The Future of EU Copyright Legislation – Certain Issues

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Many issues to be looked at in the framework of possible modifications of EU copyright law are relevant to the audiovisual sector, which is the focus of today's meeting, in the same way as for other sectors. This contribution raises some of those issues that are of a more principal nature.

1. General approach to the way in which modifications of EU copyright law may be made

It has been suggested to **'re-open' the Infosoc Directive**, i.e., to envisage an overall review of that Directive. In my mind, this may not be the wisest approach. Copyright has become one of the areas of law in which a battle of often strongly diverging interests takes place, as we have seen most lately in the high volume of – often opposite – answers to questions of the European Commission's Public Consultation, and in the more than 500 amendments to the draft Reda report. It is getting ever more difficult in this field of law to achieve compromises, and even more so to do so in a clear legal language. Opening the entire Infosoc Directive is likely to result in a failure or at least a text full of compromise language that may produce even less legal certainty and more complexity than the current text, to the detriment of all those who have to apply or respect these provisions, including in particular consumers. In addition, the Infosoc Directive already provides for a sound basis for copyright in the internet and does not in my mind require an overall review.

For the reasons indicated, also the idea sometimes expressed to create a **single unitary copyright title** does not seem appropriate or realistic, given the preference of EU Member States to continue, as far as possible, with their own legal traditions. In addition, one may doubt whether the legal basis for such a title, Article 118 TFEU, also applies to copyright, for which it was not developed, and thus whether the Treaty provides a legal basis for this approach in the field of copyright (rather than only in the field of industrial property rights). Furthermore, this approach would raise new, complex issues, such as the relation between the possible continuation of national copyright systems and a parallel unitary title. Also, the different traditions in copyright law and its application by the courts in the Member States may, at least for a long time, prevent uniform interpretation and thus a true harmonization.

Rather, to the extent that a need for modification of the existing EU copyright law is seen, a new directive modifying the Infosoc Directive as regards specific issues seems the better and more realistic way to go – an approach one might call ‘micro surgery’.

2. Guidelines for modifications

For the purpose of any EU legislation in the field of copyright, and in the framework of a ‘micro surgery’-approach, the EU legislator should first assess where exactly there is a need for amended or new EU legislation. Given the legal competence of the EU, which is limited, in the field of copyright, to the achievement of the free movement of goods and services, it will be necessary to ascertain whether in the relevant cases there are **obstacles to the free movement of goods and services** due to differences in copyright legislation in the Member States, and if so, whether they are of a major, **more than negligible dimension**. Otherwise, it is in the competence of the EU Member States to legislate. For example, in particular in the field of education, we have primarily national or even local markets; national or regional school curricula usually determine what contents must be taught in schools and thus must be contained in any material used for educational purposes. This is even true for copyright material used for teaching at universities, not least due to different languages and teaching traditions, including the contents of exams.

To give another example, one should also assess the extent to which users request material from public libraries in a foreign country; it may well be that such cross-border uses are of a minor extent compared to the local uses through users who consult libraries in the cities where they live; public law rules might also restrict lending to foreign users or libraries. Any such local uses are subject only to national legislation and do not fall within the EU legislative competence. Finally, any EU legislation has to respect not only competency rules but also the principles of subsidiarity and proportionality, as well as the respect for cultural diversity, which plays a strong role in particular in respect of culture-related institutions, and which constitutes one of the particularities and riches of Europe.

3. Exceptions and limitations

Different user groups, backed by internet service providers, have expressed their interests for mandatory, additional, and broadly worded exceptions and limitations of copyright. As in general, the EU legislator should first analyze whether there is a major cross-border problem in a given case. If so, one should be aware that such problems cannot only be solved through exceptions or limitations, but that a frequently appropriate measure may be different kinds of licensing, including individual or (voluntary or mandatory) collective licensing, which might be encouraged. Given the EU competence, which is restricted to the achievement of free movement, one may also consider to devise any relevant exceptions or limitations explicitly to apply only to cross border situations and to leave regulation of local situations explicitly to the national legislator. It should also be clear that the author's fundamental right of property includes the right to decide not to make her work available to the public, or only at a certain point in time or under certain conditions. Exceptions and limitations of this right must be justified by **sound policy reasons**, such as education, research, news reporting, while, for example, mere entertainment or the pursuit of new business models by internet service providers as such may not generally be considered sufficient reasons to restrict the author's right.

It has been claimed that **mandatory exceptions or limitations** would enhance legal certainty. However, legal certainty is the same whether a matter has been regulated at

national or European level; in the first case, it is however necessary to ascertain different national laws rather than one law if one wants to exploit or use a work beyond national borders. Thus, the mandatory character of an exception or limitation does not increase legal certainty but it creates a similar legal situation in the Member States (although interpretation of the same, mandatory provision may still vary from country to country, until a decision for any given aspect has been rendered by the Court of Justice).

Another claim by users, backed by ISPs, has been the introduction of broad, flexible clauses for exceptions and limitations, following the **US-American 'fair use'-concept**. However, the disadvantages of this approach for all stakeholders are likely to prevail: Flexible, broadly worded clauses will result in reduced legal certainty (and thus, problems regarding the application of criminal law in the case of copyright infringement, as well as problems for the application of any statutory remuneration rights or rights to fair compensation related to such exceptions and limitations, such as for private copying). They will mean years of legal proceedings with a view to find clarification of the broad clauses, and thus high transaction costs, and this only for very specific situations in individual cases brought before the courts. Therefore, clear and final reactions to technical or other changes (through the courts) may take even longer than legislative amendments. In fact, the traditional system on the European continent (and even to a large extent in the UK and Ireland), which is based on precisely drafted legal language (which can still be technically neutral) has shown that it has so far adapted successfully to new technical developments. Furthermore, too broad and flexible clauses may negatively affect the division of powers between the democratically elected legislature on the one hand and the judicial power on the other hand. Finally, flexible clauses are likely to best benefit powerful users, such as major internet companies who may afford the best lawyers, and may disadvantage small users within legal proceedings.

4. Equitable participation of authors and performing artists

Both in the audiovisual and in other sectors, authors and performing artists regularly have a weaker bargaining position when compared to that of their contractual partners,

who may be film producers, TV-broadcasters or any other exploitation company. A number of legislative models are already available under national law, though many with a limited success. There is at least one model which seems very well suited to ensure at least an equitable participation of authors and performers in the revenues from exploitation of their works and performances. I had the honor to invent that model when I was an expert to the European Commission for the purposes of drafting the proposal for the EC Rental Rights Directive. Article 4 EC Rental Rights Directive 1992 (today: **Article 5 of the Directive as consolidated in 2006**) provides for such a **model** regarding the rental right. It is based on the traditional way of exploitation of exclusive rights but provides, on a statutory basis, a kind of 'residual right' of equitable remuneration, which the author or performer cannot waive and which he should be able to transfer only to a collective management organization for the purpose of collective administration. The CMO, which has a stronger bargaining power than any given individual author, would collect the money from the rental shop (or other exploitation business, if the model is extended to other uses) and transfer the money back to authors and performers. This model could be considered to be extended by law to certain internet uses in order to avoid situations such as that of the service spotify, which has been criticized for not paying creators and performers any noteworthy remuneration.

5. Equitable remuneration from internet uses

Whether authors and performers may receive an equitable remuneration also depends on the overall income from exploitation of their works and performances in the internet. If all rightholders together do not receive what may be called an equitable remuneration, any share thereof will always result in minor revenues. However, achieving an equitable remuneration for the use of works in the internet on the basis of legal offers remains a major challenge as long as legal offers have to compete with illegal, mostly gratuitous offers, and as long as safe harbors for internet service providers represent a broad comfort zone for those who reap major economic advantages from the circulation of copyright works on the internet. Given this situation, and the fact that direct enforcement of rights against consumers has not been very popular (even with rightholders) or overall successful, one should consider modernizing the broad safe harbor rules in the e-

commerce Directive, making ISPs subject to more responsibilities, and also to promote the ‘follow the money’-approach.

In conclusion: We are living today in a period of erosion of copyright (as stated by the University of Stanford’s Professor Goldstein last year at the international ALAI-conference in Brussels) – pressure by user groups and ISPs to weaken copyright protection is high, while there has never been so much access (though in part illegal access) to copyright works as today. The main benefit thereof accrues to the powerful internet companies and, indirectly, consumers, while authors and performers both in the audiovisual and in other sectors suffer dramatic losses of income. Measures in relation to ISPs as just mentioned could and should rebalance the market situation and thereby enable in particular authors and performers to better benefit from the chances that the internet should offer them.