EUROPSKI PARLAMENT 2014 - 2019

Odbor za pravna pitanja

2014/2256(INI)

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NACRT IZVJEŠĆA

o provedbi Direktive 2001/29/EZ Europskog parlamenta i Vijeća od 22. svibnja 2001. o usklađivanju određenih aspekata autorskog i srodnih prava u informacijskom društvu
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Odbor za pravna pitanja

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PR_INI

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PRIJEDLOG REZOLUCIJE EUROPSKOG PARLAMENTA

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Europski parlament,

– uzimajući u obzir članke 4., 26., 34., 114. i 118. Ugovora u funkcioniranju Europske unije (UFEU),

– uzimajući u obzir članke 11., 13., 14., 16., 17. i 52. Povelje o temeljnim pravima Europske unije,

– uzimajući u obzir Direktivu 2001/29/EZ Europskog parlamenta i Vijeća od 22. svibnja 2001. o usklađivanju određenih aspekata autorskog i srodnih prava u informacijskom društvu[1],

– uzimajući u obzir Bernsku konvenciju za zaštitu književnih i umjetničkih djela,

– uzimajući u obzir Ugovor o autorskom pravu Svjetske organizacije za intelektualno vlasništvo (WIPO) od 20. prosinca 1996.,

– uzimajući u obzir Ugovor o izvedbama i fonogramima WIPO-a od 20. prosinca 1996.,

– uzimajući u obzir Ugovor o audiovizualnim izvedbama, koji je WIPO usvojio 24. lipnja 2012. na Diplomatskoj konferenciji o zaštiti audiovizualnih izvedaba održanoj u Pekingu,

– uzimajući u obzir Direktivu 2014/26/EU Europskog parlamenta i Vijeća od 26. veljače 2014. o kolektivnom ostvarivanju autorskog prava i srodnih prava te izdavanju odobrenja za više državnih područja za prava na internetsko korištenje glazbenih djela na unutarnjem tržištu[2],

– uzimajući u obzir Direktivu 2013/37/EU Europskog parlamenta i Vijeća od 26. lipnja 2013. o izmjeni Direktive 2003/98/EZ o ponovnoj uporabi informacija javnog sektora[3],

– uzimajući u obzir Direktivu 2012/28/EU Europskog parlamenta i Vijeća od 25. listopada 2012. o određenim dozvoljenim korištenjima djela siročadi[4],

– uzimajući u obzir Direktivu 2011/77/EU Europskog parlamenta i Vijeća od 27. rujna 2011. o izmjeni Direktive 2006/116/EZ o trajanju zaštite autorskog prava i određenih srodnih prava[5],

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[1] SL L 167, 22.6.2001., str. 10.
[2] SL L 84, 20.3.2014.., str. 72.
[3] SL L 175, 27.6.2013., str. 1.
[4] SL L 299, 27.10.2012., str. 5.
[5] SL L 265, 11.10.2011., str. 1.

– uzimajući u obzir Direktivu Vijeća 93/83/EEZ od 27. rujna 1993. o koordinaciji određenih pravila s obzirom na autorsko pravo i srodna prava koja se odnose na satelitsko emitiranje i kabelsko reemitiranje[1],

– uzimajući u obzir Direktivu Vijeća 92/100/EEZ od 19. studenoga 1992. o pravu iznajmljivanja i pravu posudbe i određenim pravima srodnim autorskom pravu u području intelektualnog vlasništva[2],

– uzimajući u obzir svoju Rezoluciju od 27. veljače 2014. o pristojbama na privatno umnožavanje[3],

– uzimajući u obzir svoju Rezoluciju od 12. rujna 2013. o promicanju europskih kulturnih i kreativnih sektora kao izvora gospodarskog rasta i radnih mjesta[4],

– uzimajući u obzir javno savjetovanje o preispitivanju pravila EU-a o autorskim pravima koje je Komisija provela u razdoblju između 5. prosinca 2013. i 5. ožujka 2014.,

– uzimajući u obzir Zelenu knjigu Komisije pod nazivom „Autorsko pravo u gospodarstvu znanja” (COM(2008)0466),

– uzimajući u obzir Komunikaciju Komisije naslovljenu „Jedinstveno tržište prava intelektualnog vlasništva: jačanje kreativnosti i inovacija kako bi se Europi omogućili gospodarski rast, kvalitetna radna mjesta te prvorazredni proizvodi i usluge” (COM(2011)0287),

– uzimajući u obzir članak 52. Poslovnika,

– uzimajući u obzir izvješće Odbora za pravna pitanja i mišljenja Odbora za industriju, istraživanje i energetiku, Odbora za unutarnje tržište i zaštitu potrošača i Odbora za kulturu i obrazovanje (A8-0000/2015),

A. budući da europski pravni okvir za autorsko pravo i srodna prava zauzima središnje mjesto u promicanju stvaralaštva i inovacija te pristupa znanju i informacijama;

B. budući da je svrha Direktive 2001/29/EZ o usklađivanju određenih aspekata autorskog i srodnih prava u informacijskom društvu bila usvajanje zakonodavstva o autorskom i srodnim pravima kojim se u obzir uzima tehnološki napredak;

C. budući da se Poveljom o temeljnim pravima štite sloboda izražavanja, sloboda umjetnosti i znanstvenog istraživanja, pravo na obrazovanje i sloboda poduzetništva;

D. budući da je u članku 17. Povelje o temeljnim pravima sadržano pravo na vlasništvo i da se u njemu razlikuje, s jedne strane, zaštita imovine (stavak 1.) i, s druge strane, zaštita intelektualnog vlasništva (stavak 2.);

[1] SL L 248, 6.10.1993., str. 15.
[2] SL L 346, 27.11.1992., str. 61.
[3] Usvojeni tekstovi, P7_TA(2014)0179.
[4] Usvojeni tekstovi, P7_TA(2013)0368.

E. budući da odluke o tehničkim normama mogu snažno utjecati na ljudska prava, među ostalim na pravo na slobodu izražavanja, zaštitu osobnih podataka i sigurnost korisnika kao i na pristup sadržajima[1];

1. pozdravlja inicijativu Komisije za provedbu savjetovanja o autorskom pravu, koja je pobudila velik interes u civilnom društvu: zaprimljeno je više od 9500 odgovora, a 58,7 % njih dali su krajnji korisnici[2];

2. sa zabrinutošću primjećuje da velika većina krajnjih korisnika koji su se očitovali navodi da se suočava s problemima u pristupanju uslugama na internetu u državama članicama, posebice ako se u svrhu teritorijalnih ograničenja primjenjuju mjere tehnološke zaštite;

Isključiva prava

3. priznaje da je nužno da autori i umjetnici izvođači mogu dobiti pravnu zaštitu za svoj stvaralački i umjetnički rad; priznaje ulogu producenata i umjetnika izdavača u plasiranju djela na tržište i potrebu za odgovarajućom naknadom za sve kategorije nositelja prava; poziva na poboljšanje ugovornog položaja autora i umjetnika izvođača u odnosu na druge nositelje prava i posrednike;

4. uvođenje jedinstvenog europskog autorskog prava koje se temelji na članku 118. UFEU-a i primjenjuje izravno i na jednak način u cijelom EU-u te u skladu s ciljem Komisije o postizanju bolje regulative smatra pravnim sredstvom za rješavanje nedostatka usklađenosti proizišlog iz Direktive 2001/29/EC;

5. preporučuje zakonodavcu EU-a da dodatno smanji prepreke za ponovnu uporabu informacija iz javnog sektora tako što će iz zaštite autorskog prava izuzeti djela nastala u okviru političkog, zakonodavnog i upravnog procesa tog sektora;

6. poziva Komisiju da zaštiti djela koja su javno dobro, tj. koja po definiciji nisu zaštićena autorskim pravom te bi stoga trebala biti moguća njihova uporaba i ponovna uporaba bez tehničkih ili ugovornih ograničenja; također poziva Komisiju da nositeljima prava prizna slobodu da se svojevoljno odreknu svojih prava i time svoja djela prenesu u javno dobro;

7. poziva Komisiju da utvrdi trajanje zaštite autorskog prava ne prekoračujući pritom vremenske okvire utvrđene postojećim međunarodnim standardima iz Bernske konvencije;

Iznimke i ograničenja

8. poziva zakonodavca EU-a da i dalje ostane vjeran cilju iz Direktive 2001/29/EZ koji se odnosi na osiguravanje pravedne ravnoteže između različitih kategorija nositelja prava i

[1] Mišljenje Europskog gospodarskog i socijalnog odbora od 16. prosinca 2014. o Komunikaciji Komisije Europskom parlamentu, Vijeću, Europskom gospodarskom i socijalnom odboru te Odboru regija: „Politika interneta i upravljanje internetom; Uloga Europe u oblikovanju budućnosti upravljanja internetom”.
[2] Komisija, DG MARKT, izvješće o odgovorima na javno savjetovanje o preispitivanju pravila EU-a o autorskim pravima, srpanj 2014., str.5.

korisnika predmeta zaštite kao i između različitih kategorija nositelja prava;

9. primjećuje da bi se iznimke i ograničenja u digitalnom okruženju trebale primjenjivati na jednak način jednako kao i one predviđene u analognom okruženju;

10. sa zabrinutošću primjećuje sve veći utjecaj različitosti u primjeni iznimaka među državama članicama, čime se stvara pravna nesigurnost te izravno negativno utječe na funkcioniranje jedinstvenog digitalnog tržišta u kontekstu razvoja prekograničnih aktivnosti;

11. poziva Komisiju da sve iznimke i ograničenja iz Direktive 2001/29/EZ proglasi obaveznima, da dopusti jednak prekogranični pristup kulturnoj raznolikosti na unutarnjem tržištu i da poboljša pravnu sigurnost;

12. sa zanimanjem primjećuje razvoj novih vidova uporabe djela u okviru digitalnih mreža, posebice njihovu uporabu u svrhu preinake;

13. poziva na usvajanje otvorene norme kojom će se omogućiti fleksibilno tumačenje iznimaka i ograničenja u određenim posebnim slučajevima koji nisu u sukobu s uobičajenim iskorištavanjem djela i koji bezrazložno ne dovode u pitanje zakonite interese autora ili nositelja prava;

14. poziva europskog zakonodavca da zajamči tehnološku neutralnost i buduću kompatibilnost iznimaka i ograničenja uzimajući u obzir utjecaj konvergencije medija; osobito smatra da bi iznimka koja se odnosi na doslovno navođenje trebala obuhvaćati i doslovno navođenje u audiovizualnom mediju;

15. ističe da je mogućnost slobodnog slijeđenja poveznica s jednog izvora na drugi jedna od temeljnih sastavnica interneta; poziva zakonodavca EU-a da jasno istakne da upućivanje na djela u obliku hiperpoveznica ne podliježe isključivim pravima jer ne predstavlja komunikaciju s novom javnošću[1];

16. poziva zakonodavca EU-a da zajamči dopuštenost upotrebe fotografija, videozapisa ili drugih vizualnih prikaza djela trajno smještenih na javnim mjestima;

17. naglašava da bi se iznimke u slučajevima karikature, parodije i pastiša trebale primjenjivati bez obzira na svrhu parodizacije djela;

18. ističe potrebu za omogućavanjem primjene automatiziranih analitičkih tehnika namijenjenih za tekst i podatke (npr. dubinska analiza podataka i teksta) u sve svrhe, pod uvjetom da je ishođeno dopuštenje za čitanje djela;

19. poziva na opsežnu iznimku koja će se odnositi na istraživanje i obrazovanje i obuhvaćati ne samo obrazovne ustanove nego i sve vrste obrazovnih ili istraživačkih aktivnosti, među ostalim i neformalno obrazovanje;

[1] Odluka Suda Europske unije od 21. listopada 2014. u predmetu C-348/13, *BestWater International GmbH* protiv *Michaela Mebesa i Stefana Potscha* (zahtjev za donošenje prethodne odluke Bundesgerichtshofa).

20. poziva na usvajanje obavezne iznimke kojom će se knjižnicama omogućiti da posuđuju knjige u digitalnom obliku, bez obzira na mjesto pristupa;

21. poziva zakonodavca EU-a da državama članicama zabrani uvođenje isključivih licencija za isplatu naknade nositeljima prava zbog štete koja je nanesena radnjama dopuštenima iznimkom;

22. poziva na usvajanje usklađenih kriterija za utvrđivanje štete koju su nositeljima prava počinile fizičke osobe reproduciranjem za upotrebu u privatne svrhe kao i usklađenih mjera transparentnosti u vezi s pristojbama na privatno umnožavanje koje su uvele neke države članice[1];

23. ističe da tehničke mjere ne bi trebale ometati učinkovitu primjenu iznimaka ili ograničenja te pristup sadržaju koji nije zaštićen autorskim pravom ili srodnim pravima;

24. preporučuje da pravna zaštita protiv izbjegavanja učinkovitih tehničkih mjera bude uvjetovana objavljivanjem izvornog kôda ili specifikacije sučelja kako bi se osigurao integritet uređaja na koje se te mjere zaštite primjenjuju te kako bi se olakšala interoperabilnost; u prvom redu smatra da u slučaju da se dopusti izbjegavanje tehničkih mjera, moraju biti dostupna tehnička sredstva za provedbu tih dopuštenih izbjegavanja;

o

o o

25. nalaže svojem predsjedniku da ovu Rezoluciju proslijedi Vijeću i Komisiji te parlamentima i vladama država članica.

[1] Kako je navedeno u preporukama Antónija Vitorina od 31. siječnja 2013. koje su proizišle iz posljednjih postupka posredovanja Komisije o pristojbama na privatno umnožavanje i reprodukciju.

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

[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

[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

[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.

to lower entry barriers for competing service providers and to avoid the development of 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

[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).

for libraries in the InfoSoc Directive has proven insufficient in enabling them to lend e-books 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.