutzrechten in Bezug auf bestimmte Online-Übertragungen von Rundfunkveranstaltern und die Weiterverbreitung von Fernseh- und Hörfunkprogrammen (COM(2016) 594 final) vor. Der Vorschlag stellt eine **Weiterentwicklung der Satellitenrundfunk und Kabelweiterleitungsrichtlinie** (Richtlinie 93/83/EWG, im Folgenden SatCab-RL) dar. Wie die SatCab-RL enthält auch dieser Vorschlag zwei Regelungsbereiche, welche voneinander zu unterscheiden sind.

Erstens soll der **Erwerb von Rechten** (sog. Rechteclearing) für eigene, grenz-überschreitende Angebote von Rundfunkveranstaltern erleichtert werden. Denn heute ist es üblich, dass Rundfunkveranstalter ihre Sendungen parallel über Internet verbreiten (**Simulcasts**). Daneben haben sich Mediathekendienste etabliert, welche die zeitversetzte Abrufbarkeit von Sendungen über Internet ermöglichen und darüber hinaus Hintergrundinformationen anbieten (**Catch-ups**). Für solche Angebote gilt die SatCab-RL nicht. Diese Lücke soll

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**Position Statement**

**I. Objective**

In the context of its programme for the modernisation of European copyright law of the 14<sup>th</sup> of September 2016, the European Commission presented a proposal for a Regulation on the exercise of copyright and related rights with regard to certain online transmissions of broadcasting organisations and the retransmission of television and radio programmes (COM(2016) 594 final). The proposal provides for **further development of the satellite broadcasting and cable retransmission Directive** (Directive 93/83/EEC, SatCab Directive). Like the SatCab Directive, this proposal also contains two regulatory areas, which must be distinguished from one another.

Firstly, the **acquisition of rights** (so-called rights clearance) is to be facilitated for cross-border services offered by radio broadcasters themselves. Today it is common for broadcasting organisations to offer their programmes simultaneously over the Internet (**simulcasts**). In addition, media services enabling the time-shifted retrievability of broadcasts over the Internet and also providing background information (**catch-up services**), have become established. The SatCab Directive does not apply to either type of offer. This gap is

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- durch die vorgeschlagene Verordnung geschlossen werden. Dabei nimmt der Vorschlag die Idee des Sendelandprinzips der SatCab-RL auf und transformiert dieses zu einem **Ursprungslandprinzip für sendebegleitende Online-Dienste** („ergänzende Online-Dienste“ nach Art. 1(a) des Vorschlags). Relevante Vorschriften sind insoweit Art. 1(a) und Art. 2 des Verordnungsvorschlags.
- 3 Zweitens geht es um die **Erleichterung der grenzüberschreitenden Weiterleitung** der Erstübertragung durch Dritte. Weiterverbreitungsunternehmen schaffen keine eigenen Sendehinhalte, sondern bündeln die Programme der Fernseh- und Radiosender, um sie einem weiteren Publikum zugänglich zu machen. Diesbezüglich sollen durch die vorgeschlagene Verordnung technische Einschränkungen, welche sich aus der SatCab-RL ergeben, überwunden werden. Konkret soll **die Verwertungsgesellschaftspflicht für die Rechtswahrnehmung auf bestimmte grenzüberschreitende Onlineweiterleitungen erstreckt** werden. Die maßgeblichen Vorschriften finden sich in Art. 1(b) und Art. 3, 4 des Verordnungsvorschlags.
- 4 Das Max-Planck-Institut erkennt den Regelungsbedarf und befürwortet den Vorstoß der Kommission, die grenzüberschreitende Zugänglichmachung von Rundfunkprogrammen über das Internet zu vereinfachen. Die SatCab-RL hat die grenzüberschreitende Verfügbarkeit von Medieninhalten in den 90er Jahren erheblich erleichtert. Sie ist nun aber deutlich über
- intended to be closed by the proposed Regulation. The proposal takes up the country-of-transmission principle of the SatCab Directive and transforms it into a **country-of-origin principle for ancillary online services** (see Article 1(a) of the proposal). Relevant provisions are therefore Articles 1(a) and 2 of the proposed Regulation.
- Secondly, the aim is **to facilitate the cross-border retransmission** of the initial transmission by third parties. Operators of retransmission services do not create their own broadcasts, but bundle the channels of television and radio stations to make them available to a wider audience. In this regard, the proposed Regulation is intended to overcome technical limitations resulting from the SatCab Directive. Specifically, the system of mandatory collective management **is to be extended to certain cross-border online retransmissions**. The relevant provisions can be found in Articles 1(b), 3 and 4 of the proposal for a Regulation.
- The need for regulation is recognised and the Commission's initiative to simplify the cross-border availability of broadcasts over the Internet is to be welcomed. The SatCab Directive considerably facilitated the cross-border availability of media content in the 1990s. However, it is far more than twenty years old, and its regulatory content is limited to the

zwanzig Jahre alt, und ihr Regelungsgehalt beschränkt sich auf die damaligen Übertragungstechnologien. Zwischenzeitlich hat das Internet den grenzüberschreitenden Zugang zu Information und Medieninhalten revolutioniert. Mit der vorgeschlagenen Verordnung soll die durch die technische Entwicklung eingetretene **Regulierungslücke geschlossen** und die **legale grenzüberschreitende Verbreitung von Sendungen über das Internet erleichtert werden**.

Allerdings leidet der Vorschlag der Kommission an einer Reihe von **Unklarheiten**. Sie betreffen die **Reichweite der vorgeschlagenen Verordnung** und ihre **Auswirkungen auf das internationale Zivilprozessrecht**; außerdem stellt sich die Frage, inwieweit **vertragliche Territorialitätsbegrenzungen** im Hinblick auf das Kartellrecht und die Grundfreiheiten zulässig sind. Weitere Bereiche erscheinen inkohärent und bedürfen aus Sicht des Instituts der Korrektur. Dies betrifft vor allem **die Wahl des legislativen Mittels**. Nachfolgend werden die wesentlichen Punkte des Vorschlags kurz beschrieben und im Kontext des europäischen Urheberrechts verortet. Anschließend wird auf die Kritikpunkte eingegangen.

## II. Regelungsinhalt

### 1. Ergänzende Online-Dienste

Der erste Teil des Verordnungsvorschlags bezieht sich auf die grenzüberschreitende Zugänglichmachung von Sendeeinhalten über das Internet durch die Sende-

transmission technologies of that time. The Internet has since revolutionised cross-border access to information and media content. The proposed Regulation is intended to **close the regulatory gaps** that have arisen through technical development and to **facilitate the legal cross-border distribution of broadcasts over the Internet**.

However, the Commission's proposal suffers from a number of **ambiguities**. They concern the **scope of the proposed Regulation** and its **impact on international jurisdiction**; it is also unclear to what extent **territorial limitations on a contractual basis** are permissible with regard to antitrust law and the fundamental freedoms. Further areas appear to be incoherent and, in the view of the Institute, require correction. This mainly concerns the **choice of the legislative instrument**. The main points of the proposal are briefly described below and are placed in the context of European copyright law. Subsequently, the criticisms are discussed.

## II. Content of the regulation

### 1. Ancillary online services

The first part of the proposed Regulation refers to the making available of broadcasting content across borders over the Internet by the broadcasters themselves. The

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anstalten selbst. Die Territorialität des Urheberrechts und die kollisionsrechtliche Geltung der *lex loci protectionis*, wie sie auch in Art. 8 Rom II VO niedergelegt ist, führen dazu, dass sämtliche Urheberrechtsordnungen parallel anwendbar sind, in deren Geltungsbereich ein urheberrechtlich geschützter Inhalt zugänglich gemacht wird. Entsprechend besteht kein einheitliches Urheberrecht, sondern ein Bündel nationaler Urheberrechte. Für die Rundfunkanstalten bedeutet dies, dass sie all jene nationalen Urheberrechtsordnungen beachten müssen – und vor allem die Urheberrechte für all jene Gebiete erwerben müssen –, in denen ihre Sendung zu empfangen ist.

territoriality of copyright and the application of the *lex loci protectionis* doctrine as a conflict of law rule, as also described in Article 8 of the Rome II Regulation, results in the parallel applicability of every national copyright regime within the scope of which copyright-protected content is made available. Accordingly, there is no unitary copyright, but a set of national copyrights. This means that broadcasters must observe all those national copyright regimes, and, above all, acquire copyrights for all areas, in which their broadcast can be received.

- 7 Zur Erleichterung grenzüberschreitender Satellitensendungen führte die SatCab-RL in Art. 1 Nr. 2(b) das Sendelandprinzip ein. **Urheberrechtlich relevant** ist gestützt darauf nur die **Eingabe der Signale zum Satelliten**. Nur dort wo die Eingabe erfolgt, findet die „öffentliche Wiedergabe“ statt. Dadurch wurde sichergestellt, dass die Rechte nur für einen Mitgliedstaat geklärt werden müssen. Diese Erleichterung für die Rundfunkveranstalter ist in technischer Hinsicht jedoch auf den Übertragungsweg über Satellit beschränkt. Die SatCab-RL gilt nicht für die Onlineübertragung der Inhalte. Eine entsprechende Erleichterung für diese wird daher in Art. 2 in Verbindung mit Art. 1(a) des Verordnungsvorschlages vorgesehen.

In order to facilitate cross-border satellite broadcasts, the SatCab Directive introduced the country-of-transmission principle in Article 1(2)(b). On the basis of this, **only the input of the signals to the satellite is relevant** from a copyright perspective. Only where the input is made does the “communication to the public” take place. This ensured that the rights had to be cleared only for one Member State. However, this facilitation for broadcasters is, in technical terms, restricted to transmission via satellite. The SatCab-RL does not apply to the online transmission of content. A corresponding facilitation for this is therefore provided for in Article 2 in conjunction with Article 1(a) of the proposed Regulation.

Der Verordnungsvorschlag nutzt – wie bereits zuvor die SatCab-RL und der Vorschlag für eine Portabilitätsverordnung (COM(2015) 627 final) – das Mittel einer **territorialen Fiktion**. Dabei handelt es sich nicht – wie der verwendete Begriff *Ursprungslandprinzip* suggeriert – um eine Vorschrift des Internationalen Privatrechts. Vielmehr wird **die urheberrechtlich relevante Handlung in nur einem Land verortet**. Untechnisch ausgedrückt findet die Onlineverbreitung (öffentliche Wiedergabe, Zugänglichmachung und Vervielfältigung) also nur in jenem Mitgliedstaat statt, in welchem das Rundfunkunternehmen seine Hauptniederlassung hat.

## 2. Weiterverbreitung fremder Inhalte über das Internet

Der zweite Teil des Verordnungsvorschlags bezieht sich auf die Weiterverbreitung von Sendeinhalten durch Dritte. Hier sollen die technischen Beschränkungen der SatCab-RL überwunden werden. Damit sollen auch die Rechte an Weiterverbreitungen, welche in bestimmten, geschlossenen Onlinenetzen wie **IPTV** erfolgen und nicht drahtgebunden oder über Mikrowellensysteme übermittelt werden, der Verwertungspflicht unterfallen. Der Anwendungsbereich des Verordnungsentwurfs beschränkt sich jedoch – genau wie bei Art. 9 (1), 1 (3) der SatCab-RL – auf die **Weiterverbreitung von Programmen „aus einem anderen Mitgliedstaat“**. Rein nationale Weiterverbreitungen unterliegen damit nationaler Gesetzgebung.

The proposed Regulation – like the SatCab Directive and the Proposal for a Portability Regulation (COM (2015) 627 final) before it – uses the means of a **territorial fiction**. This is not a provision of private international law, as the term employed, *country-of-origin principle*, implies. Rather, **the copyright-relevant act is located in only one country**. In less technical terms, online broadcasting (communication to the public, making available and reproduction) takes place only in the Member State in which the broadcaster has its main establishment.

## 2. Retransmission of third-party content over the Internet

The second part of the proposed Regulation relates to the retransmission of content by third parties. Here the proposal intends to overcome the technical limitations of the SatCab Directive. The rights to grant or refuse authorisation for retransmissions carried out in certain closed online networks such as Internet protocol television (IPTV) and not transmitted by wire or microwave systems are also to be subject to mandatory collective management. However, as is the case with Articles 9(1) and 1(3) of the SatCab Directive, the scope of the proposed Regulation is limited to the **retransmission of programmes “from another Member State”**. Thus, purely national retransmissions are subject to national legislation.

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10 **III. Der Vorschlag im Kontext des europäischen Urheberrechts**

Der Verordnungsvorschlag der Kommission kann nicht isoliert betrachtet werden. Er bildet einen Mosaikstein im Gesamtkonzept zur Entwicklung eines digitalen Binnenmarktes. Eine Übersicht über das vorgeschlagene Urheberrechtspaket und seine Bezüge zum bestehenden *acquis communautaire* findet sich in Part A der Stellungnahme des Max-Planck-Instituts zur Modernisierung des europäischen Urheberrechts.

11 Konkret sind folgende Zusammenhänge hervorzuheben:

- Der Vorschlag stellt eine Erweiterung der **SatCab-RL** dar, welche technisch auf die Übertragung via Satellit durch die Rundfunkveranstalter und auf die Weiterleitung über Kabelnetze und Mikrowellensysteme beschränkt bleibt.
- Ein enger Zusammenhang besteht außerdem mit dem Vorschlag der Kommission für eine **Portabilitätsverordnung**. Jene hat die grenzüberschreitende Portabilität für die Nutzung von Online-Inhaltediensten im Blick, die Verbraucher in ihrem Wohnsitzmitgliedstaat erworben haben. Auf derartige Online-Inhaltedienste sollen Verbraucher auch dann zugreifen können, wenn sie sich vorübergehend im Ausland aufhalten. Der Anwendungsbereich jenes Verordnungsvorschlags beschränkt sich jedoch auf Dienstleistungen, welche innerhalb eines **Abonnementverhältnisses** erbracht werden. Sein Anwen-

**III. The proposal in the context of European copyright law**

The Commission's proposal for a Regulation cannot be considered in isolation. It is one piece in the puzzle of the overall policy for developing a digital internal market. An overview of the proposed rights package and its references to the existing *acquis communautaire* can be found in Part A of this Position Statement.

Specifically, the following relationships are to be emphasised:

- The proposal is an extension of the **SatCab Directive**, which is technically limited to transmission via satellite by broadcasters and to the retransmission via cable networks and microwave systems.
- There also is a close link with the Commission's proposal for a **portability regulation**. The latter focuses on cross-border portability for the use of online content services purchased by consumers in their Member State of residence. Such online content services are intended to be accessible to consumers even if they are temporarily abroad. However, the scope of the proposed Regulation is limited to services provided within a **subscriber relationship**. Its scope is thus narrowly circumscribed and does not include services provided by broadcasters outside a subscriber relationship. Here,

dungsbereich ist damit eng umgrenzt und bezieht Leistungen, welche Rundfunkanstalten außerhalb eines Abonnementverhältnisses erbringen, nicht ein. Auch hier arbeitet die Kommission mit den Mitteln einer territorialen Fiktion.

- Von Bedeutung für den Verordnungsvorschlag sind außerdem die Rechtsgrundlagen für die **kollektive Rechtswahrnehmung**. Hinsichtlich der Weiterleitung der Sendeinhalte wird dies dadurch deutlich, dass dafür eine Verwertungsgesellschaftspflicht etabliert werden soll. Dies **setzt ein funktionierendes Verwertungsgesellschaftssystem voraus**. Aber auch die Rechte für die Primärsendung und ergänzende Online-Dienste werden teilweise durch Verwertungsgesellschaften wahrgenommen. Hierfür schafft die Richtlinie über die kollektive Rechtswahrnehmung (RL 2014/26/EU) Mindeststandards. Ihr Ziel besteht unter anderem darin, Verwertungsgesellschaften dazu zu animieren, paneuropäische Lizenzen für Online-Musikrechte zu vergeben.
- Anders als die übrigen Vorschläge der Kommission zur Modernisierung des Urheberrechts gestaltet der Verordnungsvorschlag nicht unmittelbar den Inhalt des Urheberrechts. Während der Richtlinien-vorschlag für das Urheberrecht im digitalen Binnenmarkt (**COM(2016) 593 final**) die Harmonisierung der nationalen Urheberrechtsordnungen vertie-

too, the Commission employs a territorial fiction.

- Of importance for the proposed Regulation is also the legal basis for **collective rights management**. With regard to the retransmission of broadcast content, this is made evident by the fact that a system of mandatory collective management is to be established. This **requires a functioning collective rights management system**. But also the rights for the primary transmission and ancillary online services are partly licensed by collecting societies. For this purpose, Directive 2014/26/EU (Collective Rights Management Directive) () establishes minimum standards. Its aim is, among other things, to encourage collecting societies to grant pan-European licences for online music rights.
- Unlike the other Commission proposals on the modernisation of copyright, the proposal for a Regulation does not directly define the subject matter of copyright. While the proposal for a Directive on copyright in the internal digital market (**COM (2016) 593 final**) is intended to augment the harmonisation of national copyright laws – for instance

fen soll – etwa durch die Schaffung zwingender Schranken –, zielt das Ursprungslandprinzip darauf ab, die Geltung mehrerer, parallel anwendbarer Urheberrechtsregime zu vermeiden und die Beurteilung einer grenzüberschreitenden Nutzung des Urheberrechts einer einzigen Rechtsordnung zuzuführen. Gleichzeitig vermag eine weitreichende Harmonisierung des materiellen Rechts die Erschütterungen, welche durch die Konzentration auf eine Rechtsordnung entstehen, abzumildern. Dies spiegelt sich im zweiten Teil des Verordnungsvorschlags – der Verwertungsgesellschaftspflicht für die Weiterleitungsrechte –, welche in enger **Beziehung zu den Schrankenregelungen** im Richtlinienvorschlag steht und insoweit auch einen Einfluss auf die Ausgestaltung des Urheberrechts hat.

through the implementation of mandatory exceptions and limitations – the country-of-origin principle aims to preclude the parallel application of several national copyright regimes and to concentrate the assessment of cross-border use of copyright within a single legal system. At the same time, a widespread harmonisation of substantive law can mitigate the disruptions caused by such concentration on a single legal regime. This is reflected in the second part of the proposed Regulation, which provides for a system of mandatory collective management for the purpose of exercising retransmission rights. It is closely **related to the provisions** of the proposed Directive **implementing exceptions and limitations**, and therefore has an influence on the design of substantive copyright law.

- Abzugrenzen ist der Verordnungsvorschlag schließlich von der Richtlinie über **audiovisuelle Mediendienste** (Richtlinie 2010/13/EU). Diese soll durch den Richtlinienvorschlag COM(2016) 287 final geändert werden. Ihr Fokus liegt auf der Etablierung des Herkunftslandprinzips, ergänzt um die Schaffung einheitlicher Mindeststandards für die **Inhalte der Mediendienstanbieter**. Das Urheberrecht selbst ist nicht Gegenstand jener Regelung.
- Abzugrenzen ist der Verordnungsvorschlag schließlich von der Richtlinie über **audiovisuelle Mediendienste** (Richtlinie 2010/13/EU). Diese soll durch den Richtlinienvorschlag COM(2016) 287 final geändert werden. Ihr Fokus liegt auf der Etablierung des Herkunftslandprinzips, ergänzt um die Schaffung einheitlicher Mindeststandards für die **Inhalte der Mediendienstanbieter**. Das Urheberrecht selbst ist nicht Gegenstand jener Regelung.
- Finally, the proposed Regulation is to be distinguished from Directive 2010/13/EU (**Audiovisual Media Services Directive**). The latter is to be amended by the proposed Directive COM(2016) 287 final. It focuses on the establishment of the country-of-origin principle, supplemented by the implementation of uniform minimum standards regarding **content offered by media service providers**. Substantive copyright is not a subject of the Directive.
- The same applies to the

**Geo-Blocking-Verordnung** (COM(2016) 289 final). Durch sie soll der **Zugang der Verbraucher zu Waren und Dienstleistungen im Binnenmarkt** verbessert werden. Der Vorschlag verbietet unter anderem die Zugangsbeschränkung zu Webseiten und anderen Online-Schnittstellen auf Grund der Staatsangehörigkeit oder des Wohnsitzes des Verbrauchers. Audiovisuelle Dienstleistungen sind nach Erwägungsgrund 6 des Vorschlags vorerst vom Regelungsbereich der Geo-Blocking-Verordnung ausgenommen.

proposed **Geo-Blocking Regulation** (COM (2016) 289 final). It aims to improve **access to goods and services in the internal market**. The proposal prohibits inter alia the restriction of access to websites and other online interfaces on the basis of the nationality or place of residence of the consumer. According to Recital 6 of the proposal, audiovisual services are, for the time being, excluded from the scope of the Geo-Blocking Regulation.

#### IV. Das legislative Instrument

Der Kontext, in welchem sich der Kommissionsvorschlag bewegt, verdeutlicht die Komplexität des geltenden europäischen Urheberrechts – wobei wesentliche Teile des urheberrechtlichen *acquis communautaire* hier unerwähnt bleiben müssen, allen voran die InfoSoc-RL. Von der dringend erforderlichen **Systematisierung des Urheberrechts** sind die Vorschläge der Kommission jedoch weit entfernt. Zu tun hat das vor allem mit dem legislativen Instrument.

Die Kommission schlägt den Erlass einer **Verordnung** vor, deren **Verbindung zur SatCab-RL** offensichtlich ist, nimmt sie die beiden wesentlichen Mechanismen der SatCab-RL doch auf. Erstens orientiert sie sich am Sende-landprinzip, zweitens wird die die Verwertungsgesellschaftspflicht hinsichtlich der Rechte für die Weiterverbreitung von Sendungen

#### IV. The legislative instrument

The context in which the Commission proposal is put forward illustrates the complexity of existing European copyright law, with essential elements of the *acquis communautaire* being left unmentioned, notably the InfoSoc Directive. However, the Commission's proposals are a far cry from the urgently needed **systematisation of copyright**. This is mainly due to its choice of legislative instrument.

The Commission proposes the adoption of a **Regulation**, which is clearly **linked to the SatCab Directive**, as it incorporates the two main mechanisms of the SatCab Directive. Firstly, it is based on the country-of-transmission principle; secondly, the system of mandatory collective management is introduced for the purpose of exercising retransmission rights.

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eingeführt.

- 14 Vor diesem Hintergrund ist der Vorschlag eines inhaltlich und formal losgelösten Rechtsaktes kaum nachvollziehbar. Besteht für eine Regelungsmaterie bereits ein Gefäß, sollte in erster Linie versucht werden, dieses an veränderte Bedürfnisse anzupassen. Demgegenüber vermag die Begründung, welche die Kommission in Erwägungsgrund 17 für den Erlass einer Verordnung anführt, in keiner Weise zu überzeugen. Richtig ist zwar, dass der Erlass von Verordnungen den Vorteil der unmittelbaren und einheitlichen Rechtsanwendung mit sich bringt – Umsetzungsprobleme entfallen. Dieses Argument ist freilich genereller Natur, womit es – wenn schon – auf das europäische Urheberrecht insgesamt Anwendung finden müsste. Ansätze zur Verwirklichung eines **europäischen Einheitsurheberrechts** sind durchaus denkbar; sie werden auch vom Max-Planck-Institut in den allgemeinen Anmerkungen zu den Modernisierungsvorschlägen der Kommission aufgegriffen (Part A Rn. 29 ff). Solange das europäische Urheberrechtsmodell jedoch Stückwerk ist, muss auf die bestmögliche Integration innerhalb der bestehenden Rechtsakte geachtet werden. Dieses Ziel wird mit dem Konzept der Kommission verfehlt.
- Against this background, it is hard to understand why the Commission chose to propose an act of law which is substantially and formally detached. If a regulatory framework already exists for a given subject matter, this framework should first be adapted to fit new requirements. The reasons given by the Commission in Recital 17 for adopting a Regulation, in contrast, are not at all convincing. While regulations do offer the advantage of a direct and uniform application of the law – implementation problems do not apply – this argument is of a general nature and would, if at all, have to apply to European copyright as a whole. Approaches to realise a **unitary European copyright system** are conceivable; they are also addressed by the Max-Planck-Institute in its general remarks on the Commission's modernisation proposals (Part A, para. 29 et seq.). As long as the European copyright model is, however, fragmentary, the best possible integration must be ensured within the existing legal instruments. This objective is not achieved by the Commission's approach.
- 15 Zur Begründung dafür, dass eine Verordnung vorgeschlagen wird, beruft sich die Kommission auf das Argument der **Vermeidung von Fragmentierung**. Das Gegenteil ist der Fall. Fragmentierungen werden geradezu provoziert, wenn eine Regelungsmaterie, welche einen
- In support of the proposal for a Regulation, the Commission relies on the argument of **avoiding fragmentation**. The opposite is the case. Fragmentation is almost provoked if a regulatory matter which constitutes a cohesive whole is not connected in a single legal

inneren Zusammenhang bildet, nicht in einem einheitlichen Rechtsakt verbunden wird. Gleiches gilt, wenn nur grenzüberschreitende Konstellationen adressiert werden. Unterliegen rein nationale Sachverhalte damit nationalem, transnationale hingegen (direkt anwendbarem) europäischem Recht, entsteht der Inbegriff einer Fragmentierung.

Außerdem werden die Mitgliedstaaten in Art. 3 (3) und (4) dazu aufgerufen, eine Verwertungsgesellschaft zu benennen, die bei nicht Ausübung des Wahlrechts der Rechteinhaber als bevollmächtigt gilt, und zugleich einen konkreten Zeitraum festzulegen, innerhalb dessen Außenseiter ihre Rechte gegenüber den Verwertungsgesellschaften geltend machen können. Soweit dies nicht bereits im nationalen Verwertungsgesellschaftsrecht geregelt ist, schaffen Art. 3 (3) und (4) damit einen **Umsetzungsbedarf für die Mitgliedstaaten**, was kaum dem Wesen einer Verordnung entspricht.

Auch **systematische Erwägungen** rechtfertigen den Ansatz der Kommission nicht (siehe hierzu Abschnitt VI und IX der Stellungnahme Part A). Der Verordnungsvorschlag baut auf den Inhalten der SatCab-RL auf. Jene Richtlinie wurde bereits in den Neunzigerjahren in nationales Recht umgesetzt. Wenn auf dieses umgesetzte Recht – und seiner Verankerung in der Richtlinie – nun eine Verordnung aufgesetzt wird, sind systematische Probleme unvermeidlich.

act. The same applies if the regulation addresses only cross-border constellations. If purely national issues are thus subject to national, but transnational (directly applicable) issues subject to European law, the result is the epitome of fragmentation.

Furthermore, in Articles 3(3) and (4) the Member States are urged to indicate a collecting society which is deemed to be mandated to manage the rights of the rights holders who do not exercise their right to choose, and to specify a specific period within which outsiders are entitled to claim their rights against those collecting societies. If this is not already regulated in the national law on collective rights management, Article 3(3) and (4) thus creates a **need for transposition** for the Member States, which hardly accords with the nature of a Regulation.

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**Systematic considerations** also do not justify the Commission's approach (see Sections VI and IX of Part A of the Position Statement). The proposed Regulation is based on subject matter of the SatCab Directive. This Directive was already transposed into national law in the 1990s. If a Regulation is now put on top of this already transposed law – and its statutory basis in the Directive – systematic problems are inevitable.

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- 18 Drei alternative Regelungsmodelle versprechen eine systematische Lösung:
- **Option 1:** Aufhebung der SatCab-RL und der Erlass einer gemeinsamen Verordnung.
  - **Option 2:** Überführung des vorgeschlagenen Verordnungsinhalts in die SatCab-RL – oder allenfalls eine weitere Richtlinie, die jene ergänzt.
  - **Option 3:** Trennung von Weiterleitung einerseits und originärer Übertragung durch die Sendeunternehmen andererseits. Die Weiterleitung könnte einheitlich durch eine Richtlinie geregelt werden (die entsprechenden Vorschriften der SatCab-RL und des Verordnungsvorschlags verbindend), während die originäre Sendung über Satellit und deren parallele Übertragung über Internet durch Mediathekendienste („die ergänzenden Online-Dienste“) in einer gemeinsamen Verordnung geregelt würden. Diese Verordnung sollte dann freilich zugleich den Inhalt der Portabilitätsverordnung aufnehmen.
- There are three alternative regulatory methods promising a systematic approach:
- **Option 1:** Repeal of the SatCab Directive and the adoption of a joint Regulation.
  - **Option 2:** Transfer of the proposed Regulation into the SatCab Directive or, at most, another Directive that complements the latter.
  - **Option 3:** The separation of retransmission on the one hand and original transmission by the broadcasting companies on the other. The retransmission could be regulated uniformly by a Directive (linking the corresponding provisions of the SatCab Directive and the proposed Regulation), while the original transmission via satellite and a parallel transmission over the Internet by means of media services (“the ancillary online services”) would be addressed in one common Regulation. This Regulation should, at the same time, include the content of the Portability Regulation.
- 19 Option 1 hat den Vorteil, dass die zusammengehörende Regelungsmaterie in einem einzigen Rechtsakt zu finden ist. Mit dem Instrument der **Verordnung** ist die **einheitliche Geltung gesichert**. Eine Umsetzung in nationales Recht ist nicht erforderlich. Hinsichtlich der Vorschriften zur Satellitensendung wäre dies im Hinblick auf die zentrale
- Option 1 has the advantage of containing the related regulatory subject matter in a single legal act. The instrument of a **Regulation ensures uniformity**. A transposition into national law is not necessary. With regard to the rules on satellite broadcasting, this would be quite feasible considering the crucial role of the country-of-transmission principle. However,

Bedeutung des Sendelandprinzips durchaus möglich. Problematischer erscheint jedoch die Überführung weiterer Bereiche der SatCab-RL. So führt diese in Art. 2 das Senderecht als eigenständiges Verwertungsrecht ein. Verwertungsrechte selbst wurden bislang nie durch unmittelbar geltendes europäisches Recht eingeführt. Sie sind tief in den nationalen Strukturen des Urheberrechts verwurzelt und mögen zwar harmonisiert werden, bedürfen jedoch der Anpassung an das eigene System. Dies ist bislang – solange das Fundament für einen einheitlichen Urheberrechtstitel auf europäischer Ebene nicht geschaffen ist – nur im Wege der Richtlinienharmonisierung möglich.

Auch hinsichtlich der **Weiterverbreitung** – sowohl nach der SatCab-RL als auch im Sinne des Verordnungsvorschlags – erscheint eine Überführung des Regelungsgehalts in eine Verordnung wenig praktikabel. Die Weiterleitung im Sinne von Art. 1 Nr. 3 SatCab-RL – also über Kabel- und Mikrowellensysteme – **bezieht sich ausschließlich auf die grenzüberschreitende Weiterleitung**. Gleiches gilt für die „Weiterverbreitung“ im Sinne von Art. 1(b) des Verordnungsvorschlags. Auch hier werden nur Programme „aus einem anderen Mitgliedstaat“ erfasst. Entsprechender **Regelungsbedarf für die Weiterleitung oder Weiterverbreitung nationaler Programme** besteht jedoch auch auf **nationaler Ebene**. In der Regel unterscheiden die Mitgliedstaaten bei der Umsetzung der Richtlinie

the transfer of further areas of the SatCab Directive appears to be more problematic. Thus, in Article 2, broadcasting rights are implemented as independent exploitation rights. Exploitation rights themselves have never been implemented by directly applicable European law. They are deeply rooted in the national structures of copyright law and may be harmonised, but need adaptation to their own system. As long as the foundation for a unitary copyright title is not created at European level, this is only possible through harmonisation by means of Directives.

With regard to **retransmission** – both according to the SatCab Directive and in the sense of the proposed Regulation – the transfer of the normative content into a Regulation appears to be impractical. Retransmission within the meaning of Article 1 No. 3 SatCab Directive – i.e. via cable and microwave systems – **refers exclusively to cross-border retransmission**. The same applies to retransmission within the meaning of Article 1(b) of the proposed Regulation. Only programmes “from another Member State” are covered here. There is, however, a corresponding **need for regulation of retransmission** via cable and microwave or in the sense of Article 1(b) **of national programmes on the national level**. As a rule, however, the Member

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aber nicht zwischen nationaler und grenzüberschreitender Weiterleitung (siehe beispielsweise § 20b UrhG für das deutsche Recht). Die Schaffung einer einheitlichen Rechtslage für grenzüberschreitende und nationale Weiterleitungen bzw. Weiterverbreitungen erlaubt daher nur die Verortung des europäischen Teils in einer Richtlinie.

States do not distinguish between national and cross-border retransmission when transposing the Directive (see, for example, Sec. 20b Copyright Act for German law). The creation of a uniform legal framework for cross-border and national retransmission, therefore, is only possible by addressing the European part in a Directive.

- 21 Auf diesen Überlegungen baut **Option 2** auf. Option 2 hat den **Vorteil**, dass die an sich **bewährte SatCab-RL erhalten bleibt**, während die Optionen 1 und 3 auf eine Aufhebung oder zumindest eine erhebliche Veränderung der SatCab-RL hinauslaufen würden. Bei der Option 2 hingegen würde die Weiterverbreitung, wie sie derzeit im Verordnungsvorschlag vorgesehen ist, über den Weg der Umsetzung einer Richtlinie in das nationale Regelungsmodell zur Weiterleitung integriert. Auf nationaler Ebene könnte also umfassend und integriert sowohl die Weiterleitung über Kabel- und Mikrowellensysteme als auch die Online-Weiterverbreitung nationaler wie ausländischer Programme geregelt werden. Die dem Regelungsmechanismus zugrundeliegende territoriale Fiktion, die heute für die öffentliche Wiedergabe über Satellit in Art. 1 Nr. 2(b) der SatCab-RL enthalten ist, lässt sich auch für die öffentliche Wiedergabe und Zugänglichmachung der Primärsendung in einem ergänzenden Online-Dienst in einer Richtlinie festlegen. Dabei wäre es sogar möglich, den europäischen Rechtsrahmen für **alle relevanten Handlungen** in einer **einzigsten Richtlinie**

**Option 2** is based on these considerations. Option 2 has the **advantage that the proven SatCab Directive remains unchanged** while options 1 and 3 would result in a repeal or at least a substantial modification of the SatCab Directive. Option 2, on the other hand, would allow for retransmission, as currently provided for in the proposed Regulation, to be incorporated into the national regulatory model through the transposition of a Directive. At the national level, therefore, both the retransmission via cable and microwave systems and the online retransmission of national and foreign programmes could be regulated exhaustively and embedded in the national framework. The territorial fiction contained in Article 1(2)(b) of the SatCab Directive, which underlies the regulatory mechanism currently governing communication to the public by satellite, could also be laid down in a Directive addressing communication to the public and the making available of the original broadcast through an ancillary online service. It would even be possible to bring the European legal framework together into a **single Directive for all relevant acts**.

**zusammenzuziehen.** Gewiss liegt der Nachteil der Richtlinienregelung darin, dass die nationale Umsetzung nicht immer hinreichend gelingt, zumal sich nationales und europäisches Recht überlagern. Diese Nachteile sind aber allgemeiner und struktureller Natur. Sie aus dem System des europäischen Urheberrechts zu beseitigen, setzte einen übergeordneten Ansatz und einen eigentlichen Paradigmenwechsel voraus, während mit punktuellen Eingriffen letztlich nichts gewonnen wird.

Die Option 3 verlangt den größten gesetzgeberischen Aufwand, bietet aus Sicht des Instituts aber auch die größtmöglichen systematischen Vorteile. Option 3 folgt dem Prinzip, dass **alles, was einheitlich und ausschließlich europäisch geregelt werden kann**, einer **Verordnung** zugeführt wird. Demgegenüber wird **alles, was innerstaatlich geregelt werden muss**, aber zugleich **eine europäische Dimension aufweist**, über das Mittel der **Richtlinie** adressiert. Die SatCab Richtlinie bleibt in diesem Modell weitgehend erhalten. Soweit sie Regelungen zum Senderecht an sich und zur Weiterleitung enthält, erscheint das Mittel der Richtlinie denn auch kohärent. Hingegen sollten all jene Bereiche, die eine **territoriale Fiktion** einführen und damit „quasi-kollisionsrechtliche“ Vorschriften darstellen, in einer **Verordnung zusammengefasst** geregelt werden. Konkret bedeutet dies, dass Art. 1(a) und 2 des Verordnungsvorschlags und Art. 1 Nr. 2(b) der SatCab-RL sowie der Inhalt des Verordnungsvorschlags

Certainly, the disadvantage of a Directive is that national implementation is not always successful, especially since national and European law overlap. However, such disadvantages are of a general and structural nature. To remove them from the system of European copyright law would presuppose an overarching approach and a true paradigm shift, while ultimately nothing can be achieved with selective interventions.

Option 3 calls for the greatest legislative effort, but offers the greatest possible systematic advantages. Option 3 follows the principle **everything that can be regulated in a uniform and exclusively European way** is placed within a **Regulation**. On the other hand, **everything that needs to be regulated at national level**, but at the same time shows a European dimension, is addressed through the means of the **Directive**. In this model, the SatCab Directive remains largely intact. Insofar as it contains provisions on the broadcasting right and retransmission, the instrument of a Directive indeed appears to be coherent. However, all those areas which introduce a **territorial fiction** and thus constitute “quasi conflict of law” rules **should be addressed in a single Regulation**. In concrete terms, this means that Articles 1(a) and 2 of the proposed Regulation and Article 1(2) (b) of the SatCab Directive and the content of the proposal for the portability of online content services (COM(2015) 627 final),

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zur Portabilität von Online-Inhaltsdiensten (COM(2015) 627 final), mit Art. 4 als maßgebender Vorschrift, in eine einheitliche Verordnung überführt werden. In dieser Verordnung finden sich dann auch die Ausnahmen der Territorialität des Rechts in gebündelter Form.

with Article 4 as the most relevant provision, are transferred into a single Regulation. This Regulation also contains the exceptions to the territoriality of the law in a bundled form.

## 23 V. Einzelfragen

## V. Specific issues

### 1. Zu den ergänzenden Online-diensten (Art. 2 und 1(a))

### 1. Regarding the ancillary online services (Articles 2 and 1(a))

Der Anwendungsbereich des Verordnungsvorschlags umfasst in Art. 2 ausschließlich die Verbreitung der Inhalte über **Simulcasts** und **Catchups** durch die Rundfunkanstalten.

In Article 2, the scope of the proposed Regulation covers exclusively the distribution of content through **simulcasts and catch-up TV** by broadcasting organisations.

### 24 a) Begrenzung auf ergänzende Online-Dienste

### a) Limitation to additional online services

Es ist zu begrüßen, dass der Vorschlag sich auf ergänzende Online-Dienste beschränkt, die von einer Primärsendung durch die Rundfunkveranstalter abhängen. **Ausgeschlossen** sind damit **originäre Webcasting-Angebote und Podcasts**, die unabhängig von einer Primärübertragung erfolgen. Ohne diese Beschränkung entstünden Wettbewerbsverzerrungen, weil Plattformen, die nicht zugleich Rundfunkveranstalter sind, für vergleichbare Angebote nicht in den Genuss vereinfachter Rechtsklärung kämen. Zudem erlaubt die Koppelung an das Vorliegen einer Primärsendung einen klaren Anwendungsbereich dieser Regelung, während eine Entkoppelung zu dessen Verwässerung führen würde.

It is to be welcomed that the proposal is limited to ancillary online services, which depend on a original broadcast by the broadcasting organisations. This **excludes original webcastings and podcasts**, which are independent of a primary transmission. Without this restriction, distortions of competition would arise because platforms that are not also broadcasting organisations would not benefit from simplified rights clearing for similar offers. In addition, the link to the existence of a primary transmission allows a clear application of this Regulation, whereas decoupling would lead to its dilution.

- b) Das Merkmal „begrenzter Zeitraum“** 25
- Nachgelagerte Online-Dienste wie die Catchups in den Mediatheken der Sender sollen nur dann in den Anwendungsbereich der Verordnung fallen, wenn ihre Verfügbarkeit zeitlich begrenzt ist (Art. 1(a) des Verordnungsvorschlags). Dieses Kriterium wird teilweise als zu vage kritisiert und stattdessen eine gesetzlich definierte zeitliche Höchstgrenze gefordert, um den Anwendungsbereich der Verordnung klarer zu umgrenzen.
- Subsequent or ancillary online services, such as the catch-up services of broadcasters, should only fall within the scope of the Regulation if their availability is temporary (Article 1(a) of the proposed Regulation). Some criticise this criterion as too vague and instead demand a legally defined time limit, so as to clarify the scope of the Regulation.
- Diese Bedenken teilt das Max-Planck-Institut aus zwei Gründen nicht. Erstens befinden sich die entsprechenden Angebote der Sender noch in einer Aufbauphase und ein üblicher zeitlicher Rahmen muss sich erst noch etablieren. Die Einführung einer gesetzlichen Regelung könnte diesen Prozess behindern. Zweitens unterliegt die Frage, ob und für welchen Zeitraum Medieninhalte online verfügbar sein sollen, richtigerweise der **Disposition der Parteien**. Rechteinhaber sind nicht verpflichtet, den Sendern die Onlinewiedergabe überhaupt zu erlauben. Folglich steht es ihnen auch frei, eine erlaubte Wiedergabe zeitlich zu befristen. Für eine gesetzliche Beschränkung dieser Vertragsfreiheit besteht deshalb kein Bedarf.
- These concerns are not to be shared for two reasons. Firstly, these services offered by the broadcasting organisations are still developing and a usual time frame has yet to be established. Introducing a strict legal rule could disrupt this process. Secondly, the question of whether and for what time period media content should be available online is, in fact, **up to the parties**. Rightholders are not obliged to allow broadcasters to make their content available online at all. Consequently, they are also free to limit the time period for which broadcasters are permitted to provide online access the content. Thus there is no need for a legal restriction on this freedom of contract.
- Wird das zeitliche Kriterium aufgegeben und die Vereinbarung über die Dauer der Verfügbarkeit einzelner Inhalte den Vertragsparteien überlassen, kann der Verordnungsvorschlag wie folgt angepasst werden:
- If the time criterion is abandoned and the agreement on the period of availability of individual content is left to the contracting parties, the proposed Regulation can be adapted as follows:
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- In Art. 1(a): „... zeitgleich oder nicht zeitgleich mit ~~oder für einen begrenzten Zeitraum nach~~ ihrer Übertragung ...“.
- In Erwägungsgrund 8: „Dazu gehören Dienste, die Fernseh- und Hörfunkprogramme zeitgleich mit ihrer Übertragung linear zugänglich machen, sowie Dienste, die vom Rundfunkveranstalter bereits übertragene Fernseh- und Hörfunkprogramme ~~für einen begrenzten Zeitraum~~ nach ihrer Übertragung zugänglich machen (sogenannte Catch-up-Dienste).“
- In Article 1(a): “... simultaneously or not simultaneously to ~~with or for a defined period of time after their broadcast~~ ...”.
- In Recital 8: “They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, ~~within a defined time period~~ after the broadcast, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services).”

## 28 2. Zur Weiterverbreitung (Art. 3 und 1(b))

Die Begrenzung der Verwertungsgesellschaftspflicht auf die Rechte zur Weiterverbreitung in geschlossenen Systemen wie IPTV erscheint sinnvoll. Eine Erstreckung des erleichterten Rechteerwerbs auf offene Systeme wie OTT-Services ist nicht wünschenswert, denn sie stehen in Konkurrenz zu den Geschäftsmodellen der bezahlungspflichtigen Video-on-Demand Angebote wie Netflix, Amazon, Lovefilm und Maxdome. Dies könnte deren Entwicklung erschweren. Eine Erweiterung des vereinfachten Rechteclearings ist für die Zukunft jedoch nicht ausgeschlossen, wenn die tatsächlichen Entwicklungen besser abschätzbar sind.

## 29 VI. Das Internationale Zivilprozessrecht

Eine zentrale Frage, welche die Kommission nicht berücksichtigt

## 2. Regarding retransmission (Articles 3 and 1(b))

The limitation of mandatory collective management to the rights for retransmission over closed networks like IPTV appears to be reasonable. An extension of the facilitated rights clearance to open systems such as OTT services is not desirable, as they compete with the business models of paid video-on-demand services, such as Netflix, Amazon Lovefilm and Maxdome. This could hamper the development of the latter. However, an extension of the facilitation of the rights clearance should not be ruled out in the future if the actual developments can be estimated more clearly.

## VI. Questions of international jurisdiction

A key question which the Commission has not taken into

hat, betrifft die Auswirkungen des Ursprungslandprinzips auf das Internationale Zivilprozessrecht. Der allgemeine Internationale Gerichtsstand des Art. 4 (1) und Art. 63 EuGVVO (2012) führt stets zur Zuständigkeit der Gerichte des Sitzlandes des Beklagten. Abweichend hiervon verschafft der Gerichtsstand der unerlaubten Handlung des Art. 7 Nr. 2 EuGVVO dem Kläger einen weiteren Gerichtsstand an dem Ort, an dem das schädigende Ereignis eingetreten ist oder eintreten droht. Dieser **zusätzliche Gerichtsstand am Verletzungsort** könnte nun durch die **Konzentration der urheberrechtlich relevanten Handlung im Sitzland des Rundfunkveranstalters entfallen**.

Entsprechendes wurde kürzlich vom OLG Wien (Urteil vom 27.04.2016 – 5 R 182/15V) hinsichtlich der Wirkungen des Sendelandprinzips der SatCab-RL angenommen. Ihm zufolge besteht der Sondergerichtsstand der unerlaubten Handlung in Bezug auf eine Rechtsverletzung durch Satellitensendungen nur in dem Mitgliedstaat, der als Sendeland im Sinne der Richtlinie anzusehen ist. Dies folgt nach Ansicht des Gerichts aus den **Wirkungen des Sendelandprinzips**, welche den gesamten urheberrechtlich relevanten Akt im Sendeland konzentriert. Gleiches droht hinsichtlich der Verbreitung der Inhalte über ergänzende Online-Dienste. Auch hier soll eine Konzentration der urheberrechtlich relevanten Handlung im

account concerns the effects of the country-of-origin principle on issues of international jurisdiction. The place of general international jurisdiction (*forum generale*) of Article 4(1) and Article 63 Brussels Regulation (2012) always leads to the jurisdiction of the courts of the domicile of the defendant. By way of derogation from this, the place of jurisdiction in matters of tort or delict – according to Article 7(2) of the Brussels Regulation – provides the plaintiff with an additional forum at the place where the harmful event occurred or may occur. This **additional forum at the place where the event occurred** could now be dispensed with by concentrating the relevant copyright act in the country where the broadcasting organisation has its principal establishment.

The same has recently been decided by the Vienna Court of Appeal (judgement of 27 April 2016 in Case No. 5 R 182/15V) regarding the effects of the country-of-transmission principle of the SatCab Directive. According to the Vienna Court, the alternative ground of jurisdiction based on the unlawful act regarding an infringement by means of satellite broadcasting is only set in the Member State which is regarded as the country of transmission within the meaning of the Directive. According to the Court, this results from the **effect of the country-of-transmission principle**, which deems the entire copyright-relevant act as taking place in the country of transmission. The same threatens to apply to the distribution of relevant

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Sitzland der Rundfunkanstalt erfolgen.

content through ancillary online services. Here, too, it is to be assumed that the copyright-relevant act takes place solely in the country of principle establishment of the broadcasting organisation.

- 31 Die Ausschaltung des zusätzlichen Gerichtsstands der unerlaubten Handlung stellt jedoch eine unnötige **Erschwerung der Rechtsdurchsetzung zulasten der Rechteinhaber** dar. Dies ist zu ändern. Art. 7 Nr. 2 EuGVVO verfolgt nicht nur den Gedanken, dass das Gericht am Ort des schädigenden Ereignisses wegen der Nähe zum Streitgegenstand und der leichteren Möglichkeit einer Beweisaufnahme zur Entscheidung des Rechtsstreits am besten geeignet ist; die Norm verwirklicht auch das Auswirkungsprinzip. Dort wo sich eine behauptete Rechtsverletzung auswirkt, soll ein Gericht die Verletzung auch prüfen können. Dies gilt verstärkt im Wirtschaftsrecht, zumal Unternehmen den Marktort selbst wählen; dort ist ihnen die Verteidigung durchaus zuzumuten. Wenn der Verordnungsvorschlag den **Marktort verschiebt**, so erfolgt dies lediglich **im Rahmen einer rechtlichen Fiktion**. Die – gewichtigeren – tatsächlichen Auswirkungen, nämlich die Empfangbarkeit der Sendung am betreffenden Ort, ändern sich dadurch nicht. Demgegenüber verminderte die Konzentration des Gerichtsstands am Ort der Hauptniederlassung des Rundfunkveranstalters ohne sachliche Rechtfertigung dessen Risiko, am Ort seiner tatsächlichen Geschäftstätigkeit verklagt zu werden.

However, the exclusion of the additional forum in matters of tort or delict constitutes an unnecessary **obstacle to the enforcement of rights at the expense of the rightholders**. This must be changed. Article 7(2) of the Brussels Regulation pursues not only the idea that the Court at the place where the harmful event occurred is the most appropriate because of the proximity to the subject matter of the dispute and better possibilities of taking evidence (close connection); the provision also realises general thoughts originating in the principle of effect. Where an alleged infringement produces harmful effects a court should be able to examine the infringement. This is increasingly the case in commercial law, especially as companies choose the market place themselves; there the defence is reasonable and to be expected. Where the proposed Regulation **shifts the market place, this is merely a legal fiction**. The more important actual effects, namely, the reception of the programme at the place concerned, do not change. By contrast, the concentration of jurisdiction at the place where the broadcasting organisation has its principle establishment would reduce its risk of being sued at the place where its actual business is focused. There is no reasonable justification for this.

Diese Konsequenz ist auch nicht mit der Begründung des vereinfachten Rechtclearings zu rechtfertigen. Dafür – und damit letztlich für die **Erleichterung der grenzüberschreitenden Tätigkeit** – ist eine **künstliche Verlegung des Gerichtsstands nicht erforderlich**. Für die Rechteinhaber hingegen führt die Beschneidung des Gerichtsstands am Markttort zu erheblichem Mehraufwand und ist mit einem hohen Kostenrisiko verbunden, dies namentlich dann, wenn der Betroffene gezwungen ist, Klage im Ausland zu erheben. Zwar kann das Gericht am internationalen Gerichtsstand der unerlaubten Handlung nur über den Ersatz der Schäden entscheiden, die in dem Staat des angerufenen Gerichts verursacht worden sind, und es kann auch nur insoweit eine Unterlassungsanordnung aussprechen. In vielen Verfahren genügt jedoch die gewissermaßen exemplarische Entscheidung eines Gerichts, um den Rechtsstreit umfassend beizulegen.

Ganz ignoriert der Kommissionsvorschlag diese Zusammenhänge zwar nicht. Vielmehr sollen die Wirkungen von Art. 2 des Verordnungsvorschlags insoweit eingeschränkt sein, als Art. 2 nur „für die Zwecke der Wahrnehmung des Urheberrechts“ gilt. Diese Einschränkung erscheint im Hinblick auf Friktionen mit der EuGVVO jedoch **nicht eindeutig genug**. Auch der Erwägungsgrund 19 lässt erahnen, dass die Kommission nicht die Intention hat, Einfluss auf Fragen der gerichtlichen Zuständigkeit zu nehmen. Entsprechendes ist dann allerdings klarstellend in den

This consequence likewise cannot be justified on the grounds of facilitated rights clearance. The facilitation of rights clearance – and thus, ultimately, **facilitation of cross-border activities** – **does not require an artificial transfer of jurisdiction**. For the rightholders, on the other hand, the curtailment of the forum at the market place entails considerable additional expenses and is associated with a high cost risk, particularly where the party concerned is compelled to bring an action abroad. It is true that the court at the place where the harmful event occurred is only competent to decide on the compensation for the damage caused in the state of the court seised, and it can also order an injunction only in that regard. In many cases, however, an exemplary court decision may suffice to resolve the legal dispute entirely.

Admittedly, the Commission proposal does not ignore these contexts entirely, proposing as it does to limit the effects of Article 2, in that it applies only “*for the purposes of exercising copyright*”. However, this restriction does **not** appear to be **sufficiently clear** with regard to the provisions of the Brussels Regulation. Recital 19 also indicates that the Commission does not intend to exert an influence on questions of jurisdiction. However, this should be clarified in the proposal. To this end, Article 2 should be amended by the addition of a further

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Vorschlag aufzunehmen. Hierzu bietet sich eine Ergänzung von Art. 2 um einen weiteren Absatz an, mit folgendem Inhalt:

*Das in Absatz 1 genannte Ursprungslandprinzip gilt nicht für Fragen der Internationalen Zuständigkeit der Gerichte.*

paragraph with the following provision:

*The country of origin principle referred to in paragraph 1 shall not apply to questions regarding international jurisdiction.*