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*Science and Technology Options
Assessment*

S T O A

**COPYRIGHT IN THE EU -
WHAT NEXT?**

Final Report

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SCIENCE AND TECHNOLOGY OPTIONS ASSESSMENT

COPYRIGHT IN THE EU - WHAT NEXT?

Final Report

Abstract

On October 12, 2010 the Science and Technology Options Assessment Panel (STOA) together with Technopolis Consulting Group supported by Knowledge4Innovation/The Lisbon Forum, and TNO, organised a half-day workshop entitled 'Copyright in the Single Market, Opportunities for Harmonisation and management of Rights'. This workshop was part of the 2nd European Innovation Summit at the European Parliament which took place on 11-14 October 2010. The workshop addressed in the first part the topic of the opportunities for further harmonising EU Copyright law. Despite a number of copyright related Directives, harmonisation of copyright law remains an area of controversy and a considerable number of issues arise where higher degree of harmonisation and also the level of protection to be granted are heavily debated. The second part focused on issues related to the management of rights, i.e. the means by which copyright and related rights are administered (licensed, assigned and remunerated), and whether current practices with a particular view on transparency and governance of copyright management hinder the development of the Internal Market. Despite difficulties to reach consensus in the discussion, four areas for possible policy action were identified

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Executive Summary

The Science and Technology Options Assessment Panel (STOA Panel) of the European Parliament assigned a study to Technopolis on the topic of the copyright system. The study is based on the outcomes of a workshop discussion at the 2nd European Innovation Summit on Oct 12, 2010, and background material collected.

The background

Copyrights are the least harmonised instrument of the IPR system in Europe. A total of seven Directives have been designed to foster harmonisation and ultimately innovation. They have created progress, but the main issue of territoriality remains. While technology has eradicated national borders and created an online means for easy and cheap dissemination of content, pan-European content dissemination still requires (often tediously) obtaining permissions from copyright owners for each Member State. Where exceptions to private copying have been implemented, heterogeneous rules in each Member State for calculating and collecting fees as compensation (copying levies) are said to oppose the principles of a Single Market.

The aim of the study is to examine the status of harmonisation of copyright law in the EU and lay possible foundations for further harmonisation/unification steps. The rationale for this undertaking is that Intellectual Property Rights (IPR) is one of the subjects that have been identified to be of high importance for innovation and economic welfare in the EU. Copyrights¹ are a field within the IPR system which faces particular challenges with respect to harmonisation. Copyrights are especially affected by the technological changes of the IT world, and in particular the new usage and business possibilities of the internet.

The rationale for harmonising copyright legislation in the EU is similar to the reasons why harmonisation has also been pursued with the other main IPR instruments.² For harmonising EU copyrights, seven core Directives (the 'acquis') have been implemented.

¹ Copyrights are a type of intellectual property (IP) right which are granted to an author or creator of an original 'work'. A work protected by copyright cannot be legally reproduced, distributed, communicated to the public, lent, rented out or publicly performed without the consent of the owner. 'Works' in this context may refer to poems, plays and other literary works, movies, choreographic works, musical compositions, audio recordings, paintings, drawings, sculptures, software, radio or television broadcasts.

² I.e., creation of a single market for copyright goods and services; improving the competitiveness of the economy in copyright goods and services; a need to protect intellectual creation and investment produced in the Community against unfair exploitation by users in Non-Member States; a need to balance the interests of right holders and third parties such as the general public in order to allow for competition.

An assessment performed in 2006 on behalf of the European Commission on the status of harmonisation gauged that despite of these efforts only limited success has been achieved. While some of the main disparities between the laws of the Member States have been 'smoothed out', the issue of territoriality remains. This means that content providers aiming at European producers need to clear rights³ covering 27 Member States. Furthermore, the assessment report states that only a limited *acquis* has been developed on the subject matter. Harmonised rules have been solely established with respect to new or controversial matters (e.g., computer software, databases and photographs).

Apart from general harmonisation, some of the prominent recurring issues in the copyright debate are copyright infringement (piracy), the system of copyright levies and of collective rights management. Levies are a form of tax charged on purchase of blank media or electronic devices, a compensation of right holders for allowing users to copy works for private purposes. There is no Community-wide levy system. Five of the 27 Member States do not have provisions for private copying. In those countries with a levy system, differences are visible with respect to the type of media/equipment charged or the way the levies are calculated.

A similar topic is that of collective rights management which is handled by dedicated collecting societies. These societies – also responsible for collecting copyright levies act on behalf of their members (authors of works), negotiate rates and terms of use with users, issue licenses authorizing uses or collect and distribute royalties. Issues of complexity, transparency arise which are often said to especially hinder the development of cross-border business models.

The workshop discussion

Against this backdrop, the workshop discussion focussed on likely needs for a fundamental change in the harmonisation process of copyright law in general, and the treatment of copyright levies and collective rights management in particular.

The main discussion points at the workshop were the following:

- Discussants noted that the harmonisation process lost momentum due to the need to accommodate the needs of more (new) stakeholders. In particular, Internet Service Providers (ISPs) and manufacturers of consumer electronics (CE) appeared as new stakeholders in addition to users and right holders.
- There was no consensus on the need for further harmonisation. CE industry representatives argued that the country-by-country approach would hinder the development of economic scale effects, would lead users to not having access to certain services and/or content and would entail smaller markets for authors of works. The counter argument was that legislative differences between countries are minor, and that several of the identified problems may not be the result of suboptimal copyright legislation.

³ Rights clearance in copyright terminology refers to the process of obtaining a right from a rights holder, often through a permission letter or a financial transaction. Because of the territoriality principle, each Member State may show a different right situation for one particular work. There is hence the need to obtain clearance/permission in each of the 27 Member States, if a content provider aims to disseminate the copyrighted content throughout the EU.

- As regards copyright levies, trade-related issues and issues pertaining to the calculation of fair remuneration were raised. The former affect particularly new online business models and instances where goods need to be moved across borders. CE industry representatives demanded a more objective and predictable system. Collecting society representatives noted that a first step to harmonisation could also be the introduction of the levy system in those countries which do not have legal provisions for private use of copyrighted material.
- There are similarities between the debate on copyright levies and that of collective rights management. A Commission-organised stakeholder consultation process between mid-2008 and 2010 showed initially some progress. All parties agreed that levies should be calculated on actual use. However, industry left the negotiation table after it got the – contested – impression that the topic should be treated at Member State level. There has been no indication whether the consultation process will be picked up in the future again.
- There have been some doubts expressed by other discussants whether artists (as primary beneficiaries of any licensing system) and consumers are sufficiently represented in the relevant forum and consultation processes. Especially the collecting society representatives argued for a more intense fight against piracy as prime remedy for many of the problems described.

The conclusions

The following are the main conclusions that can be drawn. They also constitute main policy areas for action (a more differentiated reasoning for these conclusions is presented in the main text):

- *Fighting piracy:* The problem of copyright infringement (i.e., piracy) has to be addressed more thoroughly. The European Parliament could be especially instrumental in this context for educating consumers.
- *Simpler copyright management system:* The current collective rights management system (and the copyright levy system) should be simplified, either by updating the existing system or by creating alternatives.
- *Payment based on actual use:* Despite challenges for measurement, attempts should be made to have levy tariffs calculated on the basis of actual use of a medium/device.
- *Alignment of stakeholder interests and involvement of stakeholder groups as requirement for advances towards a single 'European Copyright':* Possibilities to reignite the stakeholder negotiations should be explored, as well as opportunities to have a higher involvement of artists and consumers. The European Parliament could be instrumental in facilitating the respective dialogues.
- *Considerations regarding a future unified European Copyright System:* In the long run, a unified European Copyright System could tackle the issue of territoriality in a fundamental manner. The output of the Wittem project, a prototype European copyright code, could prove a good starting point for respective considerations.

1. Introduction

This study report addresses the topic 'Copyright in the EU – What next?'. The study is based on the outcomes of a workshop and a background report prepared for this workshop. The (half-day) workshop took place at the *2nd European Innovation Summit* at the European Parliament in Brussels on October 12, 2010 and is therefore part of the larger summit over 11 and 12 October 2010. The main theme of the summit was 'the role of innovation in tackling the grand challenges'.

The topic of Intellectual Property Rights (IPR) is one of the subjects that have been identified in this context to be of high importance. Many believe that effective protection and right utilisation of IPRs is fundamental to maintain Europe's future global competitiveness through ensuring the creation and commercialisation of innovations. However, a number of challenges are present to make the IPR system highly effective in the pan-European context. As concerns the field of copyrights within the IPR system, some particular challenges exist in the context of harmonisation of copyright law. This field of IPR is particularly affected by the technological changes of the IT world, and in particular the new usage possibilities of the internet.

The aim of the study is to examine the status of harmonisation of copyright law in the EU and lay possible foundations for further harmonisation/unification steps. Another aim is to analyse the role of copyrights in the digital single market and how the copyright system can contribute to establishing an innovative friendly framework. Furthermore, particular problem fields such as the system of copyright levies are elaborated and potential improvements discussed.

The study is to be seen in the context of previous work undertaken by the Science and Technology Options Assessment Panel (STOA Panel) of the European Parliament. The STOA panel published the final report of its project on 'Policy Options for the Improvement of the European Patent System' in 2007. As a follow up to this, the STOA Panel launched the project 'Current Policy Issues in the Governance of the European Patent System' in 2009. In view of the results of the previous project, the STOA Panel has organised a conference with the aim of reviewing issues related to the current status of governance of the European Patent System. At the 1st European Innovation Summit in 2009, a workshop on a future IPR strategy for innovation in Europe was organised and a respective study report produced. This report also looked at the international dimension and the IPR system as a whole. For the 2010 workshop at the 2nd European Innovation Summit, STOA now focuses on copyrights.

The rationale for the study and the approach taken has to be seen also against the backdrop that the European Parliament acts as a co-legislator in the field of IPR. In addition, issues related to IPR will be of interest to several different committees at the European Parliament. One important aim is to work towards building a discussion platform and a resource for further policy actions. This links members of the European Parliament from different committees with stakeholders in order to improve decision-making on IPR-related issues.

The report is structured as follows:

- Section 2 briefly describes the methodology.
- Section 3 provides an account of the status of the harmonisation process of copyright law and practice in the EU.
- Section 4 outlines some particular problems arising in the context of harmonising and applying EU copyright law.
- Section 5 provides an account of the workshop discussion.
- Section 6 outlines the main conclusions.

2. Methodology

A review of academic and policy-making documents as well as grey literature has been conducted. Relevant references dealing with the topics of the workshop and study were researched in databases such as EUR-Lex, Google and Google Scholar and Sciencedirect, and thereafter a concise view of the current state of the art generated. The following questions were tackled:

- *Relevance:* What is the issue at stake here? Why is it relevant? Why is this being discussed in the first place?
- *State of knowledge:* What is already known? What is the knowledge base we are building upon? What has already been established? What is the current state of the art regarding the issue?
- *Trends:* What is new? What are the recent developments? What is currently being debated?
- *Future:* What are the future avenues of research or debate?

Finally, it is worth mentioning that the results of this study are not expected to support, defend or contest any of the positions regarding the issues raised. Indeed, different opinions exist about the how and why (or why not) to address the problem areas in question. In this respect, this study aims at providing a balanced view and analysis of the current discussion.

3. Harmonisation of copyright law in the EU

3.1 Basics of copyrights and of copyright economics

3.1.1 *Copyright basics*

Besides patents, trademarks and industrial designs, copyrights are one of the main four pillars of the system of Intellectual Property Rights (Gowers, 2006). Copyrights are a set of exclusive rights that are granted to the author or creator of an original work. A work protected by copyright cannot be legally reproduced, distributed, communicated to the public, lent, rented out or publicly performed without the consent of the owner. 'Works' in this context may refer to poems, plays and other literary works, movies, choreographic works, musical compositions, audio recordings, paintings, drawings, sculptures, software, radio or television broadcasts.

An important feature of copyrights is that they usually do not need to be registered to come into force. It is enough that the originally expressed ideas are in some form 'fixed', e.g. on paper or as an electronic file on the internet. It is also important to understand that not the idea itself, but the original expression of the idea is protected.⁴

Legislations in force may allow for exceptions and limitations to copyrights to rectify two problems: the first one being transaction costs, the second one are issues of equity. In the case of the former, exceptions may be allowed, for example, for book reviews where it would be too costly and time consuming to clear the rights (i.e., find the right holder and negotiate the terms of the specific usage). In the case of the latter, a space is created where copying of copyright protected work is not illegal for narrowly defined usages such as copying a text into Braille.

Frequently, the term 'copyrights and related rights' is used. Related rights (and the equivalent notion of neighbouring rights) denote rights similar to author's rights (the original creator of a work) which are, however, not connected to the author. Related rights therefore refer to, for example, rights of performers, phonogram producers or broadcasting organisations. There is, however, no single definition of the term 'related rights'.

Other terms frequently used in copyright discussions are 'economic rights' and 'moral rights': 'The economic rights are the rights of reproduction, broadcasting, public performance, adaptation, translation, public recitation, public display, distribution, and so on. The moral rights include the author's right to object to any distortion, mutilation or other modification of his work that might be prejudicial to his honour or reputation' (WIPO, 2010).

⁴ Gowers provides the example of a court case on Dan Brown's 'The Da Vinci Code' to illustrate this issue. This work was found not to have infringed the copyright of an earlier book which contained many of the theories found in The Da Vinci Code but used different wording. Drawing on ideas of other copyrighted works does not infringe those copyrights.

Copyrights are a fully territorial concept which means that every country has copyright legislation of its own. However, there are a number of international treaties in place which provide for a minimum harmonisation. The most notable are the Berne Convention for the Protection of Literary and Artistic Works (established first in 1886), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1980. Furthermore, the WIPO (World Intellectual Property Organisation) Copyright Treaty of 1996, the WIPO Performances and Phonograms Treaty of the same year, as well as the TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement at WTO level are notable. Foreseeable is also a role of the upcoming ACTA (Anti Counterfeiting Trade Agreement).

The WIPO treaties of 1996 mentioned are especially significant for the scope of this study, as they were the first intellectual property treaties ‘...to address the digital network environment...[which] require national legislatures to bring in measures to:

- create a new exclusive right in favour of copyright owners, including sound recording producers and performers, to make their works available on-line to the public (known as the making available right)
- prohibit the circumvention of copyright protection (TPMs, technological protection measures) and
- prohibit tampering with rights management information (DRM Digital Rights Management).’ (Towse, 2005).

In Europe, respective compliance with the WIPO treaties of 1996 has been achieved with the Directive 2001/29/EC on the harmonisation of certain aspects of copyrights and related rights in the information society (see also section 3.2).

3.1.2 Economic significance of copyright, innovation and the (Digital) Single Market

The economic significance of copyrights is mostly evidenced through the number of industries which are said to rely on and/or benefit from a functioning copyright system (Picard, Toivonen & Grünlund, 2003).

The so-called copyright industries⁵ are comprised of two main groups: The core copyright industries are based upon the creation, distribution, and sale of copyright products and services (e.g., magazines, motion pictures, recorded music, software). Copyright dependent industries are defined as those industries that would not be present without the existence of products and services subject to copyright. Cases in point would be television set manufacturers, DVD player manufacturers or computer manufacturers. According to the study performed by Picard et al., core copyright and copyright-dependent industries together accounted for 5.3 % of total gross value added of the EU-15 in the year 2000, and – in the same year – for 3.1 % of employment. The authors estimate that due to gaps in data from the various national and international statistical sources, these figures underestimate the economic contribution of the copyrights industries by 5 % to 10 %.

⁵ The definition of copyright industries overlaps with many of the definitions used for the ‘creative industries’ or ‘cultural industries.’ This implies that copyrights play also a vital role in policies addressing cultural/creative industries.

There are no newer figures for the economic role of the copyright industries for the EU overall. A combined analysis of national studies across the world to the copyright industries implies that, by and large, 'industries based on copyright' account for around 5 % of GDP and are growing faster than other sectors of the economy (Towse, 2005).

Having outlined the economic significance of copyright industries, we turn now our attention to the notion of innovation used in the copyright discussion. Set against the mostly accepted finding that innovation is generally a key driver for economic welfare and employment, it is first interesting to note that the copyright-innovation debate resembles in many ways the patent-innovation debate.

The patent-innovation debate is a heated one: 'There is a dearth of hard empirical evidence to show the economic impact of the patent system but there are staunch defenders of the view that it does stimulate innovation as there are critics' (Tang, 2005). In fact, it seems that the discussion of the relation of copyrights to innovation is often mixed with the respective patent-related discussion in a more general debate on the effect of intellectual property rights on innovation.

However, there may be a number of indications that the copyright debate may be more complex than its patent-related cousin. First, there is the difficulty of obtaining data. This is an outcome of the fact that copyrights do not need to be registered, so there are no databases to refer to. By contrast, various patent databases can be used for counting and measurement purposes.

Secondly, the notion of innovation in focus seems to be typically broader in the copyright discussion than in the related patent discussion. Whereas the latter focuses most prominently on technological innovation, 'innovation' in copyrights may be in practice (indistinguishably) used for:

- New works and/or content, such as new music, movies or literary works (in this context, innovation and creativity are frequently used concurrently, or innovation is used as synonym for creativity)
- Technological innovation (such innovation would be especially associated with advances made in the devices and technical infrastructure created to disseminate the content (e.g., new recording devices))
- Business model innovation (this type of innovation is especially associated with new ways of achieving revenues using the internet in the dissemination process to the consumers).

Roughly speaking, these types of innovation correspond also to the 'innovative' output of the typical players involved in the copyrights industries (e.g., new works/artists; new devices/consumer electronics industries).

The copyright discussion shows that copyright law stipulations may lead to some forms of innovations being fostered at the expense of others. For example, Tang (2005) comes to the conclusion that while U.S. legislation adopted in line with the described WIPO treaties of 1996 has spurred the development of legal online business models for disseminating music, it has a negative effect on technologies that involve decryption. The author also notices that copyright legislation may lead to 'perverse incentives' for innovation. Tang's overall assessment is, however, a positive one: 'In sum, at least to date, digital copyright law has on average a "positive" impact on innovation. Indeed the copyright industries are justified in their clamour for strengthened copyright protection for the purpose of stimulating innovation.' (Tang, 2005).

From an economic point of view, policy makers active in the field have – when contemplating reforms of copyright laws – to consider trade-offs between the various forms of innovation and the interests of the involved stakeholders: ‘...changes in the law are justified in terms of net benefits. The benefits to the whole of society – the social welfare or public interest – must be considered. Thus prices to consumers and other users, rewards to copyright holders and any external benefits to society, such as the generation of a creative economy or cultural identity and development, must be taken into account. On the cost side, the costs to all parties of complying with the law, enforcing rights and transaction costs must be considered as private costs and any external effects, such as restriction of access for creators and consumers, constitute social costs’ (Towse, 2005).

The challenges are particular paramount in the digital environment. Within a world of territorial copyright law, technological innovation eradicated national borders and created the technological foundation not only for a European Single Digital Market, but for a global one – with little to no technical barriers for copying content. A recent study performed by Copenhagen Economics outlined that ‘content and copyright’ is featured prominently among the legal barriers that hinder the creation of a truly European Digital Single Market. Foregone opportunities of not having such a single market in the area of innovation are especially seen in the context of helping new and small firms in the EU grow: ‘This [helping new and small firms grow, ed.] requires a large home market. Successful firms in the digital economy are knowledge intensive and have high R&D costs and regulatory costs. A fragmented regulatory framework is blocking innovation and new firm creation.’ (Copenhagen Economics, 2010).

3.2 The status of the discussion on harmonising copyright law in the EU

Problem definition

Of the four main instruments of the IPR system, copyrights can be considered the least harmonised in the EU. For trademarks and designs there are two EU-wide instruments in place, the Community Trademark and the Community Design. For patents, there is no such thing as a Community Patent (yet), but there is a harmonised process on which applicants can draw with the European Patent Office (EPO) in order to obtain patent protection in their desired (designated) European countries.

The rationale for harmonising copyright legislation in the EU is similar to the reasons why harmonisation has also been pursued with the other main IPR instruments. These reasons have been laid out in a ‘Green Paper on Copyright and the Challenge of Technology’ published by the Commission in 1988 (European Commission, 1988). The paper can be described as the first milestone which was behind the implementation of many steps towards more harmonised copyright law. The four rationales listed (‘fundamental concerns’ of the Community) were the following (see also Hugenholtz et al., 2006):

- There was a need seen to create a single market for copyright goods and services. Legal barriers like disparate copyright rules are thought to lead to market fragmentation and distortion of competition. These barriers had to be removed, and measures to combat ‘audiovisual piracy’ were to be introduced.

- Another need seen was to improve the competitiveness of the economy in copyright goods and services. This need was behind a call for a legal framework for the protection of IP that would be on par with the law in the countries of the Community's main competitors.
- The third need seen was to protect intellectual creation and investment produced in the Community against unfair exploitation by users in non-Member States.
- Eventually, the fourth need acknowledged that copyrights may restrict competition particularly in technology-related areas such as computer software. Hence, the paper called for a balanced look at the interests of right holders and third parties as well as the general public.

What is already known

Following the Green Paper, a series of Directives has been implemented that were to tackle the objectives and needs listed above. According to Hugenholtz et al. (2006), the following seven Directives form currently the legal framework (the 'acquis') in the field of copyrights and related rights (the first six being termed 'first generation' Directives as they build in large parts on the Green Paper from 1988):

1. *Directive 91/250/EEC*, the Directive on the Protection of Computer Programs, can be considered the first measure to be adopted in a pan-European context in the field of copyright law. The objective of this Directive is to harmonize the legislation in the Member States regarding the protection of computer programmes, especially to guarantee a degree of security against unauthorized reproduction.
2. *Directive 2006/115/EC*, the Directive on Rental and Lending Right, '...harmonises the provisions relating to rental and lending rights as well as on certain rights related to copyright' (Webpage of DG Internal Market). The Directive defines exclusive rights to authorise or prohibit the rental and lending of both works subject to copyright and other objects subject to neighbouring rights. A number of neighbouring rights are harmonised, such as the right of fixation or reproduction. The Directive also elaborates on collective management as a model for the management of the equitable remuneration rights (without making this model, however, a requirement). Directive 2006/115/EC replaces Directive 92/100/EEC on the same subject, a Directive that one may consider the second attempt at European level to harmonise copyright law.
3. *Directive 93/83/EEC*, has as its objective to facilitate the cross border transmission of audiovisual programmes, particularly broadcasting via satellite and retransmission by cable. The aim is to ensure that creators and producers of programmes obtain a fair remuneration based on intellectual property rights for the usage of their creations. This Directive is, in the timeline of copyright harmonisation, the third of the Directives under consideration.
4. *Directive 2006/116/EC*, the Term of Protection Directive, has replaced Directive 93/98/EEC on the same subject matter. The Directive harmonises the terms of protection of copyright and neighbouring rights, i.e. the period of protection for each type of work and related rights in the Member States. The respective terms are, for example, set to 70 years after the death of the authors for works and 50 years after the event setting the time running for neighbouring rights. Other issues tackled by the Directive are, amongst others, the protection of previously unpublished works, of scientific publications or of photographic works.

5. *Directive 96/9/EC*, the Directive on the Protection of Databases, established a new exclusive 'sui generis' right for producers of database. The right is valid for 15 years and is to protect investment of time, money and effort into building databases. For obtaining a database right, it is irrelevant whether the database in itself is innovative (so called 'non-original' databases). Copyright law pertaining to 'original databases' (i.e., to innovative ways of structuring and arranging the contents of the databases) is also harmonised by this Directive.
6. *Directive 2001/84/CE*, the Directive on the resale right for the benefit of the author of an original work of art, provides a standard level of protection to artists within the single market for contemporary art. It also aims to eliminate the distortion in the conditions for competition within this market. Artists may hence enjoy the protection provided irrespective of where in the Union their works are sold.
7. *Directive 2001/29/EC*, the Directive on the harmonisation of certain aspects of copyrights and related rights in the information society, has as its objectives '...to adapt legislation on copyright and related rights to reflect technological developments and to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996.' (Webpage of DG Internal Market, 2010).

In addition to these seven core Directives, one may also consider a number of other Directives relevant in the context of the copyright discussion. This applies in particular to *Directive 2004/48/EC*, the enforcement Directive. This Directive aims to ensure that all Member States apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. Furthermore, the webpage of the European Commission lists the Directives on the protection of semiconductor topographies (Council *Directive 87/54/EC*) as part of the legal acquis.

The status of harmonisation of copyright law in the EU was the subject of the extensive analysis conducted by Hugenholtz et al. (2006). The following main points were noted with respect to the relevant 'acquis communautaire' and for the time frame of 1991 to 2006:

- *Territoriality*: The analysis asserts that despite the fact that the seven core Directives have '...smoothed out some of the main disparities between the laws of the Member States', the territorial nature of copyright legislation and economic rights has been left intact. This means that '...even in 2006, content providers aiming at European producers need to clear rights covering some 25 Member States. This clearly puts them at a competitive disadvantage vis-a-vis their main competitors outside the EU, such as the United States.' This means, in particular, that if a European content provider is trying to sell (European) content in Europe, it will find itself disadvantaged (e.g., in terms of growth possibilities) compared to a U.S. content provider trying to sell U.S. content in the U.S.A. A particular issue noted in this context are Internet-based services. The report continues to say that as long as the territorial nature is left intact, '...harmonisation can achieve relatively little'.

- *Subject matter:* The report assesses that only a limited *acquis* has been developed, and harmonised rules have been solely established with respect to new or controversial subject matters (e.g., computer software, databases and photographs). The question of whether extending the *acquis* to all copyright works would benefit the completion of the Internal Market has been, however, mostly denied. Effects of harmonisation may be limited ‘...if the dynamic application of harmonised norms by national lawmakers and courts...persists. On the other hand, national variations may be so slight as not to cause any noticeable problem from an Internal Market perspective.’ In the area of related rights, the report asserts a particular need to redefine the notion of broadcast. Current definitions in use are too technology-specific and do not cater sufficiently for the new increased possibilities to disseminate (‘broadcast’) content to users.
- *Economic rights:* In the area of economic rights, the investigation notes four areas where there are inconsistencies in the *acquis*. First, the exhaustion of the distribution right is not defined in the same manner in the Computer Programmes and Database Directives as in the Information Society Directive. A similar inconsistency is, secondly, present regarding the definition of reproduction. The third inconsistency relates again to the notion of ‘broadcasting’ and its overlap with respect to the ‘making available’ right. While the ‘making available’ right is harmonised across the Directives under scrutiny, the notion of ‘broadcasting’ is not. This causes particularly problems with new business models which share the characteristics of broadcasting and on-demand delivery and raises the question which right/notion is to be applied. The fourth issue concerns the overlap in the digital environment of the reproduction right which includes acts of temporary copying and the right of communication to the public (the latter also includes a right of making available online). The report gauges that these rights are too broadly defined. The issues noted for the first two areas are said to be not severe and rather easily remedied through interpretative communications by the Commission which clarify the issues at stake. The third issue is described as more serious, requiring either delineating the notions of ‘broadcasting’ and ‘making available’ (i.e., making these clearly separate concepts). Or – because of the rapid changes in technology and business models – applying a ‘flexible’ solution whereby the interpretation can be left to the court of the Member States and ultimately to the European Court of Justice. The fourth issue is the most serious one as the rights analysed in this context ‘...cannot co-exist in the way they are presently – too broadly – defined’.
- *Limitations:* According to Guibault et al. (2007) – to which the investigation of Hugenholtz et al. is referring –, provisions on limitations and exceptions are not well harmonised in the *acquis*. Focal point of this issue is the Directive 2001/29/EC. Two main reasons are given for the dismal situation: First, the provision of the Directive are phrased broadly and leave wide discretion to the Member States. Secondly, the Directive does not come up with a set of mandatory limitations. This gives Member States again ‘near-total freedom to come up with a set of mandatory limitations’. Guibault et al. note that ‘...the result is a mosaic of exceptions and limitations that vary from Member State to Member State which might seriously impede the establishment of cross-border online content services’.

- *Collective rights management*: The Hugenholtz report notes the absence of a general Directive on the issue of collective rights management and because of this states that '...no true 'acquis' can be reported here'. Nonetheless, and especially in the Satellite and Cables Directive, there are some provisions regarding collective rights management. Issues that have arisen and would, in the context of harmonisation, benefit from an interpretative communication by the Commission comprise: first, a clarification of the term 'transfer' used in article 10 of the Directive; second, a more detailed elaboration on the mediation system that the Directive imposes upon the Member States; and, thirdly, delineation of the notion of 'cable transmission' and whether this notion covers simulcasting via the internet.

Hugenholtz et al. comment in their conclusions on several characteristics of the harmonisation process:

- One key observation is the process of 'upwards' harmonisation. The norms laid out by the Directives under scrutiny exceed in many cases the minimum standards of the Berne and Rome Conventions to which the Member States have been signatory parties. The authors believe this process to be to some extent inevitable as scaling down IP rights would cause considerable problems for those Member States which have copyright provisions in place exceeding the internationally agreed upon minimum requirements. On the other hand, though, this process may pose a problem for finding the right balance between the right holders' interests and the interests of the general public – a delicate bargain which is at the heart of the IPR system.
- Another observation is the (administrative) costs of the harmonisation process. According to Hugenholtz, 'the step-by-step approach towards harmonisation...has placed an enormous burden on the legislative apparatus of the Member States...[and] has resulted in an almost non-stop process of amending the national laws on copyrights and related rights'.

Many of the Directives tackle specific technologies and/or industries and have shortcomings in keeping pace with the evolution of technology and business models. Only few Directives such as the Terms Directive have a 'horizontal' function and are applicable for all types of copyright industries. Such a situation promotes the issues of inconsistencies noted above across the Directives.

The overall assessment of 15 years of EU harmonisation attempts of Hugenholtz et al. is that the process has '...produced mixed results at great expense, and its beneficial effects on the Internal Market remain largely unproven and are limited at best.'

Recommendations developed distinguish between the short and the long run. In the short run, the authors advise the EC not to undertake any new initiatives at harmonisation – except for issues prompting a clear need for the amendment of the existing *acquis* – and revert instead to various instruments of 'soft law': recommendations, interpretative notices and communications. These tools are deemed especially useful if rapid technological change and changing/emerging business models are to be tackled. In the long run, attempts at harmonising copyright legislation and creating a true single market for copyright-based goods and services are inevitably to tackle the problem of territoriality in a fundamental manner. By adopting a Community Copyright Regulation, i) the existing Directives can be replaced, ii) national laws on copyright are partially pre-empted and iii) a certain rebalancing of rights and limitations can take place which could rectify overprotection resulting from the 'upwards' harmonisation process.

What is new

Since around 2008, the discussion on copyright harmonisation seems to have gained momentum. The following developments seem to be particularly noteworthy:

- In 2008, the Commission published a new Green Paper on 'Copyright in the Knowledge Economy'. The purpose of the paper was '...to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment' (European Commission, 2008b). The paper focuses on Directive 2001/29/EC and to a lesser degree on Directive 96/9/EC. It tackles in particular exceptions to copyrights. The rationale is to be seen in an identified need for free movement of research, science and educational material (as well as any other material enhancing knowledge) and respective access to such material for relevant parts of the general public (i.e., scientists, researchers, disabled people, other parts of the general public wishing to advance their knowledge) via the internet. Possibilities for exceptions are discussed in detail with respect to libraries and archives, people with disabilities, dissemination of works for teaching and research purposes and user-created content (see also section 4.2). The Green paper was followed by a public consultation process and a Communication from the Commission on the results hereof (European Commission, 2009).
- The Commission issued a proposal to extend the term of copyright protection for performers and record producers from 50 to 70 years. The proposal also included i) a new claim for session players amounting to 20 % of record labels' offline and online sales revenue, ii) a 'use-it-or-lose-it' provision that allows performers to recover their rights after 50 years, should the producer fail to market the sound recording and iii) a 'clean slate' which is to prevent record producers from making deductions from the royalties they pay to featured performers (European Commission, 2008c). This recommendation was endorsed by the European Parliament in 2009.
- Leading scholars on copyright law united in the course of the Wittem project, a project established in 2002 and sponsored by the government-funded Dutch ITeR Programme (Wittem group, 2010). The project addresses the future development of European Copyright law and is to promote transparency and consistency in European copyright law. Its main output to date is a European copyright code, published in April 2010 with a possible use '...as a model or reference tool for future harmonisation or unification of copyright at European level'. The code does take international norms and the *acquis* described above into account, yet it is more than '...a mere restatement or consolidation of the norms of the Directive'. The extent to which the proposed code will actually enter the discussions is a subject open to investigation.

4. Selected issues in the field of copyrights with a particular focus on digital markets

In the following section, we elaborate on selected issues that are particularly pertinent to the copyright harmonisation discussion. The topics selected are of particular relevance for digital markets – as evidenced by the fact that many of them are integral to the flagship initiative of the European Commission ‘A Digital Agenda for Europe’ (European Commission, 2010) – and comprise the following:⁶

- Private copying levies and collective rights management
- Exceptions to copyrights in the knowledge economy

4.1 Private copying levies and collective rights management

Problem definition

Private copying levies are a form of tax – in addition to any sales tax – charged on purchases of recordable media (‘blank media levy’) and/or equipment that allows the writing of data to such media (‘equipment levy’). The objective of such a levy is to compensate right holders ‘...based on the premise that an act of private copying cannot be licensed for practical purposes and thus causes economic harm to the relevant stakeholders’ (Commission Background Document, 2008).

In essence – and there are various variations visible –, the system works by having the levies collected by dedicated collecting societies and distributed to the right holders according to a pre-defined key (such as the sales of pre-recorded CDs in music shops or the amount of air playing on the radio). It is a misconception to view levies as a compensation for illegal copying. Rather, levies are to compensate the right holders in cases where private copies are allowed. Such exceptions to the copyright can be granted if enforcement would not be mandated for private reasons and also in cases where other forms of licensing would cause disproportional administrative burden.

Copyright levies are currently all national in scope, and there is no uniform Community-wide levy system. While it is true that Directive 2001/29/EC provides the Member States with the possibility to introduce an exception to the right of reproduction for natural persons who copy for private use (Article 5(2)b) and calls for ‘fair compensation’ for such acts, it does not prescribe any particular form of compensation like a levy system (Commission Background Document, 2008).

⁶ An important topic which is only partly touched on in this report is that of enforcement of copyrights and copyright infringement (i.e., piracy). This topic has been dealt with in greater detail in the STOA report of 2009 on the 1st European Innovation Summit (‘Towards an Intellectual Property Rights Strategy for Innovation in Europe’), where the issue of enforcement was one of two prime foci of the workshop. Readers shall hence be referred to this report for a more detailed discussion of this topic.

Currently, 22 out of the 27 Member States have levy systems in place. The five nations that have not adopted levy systems are Ireland, the UK, Malta, Cyprus and Luxembourg. The UK and Ireland do not authorise private copying by consumers. In countries where levy systems exist, considerable variation can be observed as regards the modes of implementation. Sometimes recordable media are charged only, sometimes equipment which allows the writing of data to recordable media only, and sometimes both. Differences are also visible with respect to the type of equipment/media subjected to levies or the way the levies are calculated. Calculation systems in use comprise, amongst others, uniform rates (e.g., independent of storage capacity of a medium), capacity-based rates (per MB/GB/hours recordable) or rates depending on the retail price (Commission Background Document, 2008).

Against this backdrop, a situation ensues where the same type of media may be charged in vastly different manners and amounts across Member States – for example, a levy for a blank CD-R may be 11 times higher in one Member State than in another (Econlaw, 2007). Table 1 summarises the legal situation as outlined in the Commission Background document of 2008.

Table 1 Equipment and blank media levies in 20 Member States that apply levies *)

MEMBER STATE	A	B	C	D	D	E	E	E	F	F	H	I	L	L	N	P	P	S	S	S
	T	E	Z	E	K	E	L	S	I	R	U	T	V	T	L	L	T	K	I	E
Media	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Equipment		X	X	X		X	X	X	X		X	X	X			X		X	X	

*) Romania and Bulgaria have not been part of this review.

Source: European Commission, 2008.

What is already known

There is currently no consensus regarding the feasibility of the levy systems in place to reach their objective of fair compensation. The European Commission has launched two public consultations on that matter, one in 2006 and one in 2008.

Two distinct views on the levy system have emerged:

- Proponents of the levy system underline that industries fighting the levy system usually benefit from the system to a large extent (see, for example, Pfennig, 2008). The system as such is said to work well and that no (or little) action is needed. Proponents also consider that the pricing strategies of media and equipment producers may be influenced by many, also national, factors and only to negligible extent by the levy system. In this context, hard data which links consumer behaviour, consumer prices and levy requirements is said to not exist. The main study findings of the Econlaw report (Econlaw, 2007) are in line with this assessment. According to this report, Private Copying Remuneration (PCR) (i.e., the levy system) has '...a sound economic justification, generates positive incentives to the creation of Intellectual Property Rights (IPR) protected works and increases consumers' freedom of use of intellectual works'. Four main arguments are forwarded to substantiate this view:

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- The report assesses that the income derived from the levy system represent 5 % of the total sales of consumer electronics (CE) products which, according to the authors, would imply that the CE business would not turn unprofitable should it be forced to not pass PCR charges through to consumers. The main determinants for pricing are said to be factors other than PCR.
 - The report finds that €1 collected causes a decrease in welfare for consumers of only € 1.08 - as opposed to a 2:1 ratio reported before in other studies - in the short run. Taking a dynamic view, one may expect even positive effects under specific circumstances in the medium and long run.
 - The authors argue further that a comparison between the levy system and alternatives – such as Digital Rights Management systems, public funding or an internet flat fee – should take a series of objective criteria (remuneration of rights holders should be a function of the social value of their work; minimum transaction/information/enforcement costs; positive correlation between the intensity of private copying and amounts paid by the respective consumers) into account. The example of DRM is given: 'DRM...has limited penetration, technical flaws and increased system costs.'
 - Finally, diverging levy regulations on different Member States are not seen in this study as a significant barrier to the free movement of ICT and CE products – the main rationale being that the levy systems have to take country characteristics such as income level, consumers' willingness to pay and the intensity of private copying into account. However, the report sees a need for (minor) harmonisations to make the system more easily administrable and applicable.
 - Opponents of the system – mainly producers of recordable media and CE equipment – argue in a complementary manner:
 - First, the 2:1 ratio of cost on the European economy (in terms of lost sale and competitiveness) to charged levies is underlined. The respective ratio is quoted from a study conducted by Nathan Associates (Nathan Associates, 2006).
 - Differences between levy tariffs are reported to vary too much across Member States. In some Member States, the levy is said to be more than 100 % of the otherwise possible retail price of equipment, hence doubling the price for consumers (BEUC, 2009).
 - Also noted is the growth of the amount of levies connected. Quoting the background document by the European Commission of 2008 – which draws on the figures published by Stichting de ThuisKopie of 2005–, levies collected in 2004 in 16 EU Member States amounted to € 550 Mio. This figure is twice as high as in the year 2002. ICT industry estimates are well above this figure.

Collecting societies may do more (and other things) than just collect and administer private copying levies. Under the term collective rights management, collecting societies (or collective management organisations) take care of the right of public performance (music played or performed in discotheques, restaurants, and other public places); the right of broadcasting (live and recorded performances on radio and television); the mechanical reproduction rights in musical works (the reproduction of works in CDs, tapes, vinyl records, cassettes, mini-discs, or other forms of recordings); the performing rights in dramatic works (theatre plays); the right of reprographic reproduction of literary and musical works (photocopying) and related rights (the rights of performers and producers of phonograms to obtain remuneration for broadcasting or the communication to the public of phonograms) (WIPO, 2010).

The need for collective rights management is usually advocated against the difficulties of right-owners to negotiate with each user or user group licensing terms under which these groups can use the copyrighted works. For example, radio stations can negotiate with one collection society the terms of airing music of individual musicians. In the absence of such a society, radio stations would have to enter negotiations with every artist, at least in theory, separately. The collective management organisations are to ensure that individual artists have an incentive for creating their works through '...remuneration in return for permission to make use of their works' (WIPO, 2010).

What is new

This system has come, however, under some criticism lately. This is due, amongst others, to the emergence of new business models using the internet. Consumers should expect – like in the U.S. – to get access online to music as easily as in the offline world by entering a shop and buying a CD. But, as the European Commission asserts, this is actually not the case: 'Europe lacks a unified market in the content sector. For instance, to set-up a pan-European service an online music store would have to negotiate with numerous rights management societies based in 27 countries. Consumers can buy CDs in every shop but are often unable to buy music from online platforms across the EU because rights are licensed on a national basis.' (European Commission, 2010). According to the European Commission, this puts the EU at a disadvantage in the fields of innovation and economic development if compared to the U.S.

Further criticism ensues with the argument of lack of transparency on how the tariffs are set and whether the income is actually fairly distributed (Spongenberg, 2010). Collection societies are hence said to be expensive and slow. A Spanish evaluation report produced by the National Competition Commission in early 2010 is said to back such statements and assesses that the collection societies have a lack of transparency and that their monopolistic position eases the distortion of effective competition. The report has been allegedly counter-attacked for '...having a certain aggressiveness towards the collecting societies'. Against this backdrop, a trend seems to emerge that right owners and users attempt to get directly in touch with each other. This is certainly the case with service providers such as Apple (iTunes) which enter into direct negotiations with producers such as EMI or Universal Music Group for buying licenses for online international sale.

Representatives of users stress, even when taking the criticism into account, the need to have collective rights management organisations: 'Collective licences are indispensable when a use requires, to be lawful, the clearance of a large number of categories of works and other protected matter represented by separate right holders' (European Broadcasting Union, 2010). Overall, there seems to be support for a reform of the collective rights management system also on the side of the collection societies, but with a differentiated view on the various business models in use and a call for a horizontal framework directive that covers all of the activities of collecting societies (and not just a sectoral Directive for an 'online sector') (Pappi, 2010). This call is to decrease legal uncertainty, arising for example from parallel application of other Directives (such as the Services Directive).

Against this background, the European Commission announced in its communication on a digital agenda for Europe a new framework Directive on collective rights management (European Commission, 2010). This Directive, to be issued by 2010, is to enhance the governance, transparency and pan European licensing for online rights management. Other activities envisaged comprise extensive stakeholder dialogue, a report by 2012 on the need for '...additional measures beyond collective rights management allowing EU citizens, online content services providers and right-holders to benefit from the full potential of the digital internal market, including measures to promote cross-border and pan-European licenses, without excluding or favouring at this stage any possible legal option'. These measures are to be predated by a Green Paper addressing the opportunities and challenges of online distribution of audiovisual works and other creative (due 2010) as well as a review of the enforcement Directive.

4.2 Exceptions to copyrights against the backdrop of the knowledge economy

Problem definition

As discussed in section 3.1, exceptions to copyrights may be warranted for reasons of transaction cost and equity. The delicate task for these exceptions is to find the right balance between the interest of right holders and the users addressed by the exceptions. This concerns in particular libraries and archives, teaching and research, people with a disability and user created content.

What is already known

Main issues at stake with regard to a need for exceptions in copyrights against the backdrop of developments and changed environments in the knowledge economy are thoroughly discussed in the Green Paper of the Commission of 2008 (European Commission, 2008b):

- Regarding libraries and archives, the paper notes that under current copyright legislation libraries have only limited exceptions from the right of reproduction. These exceptions concern mainly acts needed for the preservation of works in the libraries' catalogues and for other 'specific cases'. Issues that remain open are that of the number of copies that can be made or issues of 'format shifting' (i.e., from analogue via scanning to a digital format). Furthermore, current exceptions 'for specific cases' do not allow for mass digitisation of protected works and online deliveries of those to users (while making the work available for example for study at the premises of the library would be allowed).

- The case becomes even more complicated if orphan works (i.e., works which are still in copyright but whose owners cannot be identified or located; these are often works which are not commercially exploited any more) are taken into account. The problem with orphan works is how to ensure that users making orphan works available are not liable for copyright infringements if the right holders 're-appear'. With a recommendation set forth in 2006 (European Commission, 2006), the Commission encouraged the implementation of mechanisms '...to facilitate the use of orphan works and to promote the availability of lists of known orphan works' (European Commission, 2008b). A High Level Group established and consisting of stakeholders adopted a 'Final Report on Digital Preservation, Orphan Works and Out-of-Print Works' and a memorandum of understanding was signed by representatives of rightholders, libraries and archives. Recommendations and guidelines set forward are (still) subject to detailed implementation by Member States.
- Regarding exceptions for the benefit of people with a disability, the Green Paper states that all Member States have implemented such exceptions for non-commercial usage directly related to the disability. Nonetheless, there are still issues to be contemplated. First, in some Member States there are restrictions with respect to certain types of disabilities considered. Secondly, the possibility laid out by the Directive 2001/29/EC for fair compensation has led some national legislations to call for such compensation if, for example, a text is translated into Braille. Given the efforts needed to undertake such an exercise the question is raised whether beneficiaries making use of the exception should really be obliged to pay such compensation. Thirdly, concerns of rightholders with respect to piracy are to be met if they make the material for conversion available in an easy-to-read format. Directive 2001/29/EC does not lay down requirements for rightholders to present their material in a particular format suitable for conversion. A solution to this problem could be specialised intermediaries like dedicated libraries. The fourth issue concerns Directive 96/9/EC on the legal protection of databases which has no exception for disabled people. The problem seen here is that the provisions for disabled people set out in Directive 2001/29/EC may be undermined if a work is simultaneously protected through copyright and a database right (a possible, yet theoretical example could be an encyclopaedia).
- Directive 2001/29/EC allows for exceptions to copyrights for teaching and research purposes. This exception has frequently been implemented at Member State level only in a narrow sense. In particular, distance or Internet-based learning at home may not be covered. There is a clear concern on the side of the rightholders that distributing teaching material via the internet may give rise to piracy. Member States have dealt with this problem in different manners. The heterogeneous legislative situation which has resulted hereof is of particular concern when teaching/research is carried out in a transnational network. Particular examples of problems that may arise in this context are given with respect to the length of the excerpts from works which may be reproduced or made available for teaching/research (in some countries the whole work, in others only short excerpts) or the definition of the eligible institutions which can draw on the exception. Against this backdrop, there have been calls '...to introduce a mandatory exception for teaching and scientific research, with a clearly defined scope in the Directive [2001/29/EC]'. The Green Paper underlines, though, that a mandatory exception and clearer provisions may not necessarily mean an extension of the exception.

- A new issue has emerged with the advent of user created content. Such content may be defined as 'content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices' (OECD, 2007 cited in European Commission, 2008b). A case in point is, for example, video uploads to Google's Youtube service. It is evident that user-created content is different from simply uploading existing protected works. The issue is, however, pertinent once users draw on existing material, modify it and upload the changed/worked version. Such 'transformative' use is not specifically catered for in Directive 2001/29/EC, i.e. there is no clear exception for user-created (transformed) content. However, some wordings in the Directive would allow already for transformative use under very specific circumstances (e.g., '...for purposes such as criticism or review'). The question now is whether the situation merits an exception for user-created content on its own, or if there is a need for more precise rules concerns the 'dos and don'ts' of users.

What is new

The discussion and public consultation following the Green Paper show different sets of conclusions for each type of (possible) copyrights exceptions looked at (European Commission, 2009). For libraries and archives, the two core issues are the production of digital copies in the libraries' collections for preservation purposes and the electronic dissemination of these copies to users. In this context, a '...sustainable system of prior authorisation for a variety of library initiatives requires simple and cost efficient rights clearance systems.' For orphan works, establishing common standards on the level of due diligence in searching for the owners of orphan works is considered key. Possible approaches include, inter alia, '...a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, an exception to the 2001 Directive, or guidance and mutual recognition of orphan works. An impact assessment on this issue is announced. Concerning teaching and research, the Commission states to have already taken measures in close collaboration with stakeholders. Factors explicitly mentioned are the need to reduce licensing burdens for universities and monitoring the evolution of distance learning. With respect to disabled persons, the immediate next step '...is to encourage publishers to make more works in accessible formats available to disabled persons.' In particular, TPM is not to prevent '...the conversion of legally acquired works into accessible formats'. A stakeholder forum is to be established on the issue of copyright exceptions for disabled persons, and depending on the results of the forum further steps may be envisaged. As far as user created content (UCC) is concerned, the Commission considers this still a 'nascent' phenomenon which merits at the moment (only) further investigation and monitoring. All measures, conclusions and next steps discussed are to feed into a new strategy of the Commission on Intellectual Property. In its communication on a digital agenda for Europe, the Commission also announced a dedicated Directive for orphan works (European Commission, 2010).

5. Workshop discussion

5.1 The panellists

The following were the panellists participating in the discussion:

- **Thierry Desurmont** is, amongst others, the representative of the European Grouping of Societies of Authors and Composers (GESAC).
- **Elisabeth O. Sjaastad** is CEO of the Federation of European Film Directors FERA.
- **Robin Hunt** is journalist, new media pioneer and futurist. Last year he wrote 'Copycats - digital consumers in the online age' for SABIP, the Strategic Advisory Board on Intellectual Property in the United Kingdom.
- **Kaisa Olkkonen**, Vice President of EU Representative Office, Nokia Corporation, is responsible for Nokia's regulatory work in Europe. She is also globally responsible for Nokia's approach to privacy and data protection policy work. For the past years she has been especially focusing on the broad range of topics around Internet law and content licensing.
- **Konstantinos Rossoglou** is legal officer at the European Consumers' Organisation (BEUC). He is the Team Leader of BEUC's digital team, with his main area of expertise being copyright and privacy related issues.
- **Alain Strowel** is professor at the Saint-Louis University in Brussels and University of Liège. Dr. Strowel teaches in various LLM (Master of Laws) programmes. He focuses his courses in copyright cover, copyright, design and media law, as well as the interface between the IP and competition.
- **Kelvin Smits** is founder and CEO of Younison, a European advocacy organisation that gives authors a way to demand stringent transparency and accountability standards vis-a-vis their collecting societies. As an economist and music artist, Kelvin Smits has always considered himself a supporter of a fairer and clearer system of rights remuneration
- **Tilman Lüder** is Head of the Copyright Unit, DG Internal Market and Services at the European Commission and was chair and moderator for the second part of the workshop.
- **Jerzy Badowski** is Deputy General Manager of ZAIKS (Związek Autorów i Kompozytorów Scenicznych, a Polish association of playwrights/dramatists and composers).
- **Irena Bednarich** is Government Affairs Manager at Hewlett-Packard Europe. In this capacity, she represents Hewlett-Packard at EU level on a number of issues ranging from copyright to standards, data privacy, cloud services and infrastructures.
- **Paul Rübig** is Member of the European Parliament, Chairman of STOA, member of the European Parliament's Committee on Industry, Research and Energy and substitute member of the Committee on Budgets. He acted as chair and moderator for the first part of the workshop.

5.2 The discussion

In the first part of the discussion at the workshop, the eleven panellists elaborated especially on the questions of a need for a fundamental change of the harmonisation process. The second dominating question concerned the treatment of the system of private copyright levies.

In the context of the first question, discussants noted that the harmonisation process lost momentum after a period of progress between 1991 and 2001. One of the main reasons identified is the increased complexity with more involved stakeholder groups than before. Whereas in the past only two stakeholder groups had to be accommodated (users and right holders/authors) the situation is now resembling more a 'triangle' (with Internet Service Providers (ISPs) and manufacturers of Consumer Electronics (CE)) forming a third new stakeholder group).

The need for harmonisation as such has been assessed differently: The majority of discussants – particularly from CE industry, but also the representative of consumer associations – underlined their view that a system that would require a country by country approach like the present one would not fully realise economic scale effects and would hinder the development of an internal market the size of the U.S. or Japan. This would entail negative consequences for consumers (who would not be able to have access to certain services/content in each Member State and be confused about which behaviour is considered legal or not) and for authors (who would be faced with a smaller audience for their works). The GESAC representative did not favour a large reform as he believed that harmonisation has been by and large achieved. The differences in national legislations concerning, for example, exceptions to copyrights are said to be minor. They would not hinder the development of an internal market. Furthermore, there are, according to the GESAC representative, plenty of reasons why service providers may wish to provide a service in some countries only – copyrights are not the cause of all the problems mentioned. The societies acknowledge, however, that there are imperfections that need to be addressed. The Commission representative underlined that the matter of copyright law has been by and large harmonised, and it is especially (and only) the issue of territoriality that needs to be addressed.

As regards copyright levies, two sets of problems were noted: First, there are trade-related issues which arise when goods are moved across the borders of the EU Member States (e.g., the need to have each product in each country classified or issues concerning double/repayments when a product sold in one EU country but has been imported/moved from another). The trade-related problems are said to be especially problematic in the context of new online business models. The second set of issues relate to finding a suitable system for calculating a fair remuneration (i.e., tariff setting). For the CE industry, current systems should be more objective and predictable. Collecting societies pointed out that an approach to liberalisation would also entail drawbacks for certain stakeholder groups; they pointed to a need to have exceptions for private copying introduced in Member States which do not have respective legal provisions in place first (e.g., the UK, Ireland, etc.).

The second part of the discussion focussed on the system of collective rights management and on the modernisation of the licensing system. The topic of copyright levies was continued from the first part due to similarities with the collecting rights management system theme. The audience learned that the Commission organised a stakeholder's consultation on collective rights management and the levy system. The consultation achieved significant progress in an 18-month period from mid-2008 to the beginning of 2010. In particular, a consensus was reached between the stakeholders (especially collecting societies, CE industry) that the levies should be calculated on the base of actual use of a device/medium for different purposes and especially not on volume indicators. However, there have been also areas of disagreement that ultimately led the industry to leave the negotiation table. Industry believes that a dead end was reached when they got the impression that all issues with respect to actually implementing a tariff system would be ultimately handled at national level – an impression that has been contested by GESAC representative who argued that further progress would have been possible. There have been some doubts expressed by other discussants whether artists (as primary beneficiaries of any licensing system) and consumers were (and are) sufficiently represented in the relevant forum and consultation processes. Furthermore, advantages and disadvantages of alternative means to the existing collective rights management system were discussed. There has been no indication whether the consultation process will be picked up in the future again.

6. Conclusions and recommendations

The European Commission concludes that ‘...copyright policy must be geared toward meeting the challenges of the internet-based knowledge economy.’ (European Commission, 2009). The Commission also acknowledges the need for a balance of different interests (right holders vs. consumers). The background analysis has indicated that considerable efforts are spent on improving and harmonising copyright laws, but the rather pessimistic view of Hugenholtz et al. (unfavourable cost-benefit ratio of the activities, tendency of ‘upwards’ harmonisation, need to tackle the basic issue of territoriality in the long run) also shows that considerable challenges still lie ahead – both in terms of general ‘framework’ issues, and also in terms of particular details as they have been, for example, outlined in the section on copyright exceptions.

Taking in addition the workshop discussion into account, the following main conclusions on future focal points of action may be drawn:

- *Fighting piracy:* There has been overall consensus that the problem of copyright infringement (piracy) has to be addressed more thoroughly. Differences in stances were visible, however, with respect to the exact approach to be taken. Whereas the representative of GESAC was clearly in favour of improving the enforcement Directive 2004/48/EC, other discussants pointed to the need of coupling the piracy debate with the debate on modernising the licensing system. In essence, the respective discussants argued that well established functioning and legally operating services – e.g., based on new business models – could provide additional incentives for consumers not to engage in illegal piracy activities. An area of activity for the European Parliament would be, according to some discussants, to address consumer behaviour and the education of consumers.
- *Simpler copyright management system:* There was also consensus that the current collective rights management system (and the copyright levy system) should be simplified. Disagreement was present with respect to the exact approach to be taken. Some – in particular the GESAC representative – opted for an enhancement of the current system which should ensure the balance between interest of right holders and users (for which the current system is said to be, in principle, the more suitable). By contrast, other discussants favoured a system in which there are alternatives to collecting societies and also more competition among the societies.
- *Payment based on actual use:* The other important consensus reached was to have tariffs calculated based on actual use of a medium/device. However, there are considerable challenges present with measuring ‘actual’ use in practice and also with the details of implementation. An interesting development in this context is efforts to harmonise databases of collective societies such that users can easily assess who owns what rights on certain works. Again, there are various problems in terms of details of implementation.

- *Alignment of stakeholder interests and involvement of stakeholder groups as requirement for advances towards a single 'European copyright':* It became evident in the discussion that there is great interest with many stakeholder groups to improve and/or change the current copyright system in Europe, even if views on certain topics diverge. Against this backdrop, it is disappointing that the stakeholder negotiations have stopped. Possibilities to re-ignite the dialogue should be explored, as well as opportunities to have a higher involvement of artists and consumers. The European Parliament could be instrumental in facilitating such a dialogue.
- *Considerations regarding a future unified European copyright code:* The analyses on harmonisation of the European copyright system have shown that the harmonisation attempts have led to a rather 'patchy' field of legislation which does not tackle the issue of territoriality in a fundamental manner. Re-iterating the statements of the Hugenholtz et al. report, the introduction of a truly European Copyright regulation in the long run would likely i) replace the existing Directives, ii) pre-empt, at least partially, national laws on copyright and iii) achieve a certain rebalancing of rights and limitations which could remedy the issue of over-protection which resulted from 'upwards-harmonisation' tendencies. The Wittem project and its output of a 'prototype' European copyright code could provide a good starting point for respective considerations.

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Appendix A – Original workshop programme

Note: As opposed to the original programme, the invited eleven panelists were discussing jointly in both panel 1 and panel 2. Mrs. Arlene McCarthy was not part of the panel.



"Tackling the Grand Challenges - Policy meets Practice"
2nd European Innovation Summit
11-14 October 2010 | European Parliament | Brussels



**Session: Copyright in the Single Market:
Opportunities for Harmonisation (Part I), Management of Rights (Part II)**

European Parliament, Brussels
12.10.2010 – Part I 13:30-15:00, Part II 15:30-17:00 – 5 ASP G3

Welcome and introduction

Paul Rübig, Chairman of the STOA Panel, MEP

Moderator

Tilman Luder, Head of Copyright Unit, DG Internal Market, European Commission

13:30 – 15:00 Panel 1: Opportunities for Harmonisation

Arlene McCarthy, Member of the European Parliament
Robin Hunt, Journalist and Research Fellow, University College London
Kaisa Oikkonen, Vice President of the EU Representative Office, Nokia
Kostas Rossoglou, Legal Officer, BEUC
Alain Strowel, Professor, Saint-Louis, Brussels and University of Liège

15:30 – 17:00 Panel 2: Management of Rights

Jerzy Badowski, Deputy Managing Director, ZAIKS-Society of Authors-Poland
Irena Bednarich, Chair Copyright levies issue group, DIGITALEUROPE
Thierry Desurmont, Representative of GESAC
Kelvin Smits, Founder of Younison
Elisabeth Sjaastad, CEO, Federation of European Film Directors

Source: Knowledge4Innovation

Appendix B – List of Abbreviations used

ACTA	Anti-Counterfeiting Trade Agreement
CD	Compact Disc
CD-R	Compact Disc Recordable
CE	Consumer Electronics
DRM	Digital Rights Management
DVD	Digital Versatile Disc
EC	European Commission
EPO	European Patent Office
EU	European Union
GB	Gigabyte
GESAC	European Grouping of Societies of Authors and Composers
ICT	Information and Communication Technologies
IP	Intellectual Property
IPR	Intellectual Property Rights
IT	Information Technology
MB	Megabyte
PCR	Private Copying Remuneration
STOA	Science and Technology Options Assessment Panel
TPM	Trusted Platform Module
UCC	User Created Content
WIPO	World Intellectual Property Organisation