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DRAFT REPORT

on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
(2014/2256(INI))

Committee on Legal Affairs

Rapporteur: Julia Reda

CONTENTS

Page

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION 3

EXPLANATORY STATEMENT 8

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
(2014/2256(INI))

The European Parliament,

– having regard to Articles 4, 26, 34, 114 and 118 of the Treaty on the Functioning of the European Union (TFEU),

– having regard to Articles 11, 13, 14, 16, 17 and 52 of the Charter of Fundamental Rights of the European Union,

– having regard to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[1],

– having regard to the Berne Convention for the Protection of Literary and Artistic Works,

– having regard to the World Intellectual Property Organisation (WIPO) Copyright Treaty of 20 December 1996,

– having regard to the WIPO Performances and Phonograms Treaty of 20 December 1996,

– having regard to the WIPO Treaty on Audiovisual Performances, adopted by the WIPO Diplomatic Conference on the Protection of Audiovisual Performances in Beijing on 24 June 2012,

– having regard to Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market[2],

– having regard to Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information[3],

– having regard to Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works[4],

– having regard to Directive 2011/77/EU of the European Parliament and of the Council

[1] OJ L 167, 22.6.2001, p. 10.
[2] OJ L 84, 20.3.2014, p. 72.
[3] OJ L 175, 27.6.2013, p. 1.
[4] OJ L 299, 27.10.2012, p. 5.

of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights[1],

– having regard to Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission[2],

– having regard to Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[3],

– having regard to its resolution of 27 February 2014 on private copying levies[4],

– having regard to its resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs[5],

– having regard to the public consultation on the review of the EU copyright rules carried out by the Commission between 5 December 2013 and 5 March 2014,

– having regard to the Commission Green Paper entitled 'Copyright in the Knowledge Economy' (COM(2008)0466),

– having regard to the Commission communication entitled 'A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe' (COM(2011)0287),

– having regard to Rule 52 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy, the Committee on Internal Market and Consumer Protection and the Committee on Culture and Education (A8-0000/2015),

A. whereas the European legal framework for copyright and related rights is central to the promotion of creativity and innovation, and to access to knowledge and information;

B. whereas Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society was aimed at adapting legislation on copyright and related rights to reflect technological developments;

C. whereas the Charter of Fundamental Rights protects the freedom of expression, the freedom of the arts and scientific research, the right to education and the freedom to conduct a business;

D. whereas Article 17 of the Charter of Fundamental Rights enshrines the right to property,

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[1] OJ L 265, 11.10.2011, p. 1.
[2] OJ L 248, 6.10.1993, p. 15.
[3] OJ L 346, 27.11.1992, p. 61.
[4] Texts adopted, P7_TA(2014)0179.
[5] Texts adopted, P7_TA(2013)0368.

drawing a distinction between the protection of possessions, on the one hand (paragraph 1), and the protection of intellectual property, on the other (paragraph 2);

E. whereas decisions on technical standards can have a significant impact on human rights – including the right to freedom of expression, protection of personal data and user security – as well as on access to content[1];

1 Welcomes the Commission's initiative of conducting a consultation on copyright, which attracted great interest from civil society with more than 9 500 replies, 58.7 % of which came from end users[2];

2. Notes with concern that the vast majority of end-user respondents report facing problems when trying to access online services across the Member States, particularly where technological protection measures are used to enforce territorial restrictions;

Exclusive rights

3. Acknowledges the necessity for authors and performers to be provided with legal protection for their creative and artistic work; recognises the role of producers and publishers in bringing works to the market, and the need for appropriate remuneration for all categories of rightholders; calls for improvements to the contractual position of authors and performers in relation to other rightholders and intermediaries;

4. Considers the introduction of a single European Copyright Title on the basis of Article 118 TFEU that would apply directly and uniformly across the EU, in accordance with the Commission's objective of better regulation, as a legal means to remedy the lack of harmonisation resulting from Directive 2001/29/EC;

5. Recommends that the EU legislator further lower the barriers to the re-use of public sector information by exempting works produced by the public sector – as part of the political, legal and administrative process – from copyright protection;

6. Calls on the Commission to safeguard public domain works, which are by definition not subject to copyright protection and should therefore be able to be used and re-used without technical or contractual barriers; also calls on the Commission to recognise the freedom of rightholders to voluntarily relinquish their rights and dedicate their works to the public domain;

7. Calls on the Commission to harmonise the term of protection of copyright to a duration that does not exceed the current international standards set out in the Berne Convention;

Exceptions and limitations

8. Calls on the EU legislator to remain faithful to the objective stated in

[1] Opinion of the European Economic and Social Committee of 16 December 2014 on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Internet policy and governance – Europe's role in shaping the future of internet governance'.
[2] Commission, DG MARKT, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014, p. 5.

Directive 2001/29/EC of safeguarding a fair balance between the different categories of rightholders and users of protected subject-matter, as well as between the different categories of rightholders;

9. Notes that exceptions and limitations in the digital environment should be enjoyed without any unequal treatment as compared with those granted in the analogue world;

10. Views with concern the increasing impact of differences among Member States in the implementation of exceptions, which creates legal uncertainty and has direct negative effects on the functioning of the digital single market, in view of the development of cross-border activities;

11. Calls on the Commission to make mandatory all the exceptions and limitations referred to in Directive 2001/29/EC, to allow equal access to cultural diversity across borders within the internal market and to improve legal certainty;

12. Notes with interest the development of new forms of use of works on digital networks, in particular transformative uses;

13. Calls for the adoption of an open norm introducing flexibility in the interpretation of exceptions and limitations in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or rightholder;

14. Urges the European legislator to ensure the technological neutrality and future-compatibility of exceptions and limitations by taking due account of the effects of media convergence; considers, in particular, that the exception for quotation should expressly include audio-visual quotations in its scope;

15. Stresses that the ability to freely link from one resource to another is one of the fundamental building blocks of the internet; calls on the EU legislator to make it clear that reference to works by means of a hyperlink is not subject to exclusive rights, as it does not consist in a communication to a new public[1];

16. Calls on the EU legislator to ensure that the use of photographs, video footage or other images of works which are permanently located in public places is permitted;

17. Emphasises that the exception for caricature, parody and pastiche should apply regardless of the purpose of the parodic use;

18. Stresses the need to enable automated analytical techniques for text and data (e.g. 'text and data mining') for all purposes, provided that permission to read the work has been acquired;

19. Calls for a broad exception for research and education purposes, which should cover not only educational establishments but any kind of educational or research activity, including non-formal education;

[1] Order of the Court of Justice of 21 October 2014 in Case C-348/13, *BestWater International GmbH* v *Michael Mebes and Stefan Potsch* (request for a preliminary ruling from Germany's Bundesgerichtshof).

20. Calls for the adoption of a mandatory exception allowing libraries to lend books to the public in digital formats, irrespective of the place of access;

21. Calls on the EU legislator to preclude Member States from introducing statutory licences for the compensation of rightholders for the harm caused by acts made permissible by an exception;

22. Calls for the adoption of harmonised criteria for defining the harm caused to rightholders in respect of reproductions made by a natural person for private use, and for harmonised transparency measures as regards the private copying levies put in place in some Member States[1];

23. Stresses that the effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, should not be hindered by technological measures;

24. Recommends making legal protection against the circumvention of any effective technological measures conditional upon the publication of the source code or the interface specification, in order to secure the integrity of devices on which technological protections are employed and to ease interoperability; considers, in particular, that where the circumvention of technological measures is allowed, technological means to achieve such authorised circumvention must be available;

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25. Instructs its President to forward this resolution to the Council and the Commission, and to the parliaments and governments of the Member States.

[1] As stated in António Vitorino's recommendations of 31 January 2013 resulting from the latest mediation process conducted by the Commission in respect of private copying and reprography levies.

EXPLANATORY STATEMENT

The purpose of Directive 2001/29/EC (hereinafter the InfoSoc Directive)[1] was the harmonisation of certain aspects of copyright and related rights in the information society.

The InfoSoc Directive introduced minimum levels of copyright protection without setting standards for the protection of the public's and users' interests. As a consequence, the implementation of the InfoSoc Directive has not led to the EU-wide harmonisation of copyright sought by many parties. In particular, the optional nature of most copyright exceptions and limitations and the failure to limit the scope of protection of copyright and related rights to those outlined in the directive, has led to continuing fragmentation of national copyright laws among Member States.

This fragmentation is now exacerbated by the recent introduction by some Member States of additional neighbouring rights that particularly target online uses (e.g. in 2013 and 2014, Germany and Spain introduced so called 'ancillary' copyright laws for press publishers targeting news aggregators), and more generally by the misadaptation of the current EU copyright rules to the increase of cross-border cultural exchange facilitated by the Internet.

The ability to understand the law is central to its acceptance and legitimacy. It is now common for individuals, companies and even public institutions to fail to understand the copyright laws resulting from the implementation of the 2001 Directive. In particular, those who are accessing, transforming and creating new works while being located or using resources in different Member States, can find the system burdensome, while facing legal uncertainty as to whether they are complying with the law, or whether they are able to conduct their business or express their creativity without high transaction costs or risking to cross legal lines.[2] As the InfoSoc Directive was envisioned as an implementation of the four freedoms of the Union,[3] these shortcomings raise particular concerns.

The fragmentation of EU copyright law and the resulting lack of transparency are well understood by the Commission, and are reflected in the Commission's intention to break down 'national silos' in copyright legislation.[4] A particularly pressing issue in this regard is the optional nature of the exceptions and limitations to exclusive rights. For the sake of legal clarity and user-friendliness, all exceptions and limitations permitted in the InfoSoc Directive should be made mandatory in all Member States. It is worth noting that all exceptions and limitations are subject to the Three-Step-Test which limits the authorised uses to certain specific cases that do not conflict with the normal exploitation of the work and do not

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[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.06.2001 p. 10).
[2] Dobusch & Quack (2012): Transnational Copyright: Misalignments between Regulation, Business Models and User Practice. Osgoode CLPE Research Paper No. 13/2012. Available at: http://ssrn.com/abstract=2116334.
[3] Directive 2001/29/EC, Recital 3: "*The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest*".
[4] Commission President Jean-Claude Juncker's mission letter to Commissioner Oettinger: http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/oettinger_en.pdf.

unreasonably prejudice the legitimate interests of the author or right holder.[1] Considering these rules of interpretation, making all existing exceptions mandatory would therefore not be to the detriment of rightholders, while greatly improving the ability of users of copyrighted works to actually benefit from the exceptions and limitations in a cross-border setting.

The lack of harmonisation in areas of copyright law that fall explicitly outside the scope of the InfoSoc directive, such as the term of copyright protection,[2] has demonstrable negative consequences on the clarity of the law. As revealed by the 'public domain calculator' established by Europeana,[3] there is a staggering complexity in the determination of the different copyright term lengths in Member States, some of them requiring knowledge about the circumstances of the author's death or about the situation of the author's heirs at the time of her death - information that is rarely available to individuals or institutions trying to determine the public domain status of a work. In addition, the latest increases by the EU of the minimum protection terms for certain categories of works and subject-matters have been undertaken against the explicit advice of academic studies commissioned by the Commission,[4] whereas copyright term extensions are known to negatively affect the availability of works.[5] Therefore, copyright terms should be harmonised and set on the minimum international standard established by the Berne convention.

In its consultation on copyright,[6] the Commission formulated a question about the opportunity of a Single European Copyright Title. According to the opinions expressed in response to the consultation, notably by leading members of academia, but also by cultural heritage institutions - such as libraries, museums and archives - by artists and the general public, the goals set out in the InfoSoc directive can be best achieved with the introduction of a Single European Copyright Title. This single title would apply directly and uniformly across the EU,7 with the aim of removing obstacles stemming from the territorial nature of copyright and related rights that are currently standing in the way of existing instruments achieving their

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[1] The Three-Step-Test stems from the international law standards on copyright established by the WIPO Treaties (Art. 10 of WCT and Art. 16 of WPPT).

[2] Directive 2001/29/EC, Article 1(2)(d).

[3] Available at: http://outofcopyright.eu/.

[4] Institute for Information Law IVIR (2006): The Recasting of Copyright & Related Rights for the Knowledge Economy, report to the European Commission, DG Internal Market. Available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

[5] Heald (2013): How copyright keeps works disappeared. Illinois Public Law Research Paper No. 13-54, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290181; Buccafusco & Heald (2012): Do bad things happen when works enter the public domain? Empirical Tests of copyright term extension. Chicago-Kent College of Law Legal Studies Research Paper No. 2012-04, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130008; Helberger, Duft, Hugenholtz and Van Gompel (2008): Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea. Available at http://www.ivir.nl/publications/helberger/EIPR_2008_5.pdf.

[6] Consultation on the review of the EU copyright rules carried out by the Commission between 5 December 2013 and 5 March 2014. Documents and responses available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.

[7] According to the report on the Commission's copyright consultation, "*The vast majority of end users/consumers consider that the EU should pursue the idea of a single EU copyright title*", as well as the majority of institutional users and academics and a significant number of authors (Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, DG MARKT, July 2014, p. 89 http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf). The European Copyright Society recently urged Commissioner Oettinger to pursue this plan in an open letter supported by many leading scholars: http://www.ivir.nl/syscontent/pdfs/78.pdf.

goal of harmonisation and completing the Digital Single Market.[1] Since the entry into force of the Lisbon Treaty, there is now a legal basis in Article 118 of the Treaty on the Functioning of the European Union (TFEU) which provides for the possibility for the EU legislator to create "European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and [to set up] centralised Union-wide authorisation, coordination and supervision agreements". This legal basis has thus far been used in order to create the European unitary patent and the current revision of the Community trademark regulation. This legal basis could conceivably be used to create a Single European Copyright Title.

An evaluation of the InfoSoc Directive must also consider new forms of use and creation of works, and whether the directive is still adequate in the light of technological and cultural development. The initiative of the European Commission to conduct a public consultation on the review of the EU copyright rules explored these new developments in great detail, which advocates to consider the results of this consultation as core elements to guide the European copyright reform.

The urgency for a reform is underlined by the high level of participation to the consultation, with over 9 500 replies received, more than half of which coming from individual end users/consumers.[2] A number of initiatives were launched by organised stakeholders[3] that used free and open source software to remove technical barriers in the process of replying to the consultation. These initiatives nurtured the debate around the Commission's public consultation and drew attention to it. Their contribution to best practices of accessibility and ease of understanding should be considered by the Commission when designing future consultations.

The Commission's consultation on the copyright reform provides a thorough picture of the change of context of copyright in the digital age, and reveals the most pressing problems met by many stakeholders in their everyday usage of copyright.

Since 2001, whereas new internet-based services, such as streaming, have gained importance, it seems common-sense that one of the main objectives of the Digital Single Market should be removing territorial restrictions and encouraging pan-European accessibility of services. Such progress can be deemed integral and inherent to the notion of a Digital Single Market and is an important step towards fostering innovation and competitiveness of European businesses. Recent technological development has been associated with an increase in creative output,[4] but the remuneration of creators is increasingly dependent on their negotiating position towards providers of online services or other intermediaries that contribute to bring their work to the public. It is therefore necessary to develop a legal context that improves the negotiating position of creators in their contractual relationships. It is also key to put in place pro-competitive measures, such as net neutrality and the encouragement of open formats, in order to lower entry barriers for competing service providers and to avoid the development of

[1] Institute for Information Law IVIR (2006): The Recasting of Copyright & Related Rights for the Knowledge Economy (op. cit.).
[2] Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, DG MARKT, July 2014, p. 5.
[3] These include, for example, initiatives like "Fix copyright!", "Creators for Europe", and "Copywrongs.eu".
[4] Masnick & Ho (2013): The Sky Is Rising (2), Regional Study: Germany, France, UK, Italy, Russia, Spain. Available at: https://www.techdirt.com/skyisrising2/ https://www.documentcloud.org/documents/561023-the-sky-is-rising-2.html.

monopolies.

The widespread use of the Internet throughout the Union has led to a situation where virtually everybody is engaging in activities relevant to copyright law. Copyright law thus plays a central role in the daily lives of most European citizens, and as such should be updated to reflect the needs of all user groups. This requires a new balance between the interests of rightholders and the ability of average people to engage in activities that are critical to their social, cultural and economic lives, but were outside of the scope of copyright law in the past technological environment.

A relevant example of this need for adaptation is the question of how or whether to protect works of architecture in public places. In the past, legislation aimed to guard against inappropriate commercial exploitation of architecture through mass-produced post-cards, which did not target the average holidaymaker who would have taken photos that would most likely have been shared only privately once printed. Today however, any holidaymaker may create a digital image, upload it to a social media site, and perhaps unknowingly make it available to the entire global online community. Given the millions of Europeans who are already engaging in such activities, it becomes clear that copyright law can only be practical and fair if the depiction of public buildings and sculptures is exempt from copyright protection, so as not to put an unreasonable burden on everyday online activities. The extremely diverging implementation of the "freedom of panorama" exception outlined in the InfoSoc Directive[1] in different Member States shows that there needs to be a pan-European, broadly defined users' right to display and communicate works that are located permanently in public places.[2]

Similarly, whereas media convergence has generated a dramatic shift in how users create, consume and interact, this major change has not been reflected in European law. Nevertheless, this shift has created the need for copyright exceptions to be phrased in a more technology-neutral and future-proof way. Activities that serve the purpose of quotation now increasingly use audio-visual material as their basis; for example, in the common online practice of illustrating statements or emotions with animated gif images[3] showing small snippets of popular movies, tv series or sports events. For exceptions to fulfil their purpose of protecting the freedom of expression and of information in the digital environment, they must not be limited to the written world, but explicitly encompass audio-visual material, while being phrased openly enough to accommodate possible new forms of cultural expression.

In this new digital environment, it is also notable that libraries and other cultural heritage institutions are increasingly struggling to fulfil their public interest mission of public education and preservation of works. Many have concluded that this is at least partly because of the lack of protection offered to them by EU copyright law. The optional, narrow exception for libraries in the InfoSoc Directive has proven insufficient in enabling them to lend e-books

[1] Directive 2001/29/EC, Article 5 (3) h.
[2] A distinction between commercial and non-commercial uses creates new problems in the online environment as an increasing number of users simultaneously act as producers of works. Conditioning the benefit from exceptions on non-commercial use discourages the adoption of innovative remuneration schemes such as micro-payment, which may prove vital for the development of new business models for creators.
[3] For an explanation of this practice, see: http://d-scholarship.pitt.edu/13531/1/LevinsonND_etdPitt2012_Revised072313-1.pdf (pp. 41-43).

to their patrons. Although the free access to books via libraries, regardless of format[1], has a positive effect on commercial sales as it contributes to a reading culture, European libraries are facing unnecessary restrictions on e-lending opportunities, such as having to obtain access to a lending service with a restricted repertoire. Instead, libraries should be able to individually purchase the e-books that are most relevant to their community, and be able to lend them to their patrons online.

The important lesson of the libraries example is that because it has taken over a decade to move from the introduction of the InfoSoc Directive to its evaluation, we cannot assume that future European legislation will keep up with technological developments. In reality, it is most likely that legislation will lag behind such developments. Therefore, legal changes need to be introduced to allow for the adaptation to unexpected new forms of cultural expression. This flexibility could be achieved by the introduction of an open norm to be applied to the list of exceptions and limitations, subject to the rule of the Three-Step-Test. The main concern raised against the introduction of an open norm is that it could result in a fragmented interpretation by national courts. However, this concern could be addressed in the European legislation through the introduction of guiding rules for the interpretation of the Three-Step-Test[2] and by further harmonisation of the EU copyright framework.

[1] Cf. Library eBook Survey hosted by OverDrive and American Library Association (ALA). Available at: http://blogs.overdrive.com/files/2012/11/ALA_ODSurvey.pdf.

[2] The Three-Step Test does not require limitations and exceptions to be interpreted narrowly: "*All exceptions and limitation*s are to be interpreted according to their objectives and purposes." Cf. Max Planck Institute for Innovation and Competition: A Balanced Interpretation of the "Three-Step Test" in Copyright Law, September 2008. Available at: http://www.ip.mpg.de/en/pub/news/declaration_threesteptest.cfm.