

## Position Paper

### Single Market for Intellectual Property Rights

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The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 1,350 companies in Germany. Its 1,000 direct members generate a sales volume of 135 billion Euros annually and employ 700,000 people. They include providers of software and IT services, telecommunications and Internet services, manufacturers of hardware and consumer electronics, and digital media businesses. BITKOM campaigns in particular for a modernization of the education system, for an innovative economic policy and a future-oriented Internet policy.

BITKOM welcomes the opportunity to express its views on the European Commission's Strategy for a Single Market for Intellectual Property Rights.

#### Summary

BITKOM generally supports the endeavours outlined by the European Commission in its strategy paper regarding a Single Market for Intellectual Property Rights.

The European economy needs a unitary patent protection accompanied by a unified patent litigation system that provides protection for inventions combined with a significant decrease of costs for translation and administration.

Regarding licensing of musical works we support the focus of the European Commission on simplifying copyright clearance, rights management and cross-border licensing by improving the current complex licensing system and by implementing a pan-European licensing regime.

Regarding copyright levies the European Commission's Intellectual Property Rights Strategy includes the appointment of a high level independent mediator which BITKOM appreciates as a preliminary to probable EU legislation and hence, welcomes the new commitment to act in this matter. As the current system is no longer an adequate solution to the challenges posed by technological and societal innovation, the levy system private copying should be replaced by a more practicable and efficient system.

BITKOM believes that intellectual property rights are a fundamental part of creative industries' business models. They have to be protected against infringements as they play an important role in our economy. We thus support effective and well-balanced measures to combat criminal actions and facilitate sustainable growth in internet and media businesses. We welcome the draft proposal for a regulation concerning customs enforcement of intellectual property rights. As some aspects remain unclear, we want to use this opportunity to point out some additional policy objectives that should be met.

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### 1 Preliminary remarks

Nowadays creativity and innovative capability are cornerstones for economic success of companies and business locations. Innovators have to benefit from their efforts. A **balanced, effective and reliable legal framework** is inevitable. Therefore BITKOM generally supports the endeavours outlined by the European Commission in its strategy paper regarding a Single Market for Intellectual Property Rights.

The success of intellectual property as an economic asset decisively depends on **transferring the acceptance of tangible property to intellectual property** based on knowledge and ideas. Germany possesses a strong copyright combined with a patent system that enjoys international recognition. However, one can encounter an increasing discrepancy between the legal situation and the population's perception. The relevance of intellectual rights is frequently overlooked and their legitimacy is repeatedly questioned. It is a common task of politics and economy to promote the value of intellectual property and to enlighten its chances and benefits.

### 2 A unitary patent protection and unified patent litigation system

The currently highly **fragmented patent system** in Europe poses a considerable burden for innovative companies. At present the European patent is the only protective right available for patent applicants to achieve Europe-wide protection for their invention. Those, however, need to be validated in each country for which protection is needed for which a translation in every national language is required in many member states which forces up prices of the European patent. The London Agreement that intends to reduce compulsory translation of the established bundle patent system has not been implemented in every Member State. Due to financial reasons companies often decide to apply for patents in a few chosen countries (e.g. Germany, France, UK) only and, thus, forgo comprehensive Europe-wide protection.

Within the current approach of **enhanced co-operation** the ambition must remain to make an EU-patent available that is valid Europe-wide without an additional validation step in every Member State. Through this, translation costs

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as well as administrative costs can be drastically reduced which leads to a considerable reduction of the total costs of Europe-wide patent protection.

A cost-efficient language regime must not go beyond the three official **languages** of the European Patent Office (German, English, French). A compulsory application in English is also not acceptable for the German industry which is responsible for around 40 percent of patents applied for in Europe. If translations into other languages of EU Member States are needed for information purposes, high-quality machine translations are a qualified solution.

### 3 Collective Rights Management in the EU

Many BITKOM members play an essential role in the media sector and provide creative content to satisfy growing consumer demand - e.g. as provider of on demand platforms (full track music, ringtones, videos and audiovisual content), provider of Internet Protocol Television (IPTV), cable operator, and private broadcaster. The digital distribution of creative content and goods continuously takes on greater significance. Simultaneously, the EU and its Member States lag behind comparable economic areas such as the US or Asia. BITKOM appreciates the initiative by the European Commission to identify and eliminate obstacles to the development of a genuine **Digital Single Market**, thereby driving access, competition and choice to the benefit of consumers.

In particular we support the focus of the European Commission on simplifying copyright clearance, rights management and cross-border licensing by improving the current complex licensing system and by implementing a pan-European licensing regime for musical works including musical background within audiovisual media, software and applications. Licenses for audiovisual media or other content have to be granted by the content owner and the directive should be strictly limited to music rights. We hope that this initiative will allow EU citizens to have access to a substantially greater choice of creative content on a wider variety of platforms and devices and that it will spur competition between businesses, pushing them to offer better prices and innovative services. A functioning collective rights management system is of importance for creators and other right holders, consumers and businesses likewise. However, the development of sustainable business models and the negotiation of appropriate remunerations should be left to market forces on a commercial basis, without increasing administrative efforts.

As the different concrete licensing models that are currently being evaluated have not been publicised, we urge the Commission to launch a **public stakeholder consultation** regarding its favoured solutions with a view to determine a way forward that is sustainable and backed by the majority of players concerned by the new rules.

Regarding the development of a respective Directive or Regulation we believe that the following policy objectives should be met:

1. **Pan-European and cross-border licensing** is a major prerequisite to the realization of a fully-functioning Digital Single Market. Current territorial fragmentation and exclusivity of licensing mandates hinder the development of pan-EU or cross-border services. Furthermore, the licens-

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ing processes are too complex, cost- and time-consuming and act as a barrier to entry. As a result services are provided on a national basis and are hence only accessible for a fraction of the 500 million consumers in the EU. Consumers, right-holders, service providers, and the European creative industry suffer from major disadvantages in terms of economic, cultural and competitive aspects.

2. It is essential that licensing practices are based on the **principles of market economy and competition**. Innovative and new business models will only develop, if licenses are negotiated under market-based commercial conditions. Collecting societies and other rights administrators should be required to provide the necessary support by embracing flexible market-driven licensing reflecting the needs and demands of the existing and developing forms of exploitation, actively encouraging and promoting market investment, innovation and experimentation. This requires a competitive framework for all stakeholders in which collecting societies compete for the management of rights.
3. It is of great importance to interact and negotiate with a **reasonable and limited number of collecting societies respectively rights managers**, particularly for small and medium-sized companies as well as “start-ups”. Especially in a system of pan-European multi-territorial licensing, each collecting society respectively each rights manager should manage a sufficiently broad repertoire in order to keep the transaction costs of licensing and royalty distribution relatively low.
4. For smaller-sized businesses it is particularly crucial to have access to the global repertoire for one or a very limited number of territories only. Otherwise significant entry barriers would affect a competitive environment. Therefore, the new licensing framework to be put in place, while allowing for pan-European multi-territorial licensing, needs to be designed in a way that collecting societies and/or other licensing entities are also able to grant licenses for the required global repertoire for a national territory only, if so requested by users. Users should be able to optionally achieve a **territorially limited blanket license for the global repertoire** or license their offers pan-European wide.
5. Copyrights should be licensed depending on the type of use and not according to specific categories of exploitation rights as is currently the case. Where **multiple rights** are necessary to offer a certain service (e.g. the right of making available to the public and the right of reproduction for digital exploitation), it should be obligatory that these rights are granted **by the identical rights manager**. We consider it crucial that a splitting of exploitation rights, which allow a single type of use only when granted in combination, is prevented. Streamlining the copyright system would help to remove the current complex and incomprehensible rights situation, existing dysfunction as well as double payments.
6. Collecting societies and other licensing entities should be obliged to make their portfolio transparent by means of participating in a **uniform central data base or data platform** (e.g. the Global Repertoire Database) in order to enable licensees to access transparent and complete

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information about the ownership and management of musical works. We must ensure that no rights manager, collecting society or right holder is able to prevent commercial offers from coming to market, considering that due to the lack of transparency of repertoire no service provider is able to filter the licensed content from the unlicensed one in present circumstances. Lack of transparency of the repertoire being licensed and negotiated also prevents true commercial negotiations to take place.

7. In addition, it is essential to establish European-wide **principles regarding transparency, efficiency and administration** for collecting societies and other rights administrators. These principles should include common criteria for governance and their surveillance and also apply to rights administrators such as Celas or Paecol, who are currently not subject to any regulation relating to collecting societies. **Arbitration and legal remedies through a neutral body** mutually agreed by the negotiation partners offer a reasonable solution to conflicts regarding appropriate license conditions. While appropriate remuneration is being negotiated and clarified, it should be ensured (e.g. via deposit of security) that innovative services may launch in the meantime.

### 4 Harmonization of the private copying levy systems

Against the background of the special relevance to the European Single Market, the current copyright levies system is a limitation on competition and product development. In view of the importance of the proper functioning of the Internal Market, including free movement of goods that are subject to private copying levies, the EU Commission in its Intellectual Property Rights Strategy announced that a high level independent mediator will be appointed in 2011 and tasked with exploring possible approaches towards issues such as the setting of tariff rates, administration of levies and inter-operability of various national systems.

BITKOM appreciates the mediator process as a preliminary to subsequent EU legislation and hence welcomes the EU Commission's new commitment to act in this matter. The issue is of utmost importance for the industry in Germany that pays several hundred million Euros per year on copyright levies to collecting societies.

BITKOM wishes to point out a number of points that the EU Commission should take into consideration to ensure the harmonization of the European Copyright Law and, thus, to ensure the proper functioning of the Internal Market. Regarding the development of a respective Directive or Regulation we believe that the following objectives should be met:

1. **The private copying levy system should be replaced by** a more practicable and efficient one. The current system is no longer an adequate solution to the challenges posed by technological and societal innovation. Introducing levies was originally based on the user's inaccessibility to pay financial compensation directly to the rights holder and the fact that private copies of copyrighted works could not be prevented. Control of copying behavior and access to the individual users to obtain compensation for private use were impossible in the analog world. The digital world and the usage of Digital Rights Management Systems and

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Technical Protections Measures, however, provides different opportunities, e.g. the right holder can choose whether and to what extent copies are allowed when they publish their work on the internet. A blanket lump-sum payment for such use is no longer appropriate. In addition, user behavior has drastically changed during the last ten years. While, for example, in the past a music user bought one device (e.g. a CD writer) to make private copies on one or more mediums (blanks), nowadays the same user owns multiple devices (PC, CD writer, Tablet-PC, MP3 player) and multiple appending mediums (blanks, memory cards, USB-sticks, external hard drives), which he purchased for totally different functions (data sharing, internet use, data protection) and not to make private copies. Users pay multiple levies only because they might theoretically use devices to make private copies – this is not appropriate anymore.

2. If private copying levies are to be maintained in certain restricted cases where there are no alternative solutions, they should be based on the following principles:
  - i. **they should be collected in a homogeneous manner;**
  - ii. **they should apply to legal copies only and they should not be applied if the author provides his work for free on the internet;**
  - iii. **they should never have priority over individual licensing;**
  - iv. **they should be proportionate to the actual copying and damage suffered as well as the manufacturer's price of the product;**
  - v. **they should be applied in accordance with the Padawan decision**, especially its following two aspects:
    - the indiscriminate application of private copying levies to all types of digital reproduction equipment, devices and media, including the case in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying does not comply with European Law
    - prejudice which is 'minimal' does not give rise to payment obligation.Based on this, devices that are only used commercially should be excluded from copyright levies. However, the implementation of this decision into national Law differs between EU countries although consistent application is vital.
  - vi. **Levies should not be claimed retroactively**

In its Padawan decision, the European Court of Justice states that the private user for whom the reproduction equipment, devices or media are made available or who benefits from a copying service must be, in fact, regarded as the person indirectly liable to pay fair compensation and the levy is to be passed onto him. Thus, the end customer who uses devices or storage media for reproduction is the actual debtor of the compensation and has to pay the levy.

But if in practice, device manufacturers have to pay levies retroactively, the levy cannot be passed on to the end customer as

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the product has already been purchased. It therefore has to be ensured by statutory provisions that levies must not apply retroactively but only after the rates' official publication.

All points mentioned above need to be taken into account as otherwise distortion of competition through levies cannot be avoided. Different national regularizations in EU Member States lead to different market launch situations. If usage is free of charge in one Member State but chargeable in another, the obligation to pay levies will confine cross-national trade. Furthermore, as different levies lead to a distortion of competition in EU countries this might have a negative impact on single Member States as business locations. This complex situation also leads to an intolerable effort for companies as they need to consider national application to pan-European business. Thus, the discussion needs to focus on avoiding distortion of competition through levies and achieving a fair balance of interests of the parties involved, namely the copyright holder, the manufacturers and importers of devices capable of copying and the end user.

### 5 Enforcement of Intellectual Property Rights

As our members provide telecommunication services and new media services as well as manufacture hardware and software or satisfy consumer demand of audiovisual content they are facing different challenges in the digital age.

BITKOM believes that intellectual property rights are a fundamental part of the business model of creative industries and therefore play an important role in our economy. They have to be protected against infringements. Thus, we support effective and well-balanced measures to combat criminal actions and facilitate sustainable growth in the internet and media business in the future as well.

Regarding the development of the current enforcement framework we believe that the following policy objectives should be met:

1. Different value adding chains in the internet (access providing, host providing, content providing) require **distinct and well differentiated liabilities**. Legal certainty is the most important condition if we are to ensure that all members of the value chain can develop their services and expand them to the broadest possible user-base. The E-Commerce-Directive provides that much needed legal certainty: it clarifies that where an intermediary does not have "actual knowledge" of an illegal action or content, it cannot be made liable for that action or content. We remind that Article 15 of the E-Commerce Directive forbids the imposition of general monitoring obligations on ISPs. It follows from that prohibition that court injunctions ordered against ISPs must be carefully limited in scope so as not to circumvent the general monitoring prohibition.
2. Prospering legitimate online business and fight against online piracy is in the interest of all stakeholders, i.e. creative industries, internet service providers and consumers. A **stakeholder dialogue** across business segments to find concrete solutions should be favoured. Consumers

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should be represented in such a dialogue by consumer protection organizations.

3. The **information rights** of IP owners against third parties such as internet service providers are established as an effective tool for tracing infringers. However problems exist regarding the use of this tool: On the one hand it is claimed that certain law firms assigned by rights owners seem to use this tool sometimes in an inappropriate way. On the other hand, rights owners complain about the absence of relevant data as often it is deleted already or delivered with delay. The permission to store the course of dynamic IP addresses connected to the single customer is sometimes questionable. So there might be a gap between the obligation for disclosure and the lack of data necessary to inform. These problems lead to the observation that all procedures should be executed with a sense of proportion and legal security for all parties concerned. In particular the balance between the right for information and the right for privacy needs to be defined by the legislator to prevent legal and business uncertainties for internet service providers and right holders.
4. BITKOM **objects disproportionate surveillance obligations** for third party content. Internet service providers – just as access providers, hosting providers and other intermediaries – do not always have direct control over the infringing content or goods of their customers and therefore are not always in a position to effectively influence their users' behaviour. They cannot be held responsible for third party infringements per se.
5. The "**three-strikes-and-out**" **internet disconnection approach** for alleged repeating copyright infringers raises compliance questions. It is questionable if blocking internet access of alleged infringers is compliant with the regulatory framework (especially fundamental rights and data privacy) in Germany and other Member States.
6. The aim of legislative intervention and enforcement measures in this area must always be to carefully **balance** the interest in protecting intellectual property rights and the interest in protecting other individuals' fundamental rights such as the freedom of expression, access to information, the protection of users' privacy and data protection requirements.
7. To reduce IPR infringements as effectively as possible, it is inevitable to fight piracy at the source of the infringements and attack **criminal structures** that make huge profits and are prerequisite for the consumers' offences. Law enforcement resources should therefore focus on commercial and illegal offers. Because of infringers acting on a cross-border basis an intensified cooperation of European and international authorities is essential.
8. In addition to legal and business-cooperation efforts to protect and enforce intellectual property rights **awareness raising campaigns** are essential. The improvement of acceptance by consumers requires them to understand the value and functionality of intellectual property rights as

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an economic asset and precondition for economic welfare in an information society.

### 6 Customs enforcement of Intellectual Property Rights

BITKOM believes that intellectual property rights play an important role in our economy and that they have to be protected against infringements. To ensure fair cross border trade in the EU consumers as well as manufacturers and legitimate traders are interested in customs authorities adopting robust and consistent policies against those dealing in counterfeits and pirated goods. Thus, BITKOM supports effective and well-balanced measures to combat criminal actions.

We welcome the publication of the draft in its present form and appreciate the opportunity to express our views on the Commission proposal for a regulation concerning customs enforcement of intellectual property rights.

In particular, BITKOM supports the implementation of homogenous regularizations concerning destruction and initiation of proceedings (Art. 23). This simplified procedure is an advantage for all right holders as they can rely on the same process in all countries. The definitions stated in Article 2 are substantial and we especially welcome the broadened area of application [Art. 2(1), 2(7)]. We also agree with the exclusion of goods of a non-commercial nature contained in travellers' personal luggage [Art. 1(4)] as the focus of the regulation should lay on commercial trade only.

However, some aspects of the proposal remain unclear. We believe that a future directive or regulation should meet the following additional policy objectives:

1. The requirements for custom seizure procedures mentioned in Article 16 et seqq. are rather general. Based on this, the desirable request to detain and subsequently seize fake goods which are in transit through the EU from one non-EU State to another cannot be implemented. Recital 17 might even imply that the applicability of the regulation on **goods in transit** is at the discretion of customs authorities only:

*„In particular with regard to medicines the passage of which across this territory of the European Union, with or without transshipment, warehousing, breaking bulk, or changes in the mode or means of transport, is only a portion of a complete journey beginning and terminating beyond the territory of the Union, customs authorities should, when assessing a risk of infringement of intellectual property rights, take account of any substantial likelihood of diversion of these goods onto the market of the Union.“*

Even though this recital is based on the “Declaration on the TRIPS Agreement and Public Health,” misinterpretations cannot be excluded; especially because medicines are only mentioned as a specific application. Thus, Article 1(1) can be generally interpreted to exclude goods in transit that have no likelihood of diversion in the EU. By this, it appears as almost all transits are included.

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Hence, BITKOM recommends specifying the requirements for custom seizure procedures by adding the following subparagraph to Article 1(1):

*„This regulation applies as well when goods are being transshipped from one non-EU Member State to another via EU customs territory; this regulation shall apply without prejudice to the ‘Declaration on the TRIPS Agreement and Public Health’ adopted by the Doha WTO Ministerial Conference on 14 November 2001.”*

2. Even though **parallel trade and overruns** are included in the abstract wording of Article 1(1), it should be optimized. To be more user-friendly the case groups mentioned in Article 3(1) and Article 1 and 2 UA PPVO should be added to Article 1(1) as further subsections. BITKOM thus proposes the following wording:

*“This Regulation shall apply to goods bearing a trademark or being protected by another intellectual property law with the consent of the holder of that trademark or the law and which have been manufactured with the consent of the right-holder but are placed in one of the situations referred to in Article 1(1) without the latter’s consent. It shall similarly apply to goods referred to in the first subparagraph and which have been manufactured or are protected by another intellectual property right referred to in Article 2(1) under conditions other than those agreed with the right-holder.”*

However, no legal change should blur the differences between counterfeit goods and parallel traded goods. Furthermore, customs’ focus should stay on counterfeit goods as they are dangerous and insecure for consumers. Any change of legal requirements has to ensure that customs resources are primarily spent on fighting counterfeits.

3. Article 24 about the “specific procedure for the destruction of goods in **small consignments**” foils the interests of right holders at one point. BITKOM generally appreciates further simplification of the “simplified procedure”. However, in its current version the proposal allows for the right holder to be notified about the proceedings only once “the declarant or holder of the goods objects to the destruction of the goods” [Art. 24(8)]. Under the aspect of asserting legal rights it seems favourable to at least inform the right holder about all planned proceedings mentioned in Article 24. This would enable the storage of every infringer in one database as well as the verification of the gained information with data from other proceedings. Nevertheless, BITKOM welcomes the following aspect of the proposed regulation: right holders do not need to contact the infringer themselves in case of small consignments to obtain approval of the destruction of goods.
4. The proposal states that the affected right holder must pay the cost in advance that occurred through an administrative procedure caused by an infringer. This is inaccurate and as such a revision of Article 27 dealing with **costs** is necessary.

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Goods are detained at customs for all sorts of non-IPR related reasons. Storage and destruction costs should be dealt with in the same way as in other areas of practice. Primarily liable should be the de facto holder of the goods. Shippers, carriers or holders of customs warehouses are in the best position to contract with their customers about this. This is complemented by insurances against the risk of incurring these costs.

5. The **use of certain information** by the holder of the decision granting the application should be extended to cover all proceedings – especially compensation for damages and the like. Based on the current proposal the right holder might run the risk of being exposed to sanctions as stated in Article 15(1) if he or she, for instance, uses information gained through confiscation at the border for seeking compensation from the infringer. This situation is contrary to the intention of the Commission's policy. Thus, the regulation should leave it to courts to decide when the use of information from customs seizures for other purposes is or is not a question of privacy. Moreover, the affected right holder should be able to use all gained information for every purpose that is connected with the infringement, i.e. not only for injunctive relief but for compensation claims and, furthermore, as a warning for business partners.
6. Some issues arise on the topic of **EU-wide applications**, i.e. for more than one Member State. According to Article 9(2b) the application becomes valid in all other Member States on the date of the acceptance of the motion. This raises a couple of questions. It is not clear if granting customs authorities send the decision only or if they as well send the detailed application with all information that the right holder must provide. The language they need to use is not clarified either. Further questions arise concerning Article 27(3) which states that the applicant has to pay for any translation in connection with border seizure applications which shall be valid in more than one Member State. If granting customs authorities must have the translation made this would be a contradiction to Article 7(3) which states that no fees shall arise for administrative processing. Transferring an EU-application to customs authorities of other Member States is part of the administrative process, i.e. translations are also part of the administrative process and thus no fees should be charged. If this is not applicable it needs to be clarified by whom the translation is done. No costs arise if it is done in-house. If it is done externally safety of transferred confidential information of the right holder needs to be ensured. Furthermore, the way of choosing the translator needs to be clarified, i.e. if translations will be advertised, who decides and based on which criteria.  
If electronic systems are used by customs authorities in one Member State but not in the country of application, questions arise about the responsibility of data recording in the customs authorities' database. If the local representative of the right holder in Germany is responsible for this, reimbursements need to be discussed.

In the current draft all points mentioned above remain unclear and thus need to be clarified to avoid uncertainty and misunderstandings.