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Working Group on IPR and copyright reform

WORKING DOCUMENT

Copyright Reform

Presented to the Committee on Legal Affairs on 13 June 2016

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I. INTRODUCTION

The *WG on IPR and copyright reform* was set up by the European Parliament Committee on Legal Affairs in autumn 2014 after the new Parliament took office with the aim to carry on the work undertaken by the *Working Group on Copyright* set up under the previous legislatures.

The idea was to stimulate the reflection of Members on IPR issues, facilitating specific information, providing exchanges of views with the widest range of stakeholders having interest in the matter and enabling Members to drive in-depth examination of the challenges and prospects at stake. The purpose of these activities was also to allow Members to critically assess the better regulation activities and measures undertaken by the Commission, for instance impact assessments, in view of upcoming legislative proposals.

The scope of the Working Group includes all intellectual property rights issues and therefore goes beyond copyright, enabling members to discuss other IPR matters. However, given the reform of the EU legal framework on copyright, the Working Group decided to start focussing on this issue, organising hearings where all stakeholders would have the possibility to express their views.

The list of organisations and individuals that have contributed to the Working Group is annexed (see Annex I).

Each political Group has been given the possibility to be represented in the Working Group (see list of the Members in Annex II). In addition, one Member of each of the other committees interested, namely the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education also take part in the Working Group. Finally, a Member of the Committee on International Trade attends the meetings when the agenda covers issues of the competence of this committee.

Representatives of the Commission are invited to attend all the meetings of the Working Group.

The Working Group is supported by a Project Team, which prepares the monthly meetings of the Working Group.

In order to have more open discussions, the Members of the Working Group decided not to open the meetings to the public, but to inform the general public via a dedicated webpage[1]

[1] http://www.europarl.europa.eu/committees/en/juri/subject-files.html?id=20150128CDT00182

where all relevant information and documents (agendas, minutes, presentations, etc.) would be published and freely accessible.

The aim of the present Working Document is to summarise the main elements that came up during the discussions in the Working Group meetings from January 2015 until March 2016. Each section presents a topic that has been recurrent throughout the meetings, including the main challenges and the proposed solutions mentioned either by stakeholders or by the academics invited. The Working Document also underlines the issues that are still under consideration and that would require further analysis by the Working Group. A section "other topics" indicates those areas that have not been extensively addressed so far and that could be further examined if the Members so require.

The Working Document also takes into account the findings of the ex-post impact assessment study presented to the Working Group at the meeting of 15 October 2015 and Parliament's resolution of 9 July on the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (P8_TA(2015)0273), referred to as the "InfoSoc resolution".

This Working Document will be presented to and endorsed by the Committee on Legal Affairs.

II. REMUNERATION/COMPENSATION OF AUTHORS AND CREATORS

1. Challenges and concerns

In its September 2010 Working Document, the Working Group on Copyright emphasised the digital age challenge. Specifically, digital technologies have offered the possibility to access content and use creative works online. This development still poses serious challenges for the fair remuneration or compensation of rightholders; on the one hand, it is extremely complicated to measure the online use of copyrighted works, on the other hand, unauthorised use and copyright infringement is difficult to detect.

Overall, the EU acquis provides for minimum level of harmonisation in the area of remuneration or compensation of authors and creators, whereas the InfoSoc Directive does not specify the scope and meaning of 'fair' remuneration or compensation of rightholders for legitimate uses of creative content.

2. Stakeholders' point of view

The new Working Group on IPR has heard stakeholders from different fields of creative works. Accordingly, the following issues were pointed out:

Long commercialisation chain:

The Society of Audio-visual Authors (SAA) emphasised the existence of many intermediaries between the author of a creative work and distributors. This situation seems to be preventing remuneration or compensation to reach back to the creators. It was thus proposed that a new mechanism needs to be set up that would ensure that authors get a fair share of the revenue from the exploitation of their works, while maintaining the commercialisation chain, albeit with a single intermediary in the remuneration process, namely the collective management organisations.

YouTube stated that the part of the revenues coming from the Internet is given to a whole chain of intermediaries between YouTube and authors and everyone takes that cut. Hence there is low revenue turn out for individual artists and creators. When it comes to revenue from advertising, the majority of advertising revenue goes to the rightholder. That being said, if YouTubers do not make a certain number of viewings, they cannot be remunerated.

Contractual position of performers:

The Association of European Performers' Organisation (AEPO-ARTIS) stressed that currently, the majority of performers transfer contractually all their exclusive rights to producers in return for a one-off, all-inclusive fee ('buy-out' contracts). This deprives performers from their fair share of the revenues from online exploitation of their works. An unwaivable right to remuneration or compensation should thus be granted to performers that will be managed collectively by collective management organisations. Amending the 1992 Rental Directive and its provision in Article 4 could be a way to achieve such a development. These concerns were shared by the European Writers' Council, which suggested that an EU instrument banning unfair clauses, such as on cancellation of the contract, and specifying digital uses for which remuneration should be provided, could be envisaged.

3. Analysis and conclusion

Remuneration or compensation of authors and creators is currently mainly a matter of market mechanisms, contractual agreements and negotiating relationships between the authors and performers and the different actors in the value chain.

As pointed out in a recent study published by the European Commission and entitled 'Remuneration of authors and performers for the use of their works and the fixations of their performances', some challenges persist with regard to authors' fair remuneration: i) there is lack of contractual transparency in terms of the remuneration arrangements for the rights transferred; and ii) there is weaker bargaining position of new authors and performers to the industry and this can lead to contracts with particularly unfavourable terms especially with respect to new modes of exploitation.

Depending on the existence or absence of a free movement obstacle as a result of these challenges, action at EU or national level could be envisaged, which in any case should be based on a full impact assessment of the costs and benefits of different options. This is in conformity with the InfoSoc resolution (see in particular paragraphs 7, 21, and 24).

III. TERRITORIALITY, TERRITORIAL LICENCING AND GEO-BLOCKING

1. Challenges and concerns

Each Member State has a distinctive copyright system applying exclusively within its own borders, despite the harmonisation process that has been undertaken in the EU. This **territoriality of copyright protection** leads to copyright rules (e.g. the definition of the rights granted to authors, performers and content producers) as well as the exceptions and limitations to such rights and the enforcement measures varying from one Member State to another. In addition, the online distribution of copyrighted content in the EU is driven by **territorial licensing agreements** that partition the Internal Market along national borders.

The exclusive territorial licensing practices allow right-holders to apply technical and contractual measures which limit cross-border portability (ability for a consumer who lawfully subscribes to online services in a country to access the same service when moving -temporarily- to another country) and access (ability for consumers living in a MS to access -whether through subscription or not - copyrighted content that is available in another MS and at the conditions and prices of that MS) of copyrighted works. **Geo-blocking practices**, which are those practices imposing restrictions to consumers based on their location (denying access to a website or re-routing them to a local store with different conditions), are not per se a copyright issue. However, technological measures preventing online consumers from accessing protected online content based on geographic location are the result of these exclusive territorial licensing practices.

According to CEPS, the main challenge that the EU copyright framework poses to the correct functioning of the Internal Market for creative works, especially in a borderless environment such as the Internet, is therefore related to the principle of territoriality.

2. Stakeholders' point of view and proposed solutions

Territorial licences induce some negative effects. For example, according to libraries, territorial licensing is an obstacle to the provision of digital documentation for libraries when different territories are involved (e.g. Eucor – The European Campus). It also prevents libraries to lend digital documents to linguistic minorities of another Member States. From a consumer point of view, there is a lack of cross-border access to audiovisual offers due to geo-blocking techniques applied to the online distribution of content which leads consumer organisations to warn against territorial discrimination caused by geo-blocking. The European Language Equality Network underlined that geo-blocking also undermines regional/minority language usage, especially in the case of cross-border minorities. On the other hand, the existing system of territorial licensing and territoriality is a guarantee to the

creative industry's viability, according to the Association of Commercial Television in Europe. For example, the financing system of audiovisual works is based on territorial licensing and film distributors consider that granting exclusive rights is vital to continue to invest as they take the financial risk. Book publishers' business also relies on the conclusion of enforceable contracts and licences.

Public service media organisations (European Broadcasting Union) also consider that the principles of contractual flexibility and territoriality are crucial even though they support the idea of enabling cross-border access. With this aim, they call for extending the licensing system for satellite distribution to the broadcasters' own online services (e.g. online streaming and video on demand) updating the Cable and Satellite Directive.

As regard multi-territorial licensing, the European Federation of Journalists considers that national licensing models are well-functioning and that multi-territorial licences would create damages given the different conditions existing in Member States. In addition, according to EFJ, a ban on geo-blocking would help multinational corporations take over the market.

The German national consumer organisation explained that they do not want to get rid of territoriality but want to improve cross-border access and therefore considered favourably improving portability of content (i.e. enabling consumers who have legally paid for an online service to access it in another Member States) as well as improving licences practices such as the simplified licence systems in Scandinavia.

Distributors and content producers such as Canal+ or Amazon indicated that the content they produce is already portable and that they would support the Commission's proposal of cross-border portability of digital content services in the internal market. In the area of European cultural patrimony, the Association des Cinémathèques Européennes considers that a sectoral approach should be aimed at cutting down the transaction costs and territoriality.

Another element is that cultural specificity has structured the EU audiovisual industry and reflects demand in local market. According to EuroVOD, new business models need to be found, where VoD platforms would be more actively involved in the financing of films and would also provide more input on audiences' preferences.

Among the solutions proposed: limiting territorial restrictions and further harmonising exceptions and limitations. BEUC also proposes to apply the principle of exhaustion to digital works.

3. Analysis and conclusion

On the one hand, elements have been brought to the attention of the Working Group regarding the negative effects of territorial licensing, especially by institutions of public interest such as libraries and archives, but also by consumer's representatives. The ex-post impact assessment study on the InfoSoc directive also underlines that territorial licensing and geo-blocking limit cross-border portability of copyrighted works and cross-border trade of digital works. In its resolution of 9 July 2015, Parliament recalled that consumers are too often denied access to certain content services on geographical grounds and urged the Commission to propose adequate solutions for better cross-border accessibility of services and copyright content for consumers.

On the other hand, the stakeholders met by the WG, ranging from the creative industry to national consumers organisation, do not seem to wish to eliminate territoriality in block. This is in line with the InfoSoc resolution which calls for a reaffirmation of the principle of territoriality, given the fact that the existence of copyright and related rights inherently implies territoriality and given the importance of territorial licences in the EU, particularly with regard to audiovisual and film production.

Parliament is of the opinion that there is no contradiction between that principle and measures to ensure the portability of content and supports the Commission's will to enhance the portability, within the EU, of online services for content legally acquired and made available but at the same time respecting copyright and the interests of right-holders. It also calls upon the Commission to take steps to ensure cross-border access, particularly for the benefit of linguistic minorities. In this respect, the review of the Cable & Satellite directive announced by the European Commission is worthy of consideration.

It is also necessary to underline that contractual practices largely vary among sectors and that the territorial nature of copyright affects the various stakeholders differently. One should take this into account when assessing the implications of territorial licensing and geo-blocking.

The Legal Affairs Committee is now working on the Commission's proposal for a regulation on ensuring the cross-border portability of online content services in the internal market, which according to the Commission, is not intended to affect cross-border access but only to deal with portability. The Committee looks forward to the upcoming legislative proposals from the Commission in the context of the Digital Single Market during 2016, including more generally on geo-blocking.

IV. COPYRIGHT ENFORCEMENT IN THE DIGITAL ENVIRONMENT

1. Challenges and concerns

EU legislation provides for enforcement measures against infringing activities. Both the IPR enforcement directive (IPRED) and the InfoSoc Directive make the recourse to judicial enforcement of copyright by means of civil injunctions possible, the former as a general IPR enforcement provision, the later specifically aiming at copyright infringements.

The coherence of the copyright enforcement framework is at stake with the InfoSoc Directive enabling injunctions against intermediaries whose services are used by third parties to infringe copyright and the liability exemptions for Internet Service Providers (ISPs) under the e-Commerce Directive (the 'mere conduit' or sole purpose of transmission principle). According to the Centre for European Policy Studies (CEPS), there is also a **lack of clarity as regards compatibility of enforcement provisions in the InfoSoc Directive and in other EU legislation in particular** the IPRED when it comes to fundamental rights and data protection.

A second concern, pointed out by CEPS, is linked to the fact that **enforcement foreseen in the InfoSoc Directive and IPRED has proved ineffective**, mainly as it has been taken over by technology. In practice, civil injunctions seem to be residual and to have been replaced by extra-judiciary means such as procedures codified in voluntary codes of conduct or ad hoc administrative-based mechanisms (e.g. HADOPI). In addition, there is significant disparity between Member States as regards the types, conditions and effects of enforcement law, and uncertainty as regards determining the laws applicable to online copyrights infringement. The principle of territoriality of copyright also limits the effect of the measures (e.g. injunctions) to the national level.

Other implementation gaps have been pointed out by CEPS in its ex-post impact assessment of the InfoSoc Directive, such as the lack of clear rules on access to justice and on the collection of evidence to be used in civil proceedings.

2. Stakeholders' point of view and proposed solutions

Rightholders and especially distributors mentioned enforcement of copyright rules as very important so as to give them security in their (financially) risky activity. Enforcement of copyright rules is also one of EFAD's top five demands for ensuring better distribution and circulation of European audio-visual works. In this regard, CEPS pointed out that enforcement is the weak part of the protection system envisaged in the InfoSoc Directive.

Involvement of intermediaries in copyright enforcement

According to Pr. Sirinelli, copyright can currently be opposed only to internet users and this is of no relevance in terms of value-sharing. He is therefore in favour of getting other stakeholders (i.e. centralised servers, proxies, search engines, advertisement companies or agencies, credit card companies) involved in copyright enforcement through soft law or by revising the copyright directive. According to him, a black list of sites uploading content illegally should be provided to intermediaries so no investment is made on them (i.e. "second-class liability"). Internet service providers (EuroIspa) consider that determining a copyright infringement should not rely on the platforms but should remain the Courts' task. With regard to liability of ISPs, see Chapter VI.

Soft law vs. amendment of legislation

According to Valdani Vicari & Associati (VVA), non-legislative proposals and clarifications would help to address the major problems. Self-regulation measures (e.g. voluntary revisable codes of conducts agreed between right holders and intermediaries) would give flexibility to the framework but also increase legal uncertainty. VVA considered that specialised national copyright courts, awareness-raising actions and guidelines to foster harmonised practices could be encouraged. The importance of correct transposition of EU legislation was underlined by Amazon who considered that the Commission should provide more guidance to Member States on the implementation to ensure the correct application of enforcement rules. Overall, the positive results of the "follow the money approach" adopted by the Commission with regard to enforcement was confirmed by Amazon which indicated that the Memorandum of Understanding has also improved cooperation between right holders and intermediaries. The rise of new forms of copyright infringement such as illegal streaming, should be taken into account while revisiting the legal framework (Spotify).

3. Analysis and conclusion

There is a lack of harmonised framework for IPR enforcement across EU and a need for coherence.

The EP impact assessment mentions a number of non-legislative measures considering them as able to improve IPR and especially copyright enforcement: voluntary code of conduct agreed by intermediaries; set-up of specialised national copyright courts; awareness-raising actions and educational campaigns; new guidelines to foster harmonised practices in implementation. These measures are currently being developed in line with the Commission's Action Plan on IPR enforcement The Commission, instead of supporting strategies against end users based on civil injunctions, favours those involving intermediaries in copyright enforcement via self-regulatory instruments, which target IP infringements on a commercial scale by means of memoranda of understanding signed

between rightholders and payments services or advertising industry (the so-called "follow the money approach"). This solution is currently being implemented by the Commission and supported by stakeholders and Parliament. The Commission is working on further agreements to be signed by spring 2016. As regards the legislative options, the authors of the implementation assessment[2] think that it would be worth considering the introduction of a new provision in IPRED allowing for the blocking of payments to individuals involved in infringements on a commercial scale in order to involve intermediaries. The types of intermediaries covered, the conditions for justifying an injunction, and the extent to which intermediaries can be affected in the enforcement process would then have to be clarified. With regard to the "notice and take down" system, VVA proposes to draw new provisions compatible with the mere conduit principle of the e-commerce Directive that could be inspired by national case law that deem monitoring and filtering possible under certain conditions provided that these are proportionate to the public objective to be achieved and do not put at risk fundamental rights and freedoms. Measures to facilitate cross-border civil injunctions could also be considered in this context.

Views are divided on the possibility of re-opening the e-commerce Directive in order to increase the ISPs' liability and role in copyright enforcement.

Both the Council and the European Parliament support the non-legislative initiatives but called for more intervention. The European Parliament encouraged in its resolution the revision of the EU legal framework, underlining the necessity of an assessment of its functioning in the digital environment. The Commission is currently in the process of evaluating the EU legal framework on IPR enforcement.

[2] Review of the EU copyright framework: The implementation, application and effects of the "InfoSoc" Directive (2001/29/EC) and of its related instruments, European Implementation Assessment, Study, 2015

V. EXCEPTIONS AND LIMITATIONS

1. Challenges and Concerns

The InfoSoc Directive contains a long and exhaustive list of mainly optional exceptions to economic rights stemming from copyright, such as those for the dissemination of works for the purposes of teaching and scientific research as well as those for the use of works of architecture or culture made to be located permanently in public places (also known as 'freedom of panorama'). The sole mandatory exception to date concerns the exception for temporary acts of reproduction of Article 5(1) of InfoSoc Directive. As a result of their optional character, some Member States made use of these exceptions whereas others didn't, which created disparity across the EU.

This fragmented environment is exacerbated by the uncertainty with regard to certain types of digital uses of works with economic or non-economic application and the extent to which these fall within the scope of copyright. As the right of reproduction has a wide scope and the InfoSoc Directive was drafted at a relatively early stage in the digital era, it is proving quite challenging to fit new types of uses to more conventional exceptions. Text and data mining is an indicative example of this development, where computational analysis on texts and automated extraction of data is undertaken by machines to the benefit of other machines. In this process, copyrighted material is treated as data from which useful information may be extracted, collected or reused. A practical application of this technology enabled use consists in large-scale digitisation of books, which are not displayed to users, but used only for the purpose of text and data mining. This activity entails the reproduction of copyright works as a technical prerequisite and would allow automated user access to extracts of legally acquired data.

2. Stakeholders' point of view

Scientific research and teaching/ Text and data mining:

The Association of European Research Libraries (LIBER) stressed that libraries and research institutions spend an increasing amount of money in buying content licenses, especially in digital format, which has enabled interdisciplinary research. Therefore, text and data mining is the best way to exploit digital collections through the extraction of data and facts and the creation of new knowledge. This does not amount to copy or reproduction of existing knowledge. However, currently text and data mining may infringe copyright and particularly the *sui generis* databases directive. As a result, an exception in this area should not be

limited to non-commercial use, but should be broader. Still more clarification and legal certainty is needed under the existing regime. To that point, the Commission stressed the necessity to distinguish between research undertaken solely by commercial operators and research undertaken by research institutes in partnership with private actors. The European Newspaper Publishers' Association pointed out that copyright is a reasonable basis on which publishers can invest and innovate and that any reform of the existing acquis should not weaken their position by extending the scope of exceptions such as on text and data mining.

The International Association of Scientific, Technical and Medical Publishers (STM) emphasised that material is being made available electronically and online and there is a constant effort to facilitate access to digital content. Nevertheless, educational and research markets are key markets for STM publishers and copyright allows them to produce work and innovate through constant investments. Accordingly, there are three main concerns in the publishing industry: i) broadening copyright exceptions for education and research purposes; ii) e-lending; and iii) text and data mining.

The European Federation of Journalists emphasised that voluntary solutions and negotiation between rights holders and educational institutions could enable access at a fair price. What is more, according to the European and International Booksellers Federation, new business models enabling e-books to be available in libraries under certain conditions so as not to damage the primary market should be identified. Harmonisation of e-lending schemes should thus be avoided in the context of a particularly fragmented market. Finally, EBLIDA called for better harmonisation of national legislations to allow the emergence of a real European market permitting the trade and exchange of digital content in the interest of citizens. In that context, a mandatory exception granting libraries the 'right to lend' (including to 'e-lend' remotely) could be envisaged.

SPARC Europe has argued that there are around 30 000 peer reviewed academic journals, whose prices differ from EUR 100 to approximately EUR 40 000. As a result, academic libraries cannot afford to buy all of these journals. In the UK, there is an exception for copying for non-commercial research[3] and the rest of the EU should adopt at least a similar provision, or even better a specific research exception that could then be extended to commercial research too if Member States chose to do so.

Essentially, there are three main avenues in which to respond to this challenge: i) introduce a specific 'text and data mining' exception in the EU copyright acquis; ii) remove the non-commercial restriction from the scientific research exception - while at the same time specifying the term 'scientific' in a multi-lingual society; and iii) extend the scope of the exception on temporary copies.

[3] The said exception in the UK provides for a librarian to copy one article per issue of a periodical or one chapter per book.

'Freedom of Panorama':

In its meeting of 2 July 2015 the WG heard different stakeholders representing various interests in the possible exception for panorama (permitting the use of works that were made to be permanently located in the public space) including, Wikimedia, the European Visual Artists (EVA) Organisation, architects, the Federation of European Professional photographers and last but not least, academics.

Wikimedia pointed out that the term 'commercial' in the InfoSoc Directive is not clear as it does not always coincide with 'profitable' - non-profit organisation can provide commercial services. The meaning and scope of commercial usage should thus be further exemplified and a compromise must be found, which would not restrict freedom in Member States where this exception exists.

In the area of visual arts, EVA pointed out that the freedom of panorama is one of the 12 exceptions in total in the InfoSoc Directive that directly affects visual artists by putting them in a weaker position. Although the exception of panorama is applied differently from one Member State to the other, in some Member States like Spain and Portugal, the freedom of panorama is combined with certain fees. Social platforms' terms and conditions ask for commercial transfer of rights, which, if mandatory, could deprive authors from receiving fees. In the case of architects, although display of their works for educational and cultural purposes posed no problem, use for commercial purposes raises both financial and ethical questions, as their works could be used for illustrating ideas that the architects themselves do not share and would not thus wish for their works to be associated with. In that context, two situations need to be discerned: on the one hand, incidental use of architectural works raises no issues in terms of rights of authors; on the other hand, where architectural works are central to a scene in the television, producers should seek authorisation from the artist, who may in that case be entitled to some payment. In other words, there should be a distinction between use of architectural works in the public interest, which should be excluded from any fees and other uses. This distinction was supported by professional photographers, who pointed out that it should be further clarified and that individuals need to be properly educated as to the relevant law.

A further issue identified by academics was the choice between a mandatory exception in Article 5 of the InfoSoc Directive and a restriction to non-commercial uses. In any case, it should be recalled that there is not much litigation with regard to the freedom of panorama. Nonetheless, there is a potential grey area in terms of what amounts to commercial and non-commercial use as becomes apparent in the potential commercial use by Facebook of pictures uploaded by individuals agreeing to grant worldwide licences to Facebook to use the pictures. It should be borne in mind that an exception on the public could change

perceptions regarding copyright and restricting freedom of panorama might have a serious impact. In this context, Pr. Alexandra Bensamoun argued that the principle of subsidiarity should be respected, as well as the risk of discriminating certain categories of artists through mandatory exceptions. In her opinion, copyright, as property right, is a fundamental right and any limitation to it needs to consider the three-step test, enshrined in the main international Treaties on copyright and which provides that exceptions shall only be applied in certain special cases, which do not conflict with the normal exploitation of a work and which do not unreasonably prejudice the legitimate interests of rightholders.

3. Analysis and conclusions

The InfoSoc Directive has the following discrepancy: although it has harmonised the majority of exclusive economic rights stemming from copyright, exceptions and limitations to the economic exploitation of copyright was mainly promoted on an optional basis and it was thus left to the Member States to make use of these options. This has led to considerable divergence in the scope of copyright across the EU, with a potential impact on the functioning of the internal market and cross-border activities. This has also led to legal uncertainty for both authors and users. Commissioner Navracsics confirmed on the 26 March 2015 meeting of the Working Group that the Commission was preparing a study on mapping up the practices in Member States and the problems of implementations of legal instruments. In its InfoSoc resolution, Parliament therefore called on the Commission to examine the possibility to apply minimum standards across the EU as regards exceptions and limitations, hence improving legal certainty.

In its Digital Single Market Strategy (COM(2015)0192), the Commission announced that it would make legislative proposals before the end of 2015 to reduce the differences between national copyright regimes including through proposals for greater legal certainty for cross-border use of content for specific purposes through harmonised exceptions. According to a recent report published by the European Commission expert group on 'Standardisation in the area of innovation and technological development, notably in the field of text and data mining', the legal uncertainty is particularly acute in the area of text and data mining, which could raise research costs and create barriers to market entry for innovative SMEs. According to the EPRS Study entitled 'Review of the EU copyright framework: European Implementation Assessment' (October 2015), the importance of a clear legal landscape in this area should be considered also in the context of the emerging mass automation of service industries (automation of thinking), as well as the constantly increasing quantity of analysable data via the Internet of Things. In its InfoSoc resolution, Parliament stated that the possibility to enable automated analytical techniques for text and data for research purposes should be assessed.

Finally, with regard to 'freedom of panorama', diverging national practices as to the freedom to share photos and videos of copyrighted works constitutes a further source of uncertainty. As confirmed in the above EPRS study this exception is central to the modern digital age where both pictures and videos are posted on websites and platforms hence making them immediately available at a global level. However, depending on national implementations of this exception, sharing pictures and videos of copyrighted works permanently placed in public spaces may be classified as a copyright infringement in many EU jurisdictions and may lead to heavy penalties. The Commission has opened a consultation on 'freedom of panorama' during the spring of 2016, with the first results expected to be available by the summer.

VI. LIABILITY OF INTERNET SERVICE PROVIDERS

1. Challenges and concerns

The question of whether Internet Service Providers (ISPs) should be liable for any infringements of copyright by users on their networks, or whether such networks should be considered mere conduit (see chapter IV)) has thus far been regulated in the e-commerce directive and was one of the main questions in the widely reported so-called Pirate Bay case, which ended in February 2012. More recent practices, such as streaming, have however given rise to uncertainty on liability questions.

When it comes to the portability proposal, the Commission considers that there is no need for a monitoring mechanism, not least in order to avoid introducing burdens for service providers.

In the InfoSoc resolution, Parliament suggests that a review should take place of the liability of service providers and intermediaries in order to clarify their legal status and liability with regard to copyright, to guarantee that due diligence is exercised throughout the creative process and supply chain, and to ensure fair remuneration for creators and rightholders within the EU.

2. Stakeholders' point of view

When it comes to facilitating the enforcement of rights, some voice that more obligation and responsibilities should be put on ISPs (as the main benefit of access to works goes to internet companies) and that there should no longer be any "safe harbour" for ISPs. But at the same time, concerns are raised regarding the adverse effects of requiring platforms to monitor the content of materials uploaded by individuals and the risks of reopening the e-commerce directive. There seems to be a prevailing sense of uncertainty as to how platforms should react to complaints of copyright infringement, e.g. when demands aim at preventing competition or contain unfounded allegations.

The European Internet Services Providers Association (EuroISPA) takes the view that it is not possible to run an internet platform with unlimited responsibility for what is uploaded in it. This matter should therefore not be reopened in their view, but they do acknowledge the same concern as to how platforms should react to complaints of copyright infringement. Platforms have realised that some complaints and demands to take down content, which come from applications or robots, are sometimes used to prevent competition or contain completely unfounded allegations. The answer to a complaint cannot be to take the contentious content down straightforward and immediately. An assessment as to whether a

copyright infringement has taken place should be made and a balance struck, but not by the platforms themselves but by courts of law. Determining a copyright infringement should be a question for the courts and not the business of platforms.

EuroISPA likewise referred to the YouTube Revenue Sharing Program, according to which a creator could decide either to receive a share of revenues or ask for removal of his or her material, as an example of good practice for remuneration. Representatives of the music industry underlines, however, that this program had been concluded with certain music labels only, and there is still distortion in the marketplace since this scheme competes with sites which works on licence. YouTube underlined that it merely constitutes a hosting service, but that it does work with collecting societies.

The Centre of the Picture Industry (CEPIC) referred to unconscious piracy, underlining that as photos are copied all the time, users are not aware of the extent of their actions. They therefore advocate liability for platforms rather than to turn users liable. Google Image Search, the biggest agency of images in the word, was highlighted as a good example, as it benefits from user traffic and advertising at no cost and no license. Further education of consumers and more cooperation, rather than harmonisation of legislation, is however needed.

3. Analysis and conclusion

With the current enormous pace of technological development, networks are becoming more and more intricate and the rate of creation of new business models for the diffusion of works is constantly multiplying, the question of drawing the line between storage and transmission is becoming more difficult and so is the question of liability for copyright infringement. Soft law solutions and voluntary cooperation mechanisms between service providers and rightholders could complement the harmonisation of legislation. What is more, any future policy on the liability of internet service providers would need to take into account the existing case law of the Court of Justice regarding the balancing between the rights linked to intellectual property and other fundamental rights.

VII. LEGAL BASIS OF EU COPYRIGHT LEGISLATION

1. Challenges and concerns

Action at the European Union level in the field of copyright has thus far taken place exclusively on the basis of harmonisation of national legislation, with the InfoSoc Directive constituting the best example. The most common legal basis has been Article 114 TFEU[4] on harmonisation in the internal market, but Articles 50, 53 and 62 TFEU on the freedom of establishment and to provide services have also been used, for instance most recently for the orphan works and CRM directives.

In the fields of patent and trademarks, use has however been made of the new legal basis in Article 118 TFEU, which has been introduced by the Lisbon Treaty and allows for the creation of European intellectual property rights to provide uniform protection throughout the Union.

In the InfoSoc resolution, Parliament invites the Commission to evaluate targeted and appropriate measures to improve legal certainty, in line with the Commission's objective of better regulation and calls on the Commission to study the impact of a single European Copyright Title on jobs and innovation, on the interests of authors, performers and other rightholders, and on the promotion of consumers' access to regional cultural diversity.

2. Stakeholders' point of view

Some commentators, including the Commission, have raised concerns that it could be too early to abolish national copyright regimes without further harmonization as a first step, since a pan-European copyright title would replace such regimes overnight. Furthermore, legal authority is split on the question whether Article 118 TFEU could be used exclusively for industrial property rights or whether it could also be used to create a an EU-wide title for copyright, including authors' rights. The question of mandatory registration, which is a prerequisite for patents or trademarks but is not allowed for copyright according to the Berne Convention, and whether the word "right" is an incorrect translation of the original French word "titre" in this Treaty article, constitute the two main contentious issues.

3. Analysis and conclusion

[4] A recent EPRS Study entitled 'Review of the EU copyright framework: European Implementation Assessment' (October 2015, p.66) argues that despite of the internal market legal basis (then Article 95 TEC) of the InfoSoc Directive, "the purpose of strengthening copyright protection through the expansion of the digital rights of authors, performers and content producers prevailed over the goal of paving the way for a 'Digital Single Market'".

Since a pan-European copyright title would necessitate the simultaneous abolishment of national titles, one possible policy option is to introduce a voluntary single title (with an accompanying voluntary registration system) initially, which would exist in parallel with the continued harmonization of national titles, mirroring the systems in place for patents and trademarks.

VIII. OTHER ISSUES

Linguistic Minorities

The concept of minority by reference to language groups refers to social groups, marked by a certain language and culture, that exist within wider societies and states but which lack the political, institutional and ideological structures which can guarantee the relevant of those languages for the everyday life of members of such language groups.[5]

The position and interests of linguistic minorities in the context of copyright protection at EU level has come up in several instances in the discussions of the Working Group. This was particularly so, in the context of the proposal on cross-border portability of online content services since linguistic minorities are particularly interested in accessing content that is not available in the territory where they live. Vice-President Ansip referred to the example of the 400.000 Swedish people who are currently leaving in another Member State and there is no legal way to access Swedish movies from those Member States, since demand is too low to pay for a territorial license. This concerns cultural protection and film archives.

What is more, according to the European Language Equality Network (ELEN), copyright, portability and geo-blocking have a huge language dimension. Especially geo-blocking in ELEN's view undermines regional and minority language usage, especially in the case of cross-border minorities. There is thus a need to assess the impact of the proposals on regional and linguistic minorities and to create obligations to ensure international transmission for regional/minority language content, particularly for cross-border minorities and for services in all languages of a territory. ELEN thus proposed the idea of territoriality of broadcasting rights based on language groups rather than state borders.

Private Copying Levies

Under the InfoSoc Directive, Member States may provide for certain exceptions and limitations to the exclusive right of reproduction. One such optional exception applies to acts of private copying (Article 5(2)(b) of the Directive), which allows Member States to introduce an exception to the right of reproduction only for natural persons who copy for private use and for non-commercial purposes (i.e. private copying). The Directive envisages fair compensation for acts of private copying, which should be understood as adequate compensation to rightholders ('to compensate them adequately'). The Directive is neutral as to the form of fair compensation. Many Member States have implemented the requirement

[5] Peter Nelde, Miquel Strubell and Glyn Williams, 'Euromosaic: The production and reproduction of the minority language groups in the European Union' (report prepared for the European Commission, 1995), p.1.

of 'fair compensation' for acts of private copying by means of a private copying levy system on recording equipment and/or blank media.

This form of compensation for rightholders is based on the premise that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant rightholders. The private copying levy systems were introduced at a Member State level on the basis that there were no effective means to monitor and therefore authorise acts of home copying of, e.g. music, films or books. There is no uniform Community-wide levy system. As a result, different levies apply in relation to the same products across Europe.

This parameter has not been extensively considered by the Working Group. However, on two occasions, the invited experts expressed their views on this point. Specifically, Mr Patrick Messerlin, Professor of economics and Director of the Groupe d'Economie Mondiale (GEM) at Sciences Po, argued that private copying levies are enforced differently across the EU with varying results. He also underlined that there is no relationship between private copying levies and success. What is more, Ms Eirini Zafeiratou, Director Public Policy at Amazon, welcomed the intention by the Commission to reform levies, since in her view, they usually create a lot of litigation and very often oblige consumers to make double payments and incur the costs. According to her, the idea is not to abolish the levies system altogether, but to reorganise it in order to avoid double payments. Several times in cases of cross-border sales, consumers have to pay levies where the retailer is establishes and then against in the country where the customer is based. In Amazon's view, the lev system has to be reviewed and simplified, allowing for a correct remuneration of right holders. There are many alternative ways to do it keeping the levies system but updating the rules, for example payment through a clearance house.

IX. CONCLUSION

In the area of fair and adequate remuneration of authors and creators the following aspect could be further explored: the relationship between Creative Commons licences and rightholders' compensation schemes. The Parliament in its 9 July 2015 Resolution called the Commission to examine whether rightholders may be given the right to dedicate their works to the public domain in whole or in part. The Working Group on Copyright and Intellectual Property Right could therefore consider inviting in one of its future meetings representatives of the open licence organisations, such as the Creative Commons and the Cultural Commons Collecting Society, to complete its examination and understanding of the broader topic.

On 9 December 2015 the European Commission unveiled its plans to modernise the EU copyright rules based on a step-by-step approach. Accordingly, the Commission came up with a proposal for a Regulation on cross-border portability of online content services aiming at ensuring that subscribers to online content services can continue using them while temporarily present in another Member State.

According to the Communication on a modern, more European copyright framework, more measures will come in 2016 and will be based on four targeted pillars:

(i). Widening online access to content across the EU, including in the light of the results of the review of the Satellite and Cable Directive;

(ii). Adapting exceptions to copyright rules to a digital and cross-border environment, focussing in particular on those in the area of education, research - including text and data mining - and access to knowledge;

(iii). Achieving a fair and well-functioning marketplace for copyright, also considering for that matter the role of online intermediaries when they distribute copyright-protected content;

(iv). Strengthening the enforcement system.

ANNEX I: SOURCES

The Working Group received contributions from the following entities and people:

European Commission

- Commissioner Günther Oettinger on Copyright (17.12.2014)
- Commissioner Tibor Navracsics, Commissioner for Education, Culture, Youth & Sport (26.03.2015)
- Ms Maria Martin-Prat and Mr Marco Giorello (Copyright Unit - DG CONNECT)
- Commissioner Andrus Ansip, Vice-President for Digital Single Market (16.12.2015)
- Mr Helge Kleinwege, Policy Officer, "Intellectual Property and Fight Against Counterfeiting" Unit, DG GROWTH (16.03.2016)
- Mr Eric Peters and Ms María Martin-Prat ("Digital Single Market" and "Copyright" Units, DG CNECT) (16.03.2016)

European Parliament's services

- Ms Maria-José Martinez Iglesias, European Parliament's Legal Service (21.01.2015)
- Mr Joseph Dunne, European Parliament Research Service (28.05.2015)
- Ms Katharina Eisele, Ex Ante Impact Assessment Unit, European Parliament Research Service (18.02.2016)

Stakeholders heard by the Working Group (from January 2015 to September 2015)

- Mogens Blicher Bjerregård, President of the European Federation of Journalists (EFJ) (12.02.2015)
- Myriam Diocaretz, Secretary-General, European Writers' Council (EWC)(12.02.2015)
- Mr Patrick Ager, Secretary General, European Composer and Songwriter Alliance (ECSA)
- Ms Cécile Despringre, Executive Director, Society of Audiovisual Authors (SAA) (23.06.2015)
- Mr José María Montes, Director of Legal and International Affairs at AISGE and Vice President of the Association of European Performers' Organisations (AEPO-ARTIS) (23.06.2015)
- Ms Marie-Anne Ferry-Fall, President, European Visual Artists (EVA) (02.07.2015)

- Mr Aymeric Zublena, architect (02.07.2015)
- Ms Brigitta Bartsch, acting head of office/legal adviser, EU-Liaison Office of the Federal Chamber of German Architects (BAK) (02.07.2015)
- Mr Bent Nygaard Larsen, Federation of European Professional Photographers (02.07.2015)
- Véronique Desbrosses, General Manager, and Burak Özgen, Senior Legal Advisor, GESAC, European Grouping of Societies of Authors and Composers (21.01.2015)
- Ms. Liv Vaisberg, Legal Adviser, Federation of European Publishers (FEP) (12.02.2015)
- Mrs Francine Cunningham, Executive Director, European Newspaper Publishers' Association (ENPA) (12.02.2015)
- Françoise Dubruille, Director, European and International Booksellers Federation (EIBF) (12.02.2015)
- Albert de Roos, Senior Business Solution Analyst, Reed Elsevier (26.03.2015)
- Barbara Kalumenos, International Association of Scientific, Technical and Medical Publishers (STM) (26.03.2015)
- Mr Matthieu Philibert, Public Affairs Manager, IMPALA (Independent Music Companies Association)
- Mr Andrew Clark, VP Global Digital Business Affairs, Universal Music and Daniel Friedlaender, Head of EU Communications and Public Affairs, IFPI - International Federation of the Phonographic Industry
- Mr Bertrand Moullier (Narval Media) and Michael Ryan (GFM Films) representing the Independent Film & Television Alliance (IFTA) (23.06.2015)
- Ms Alexandra Lebret, Managing Director, European Producers Club (EPC) (17.09.2015)
- Mr Victor Hadida, President of the International Federation of Film Distributors Associations (FIAD) (17.09.2015)
- Ms Christine Eloy, General Manager, Europa Distribution (European Network of Independent Film Distributors) (17.09.2015)
- Ms Nicola Frank, Head of European Affairs, European Broadcasting Union (EBU) (17.09.2015)
- Ms Emilie Anthonis, Association of Commercial Television in Europe (ACT)
- Jean Martin, lawyer (26.03.2015)
- Pr. Pierre Sirinelli, Professor at Paris University (Panthéon Sorbonne), founder of CERDI (Centre d'études et de recherches en droit de l'immatériel), coordinator of the Mission

Report on the revision of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (October 2014)

- Mr Andrea Renda (CEPS), Giuseppe Mazziotti (CEPS), Felice Simonelli (CEPS), authors of the Infosco Directive Ex-post Impact Assessment study (28.05.2015)
- Mr Patrick Messerlin, Professor of economics (emeritus) and Director of the Groupe d'Economie Mondiale (GEM) at Sciences Po (23.06.2015)
- Dr. Silke von Lewinski, Senior Research Fellow at Max Planck Institute, Adj. Professor, Franklin Pierce Center for IP at Univ. of New Hampshire (23.06.2015)
- Dr. Eleonora Rosati, Lecturer in IP Law, University of Southampton (02.07.2015)
- Pr. Alexandra Bensamoun, Lecturer in private law, Université Paris-Sud, co-director of CERDI (Centre d'Études et de Recherche en Droit de l'Immatériel) (02.07.2015)
- Mr Frédéric Blin, Member of the Board of International Federation of Library Associations and Institutions (IFLA), representing the European Bureau of Library, Information and Documentation Associations (EBLIDA) (12.02.2015)
- Susan Reilly, Executive Director, Association of European Research Libraries (LIBER) (26.03.2015)
- Ms Alma Swan, Director of Advocacy Programmes, SPARC Europe (22.04.2015)
- Mr Nicola Mazzanti, President of ACE-Association des Cinémathèques Européennes (17.09.2015)
- Mr Neil Watson, Strategy Adviser to the British Film Institute (BFI) and Board Member of the Association of the European Film Agency Directors (EFAD) (23.06.2015)
- Ms Siada El Ramly, Director General, European Digital Media Association (EDiMA) (22.04.2015)
- Mr Malcolm Hutty, Chair of Intermediary liability working group, EuroISPA
- Mr Dragoslav Zachariev, Secretary General, European Federation of Independent Cinema Video on Demand Platforms (EuroVoD) (23.06.2015)
- Mr Dimitar Dimitrov, Wikimedia (02.07.2015)
- Mr Agustín Reyna, Senior Legal Officer and Digital Team Leader, BEUC (22.04.2015)
- Mr Lenz Queckenstedt, Verbraucherzentrale Bundesverband - vzbv (German national consumer organisation) (23.06.2015)
- Mr Andrew Farrow, project's coordinator, The Rights Data Integration (RDI) project (22.04.2015)

- Mr Dominic Young, CEO, The Copyright Hub (22.04.2015)
- Mr Cedric Manara, Copyright Counsel EMEA (16.12.2015)
- Mr Ben Smith, YouTube Partner Technology Manager (16.12.2015)
- Ms Clara Sommier, Public Policy and Government Relations Analyst (16.12.2015)
- Ms Helen Keefe, Head of International Policy, BBC (18.02.2016)
- Mr Christophe Roy, Deputy Director Legal Affairs, Groupe Canal+ (18.02.2016)
- Ms Janneke Slöetjes, Director, Public Policy Europe, Netflix (18.02.2016)
- Mr Mathieu Moreuil, The Sports Rights Owners Coalition (SROC) (18.02.2016)
- Mr Davyth Hicks, Secretary-General, European Language Equality Network (ELEN) (18.02.2016)
- Mr David Martín, Senior Legal Officer, The European Consumer Organisation (BEUC) (18.02.2016)
- Ms Elena Segal, Director, iTunes International (Apple) (16.03.2016)
- Ms Eirini Zafeiratou, Director Public Policy, Amazon (16.03.2016)
- Ms Marine Elgrichi, Head of Public Policy Europe, Spotify (16.03.2016)
- Ms Sylvie Fodor, Executive Director, Coordination of European Picture Agencies Stock, Press and Heritage (CEPIC) (16.03.2016)

ANNEX II: COMPOSITION OF THE WORKING GROUP ON IPR AND COPYRIGHT REFORM

Mr Pavel SVOBODA (EPP)

Mr Dietmar KÖSTER (S&D)

Mr Angel DZHAMBAZKI (ECR)

Mr Jean-Marie CAVADA (ALDE) - Coordinator of the WG

Mr Jiří MAŠTÁLKA (GUE/NGL)

Ms Julia REDA (Greens/EFA)

Ms Laura FERRARA (EFDD)

Mr Gilles LEBRETON (ENF)

Ms Adina-Ioana VĂLEAN (EPP) (ITRE)

Ms Catherine STIHLER (S&D) (IMCO)

Ms Helga TRÜPEL (Greens/EFA) (CULT)

Members of the Committee on International Trade also took part in the Working Group meetings when the agenda covered issues of its competence.