Policy Paper

# The EU Copyright Law Reform – Moving Forward to Digitization

The last essential pillar of the EU-legal framework on copyright in the digital age was laid in 2001 when the Copyright Directive 2001/29/EC[1] was adopted. Since 2001 digital technology and the internet have dramatically reshaped the ways in which content is created, distributed, and accessed. New opportunities have materialized for those who create and produce content (e.g. a film, a novel, a song), for new and existing distribution platforms and digital service providers (»DSPs«), for activities such as research, information and documentation and for citizens who now expect to be able to access the full variety of content regardless of geographical borders, at any time on any device.
The European Commission and the European Parliament have made a relevant step forward by working on a copyright reform which aims at materializing the digital opportunities in a fair and legally secure way.
BITKOM welcomes this reform initiative to the benefit of creators, distributing industries, society at large, aiming at innovation, investments and increased competitiveness of the cultural, ICT and media sectors. Below BITKOM addresses the four key issues in the context of copyright law and digitization:

## 1. Effective licensing for online exploitation

### Where are we now?

DSPs for video and music online content are facing huge challenges regarding licenses for music. The clearing of rights becomes more and more difficult. In many cases DSPs do not even know who the right owners or who the licensors are due to rights fragmentation and complexity of the number of right owners and licensors. On the other hand, they have to negotiate royalty rates with different licensor-monopolies without the latter being subject to sector-specific conditions or effective control according to standards for open and fair competition. The CRM-Directive[2] aims to counter steer against such monopolies. In the view of relationship between copyright owners and collecting society the Directive, once implemented in national law, appears to become a very effective tool. However, in the context of licensing, i.e. as far as the relationship between collecting societies and DSPs is concerned, the Directive will not have any positive impact, though the need to improve the licensing situation does not present itself any different from what holds true in respect of collective rights management organisations. Negotiations of fair royalty rates remain very difficult, and, especially for small DSPs, they prove almost undoable due to the monopolistic character of licensors. The intended joint venture of the collecting societies GEMA, PRSfM and STIM[3], now after notification under scrutiny by the European Commission's DG Competition, is a very telling example of a licensor-monopoly on European level.

1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
2 Directive 2014/26/EU of the European Parliament and of the council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
3 http://europa.eu/rapid/press-release_IP-15-3300_en.htm.

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### What do we need?

The licensing procedure for music and video on-demand-services has to be simplified. We need (1) a one-stop-shop for both national and European-wide services, (2) information on who owns the copyright and who licenses the right and (3) real competition among licensors and thus a level playing field for negotiations between DSPs and licensors resulting in appropriate royalty rates.

### What are the good reasons?

The digitalization of the exploitation of content offers multiple chances to monetize the content. Copyright owners should benefit from this technological development. Therefore, the online exploitation of content has to be licensed, to the extent that this requirement is applicable, in a transparent, effective and fair manner. If copyright owners mandate collecting societies with the rights administration and monetization of their content, collecting societies should license to DSPs on appropriate conditions. Otherwise, new business models would be thwarted, monetizing the content is impeded and online piracy, i.e. illegal usage of content online, is stimulated. For an effective licensing process it is of key importance that licenses are negotiated on a level playing field.

### Which actions does the EU-legislator have to take?

The EU legislator should evaluate the implementation of a mandatory registration system in a centralized data base, even if such system does not constitute a precondition for the protection of exercise of copyright. The collecting societies, their subsidiaries and joint ventures (like e.g. SOLAR, CELAS, ARESA) should be regulated by the EU-legislator due to the monopolistic character. This is not covered by the CRM-Directive. For a level playing field between licensor and DSPs we need the duty for agreements among collecting societies which allow one collecting society to make available licenses for the repertoire administered in the first place by another collecting society (so called »reciprocal agreements«). Collecting societies, their joint ventures and subsidiaries should stay under the duty to contract regarding license agreements with DSPs, unless they can demonstrate that appropriate conditions have not been achieved (basically, the underlying principles of the regime for cable transmission, as established more than 20 years ago by EU legislation and modernized through some adaptions, would serve as a best-practice model here). Furthermore, the EU legislator has to make mandatory an efficient arbitration proceeding, including interim measures which reflect adequately the general interests of both parties, for cases in which negotiations between licensors and DSPs end without success.

## 2. Revision of the definitions of exploitation rights

### Where are we now?

In the case of online exploitation DSPs have to acquire at least two rights – the right of »making available« and the right of »reproduction«. In other words, for one technical process – to put something online – the DSPs currently need to clear and obtain at least two different rights; in some member states, this has to be secured even from different licensors. Such »split of copyrights« blocks online exploitation. Furthermore, right holders still call for an exclusive right for linking and browsing and the discussion does not seem to come to an end – i.e. in the view of right holders core and constituent elements of the internet and digital services delivered over it – interconnectedness and reading, viewing, listening to digital content – should be guarded against undue and unjustified interference by right holders. However, in a recent judgment the European Court of Justice has made clear that exclusive rights were fully harmonized in the member states, precluding the creation of new rights at national level.[4]

### What do we need?

The split of copyrights has to be avoided by legal means. It should be prescribed that one technical exploitation act requires only one exploitation right from one licensor. Furthermore, it should be made clear that the introduction of new forms of rights at national level are not permitted under EU law and create new barriers to the single market. Linking, framing/embedding and browsing and its social benefit should not be jeopardized by an unjustified authorization requirement.

4 EUCJ C-466/12 Svensson, judgment of 13.2.2014.

### What are the good reasons?

In the online environment the making available right is meaningless without the reproduction right. Therefore, German courts have already confirmed that a copyright split contradicts German copyright law. As far as linking and browsing is concerned the following facts have to be taken into account: Any type of linking serves as a reference to an already published content. Making linking subject to authorization would have the effect, that linking would not be practiced anymore. Why should somebody pay for content, if he cannot control the availability of the content? From another perspective: there is no reason to prohibit linking (as long as the linked content is not illegal), as the copyright owner always benefits from the link as it increases the traffic on the origin website. The same applies to framing/embedding: The copyright owner benefits from it as it increases the number of (video-) hits. Also society as a whole benefits since cultural diversity is promoted. Browsing can also not be subject to authorization by right holders. An exclusive right on browsing would have the unacceptable effect, that millions of ordinary internet users would be considered to be copyright infringers by dint of merely accessing a web-page containing copyright protected material.

### Which actions does the EU-legislator have to take?

The definition of the exploitation acts »making available« and »reproduction« should be reviewed taking in mind online exploitation. The act of »making available« and the act of »reproduction« should be combined in one right to be licensed. Moreover, the European legal framework has to clarify that linking, framing/embedding and browsing should not – neither in general nor under specific circumstances – be subject to authorization by right holders.

## 3. Copyright levies

### Where are we now?

The EU Copyright Directive allows member states to introduce an exception for private copying. Most of the member states had already allowed such use or seized the opportunity to do so, however, the important issue of fair compensation has been treated in a highly heterogeneous manner. In some member states there are device-based levies, in others storage-media-based levies (both »hardware-based levy«). Levies can go from a few cents in one country to 36 Euros in another one, for the same product. Some member states ensure fair compensation via the state budget, others through a compensation fund established by the government. In the UK an exception for personal copying for private use has been introduced in 2014 – accompanied by the assessment that an additional compensation scheme is not necessary. A hardware-based levy is the most inappropriate of these systems. It interferes with the concept of a European internal market, leads to a significant burden for consumers and companies and disregards the ongoing transition to a digital world as well as changed user behavior, e.g. streaming instead of downloading.

### What do we need?

Current private copying levy systems are not fit for the digital age and require significant reform as transitional measures towards the development of alternative compensation mechanisms. The reviewed framework should clarify that new business models and the vast possibilities in the digital world allow an appropriate direct compensation of the right holder. In cases relevant harm can still be observed we need to introduce better alternatives – e.g. funds, which are technological neutral – and a phasing out of hardware based levy systems.

### What are the good reasons?

The mediator and former Commissioner Antonio Vitorino highlighted in his report on private copying and reprography in 2013 that levy systems harm European consumers, pose obstacles to the internal market and represent a major impediment to Europe's digital economy. This is particularly true as each country has a different system, which counteracts the free movement of goods. A hardware-based levy system will forever remain highly affected by and lag behind technical developments and new business models. Such developments are always faster than a regulatory framework is capable of adapting to it. Consistency would hardly ever be achieved. Furthermore, there is a high risk of double payments for such private copies. Finally the system of copyright levies requires costly negotiations, litigation and implementation, which lead to an enormous administrative burden on both sides helping lawyers but not the authors.

### Which actions does the EU-legislator have to take?

Based on the recommendations of the mediator Antonio Vitorino the copyright levy system should be revised. Furthermore, we need a concrete roadmap for the introduction of appropriate alternatives to hardware-based systems in such cases where further compensation besides direct compensation is needed and a plan for the ultimate phasing-out of this significant drag on European competitiveness.

# 4. Technological neutrality for TV-transmission

## Where are we now?

The European Satellite and Cable Directive 93/83/EC[5] and corresponding national copyright (and neighboring rights) law ensures for cable retransmission of TV programs that such services cannot be blocked by individual copyright holders denying a license to network operators. Some member states, e.g. Germany, however do not consider Web TV (i.e. transmission over open networks) as cable retransmission and, therefore, Web TV services have to comply with a different set of licensing rules. Thereby, similar services are treated differently and the development of a broader Web-TV-market is constrained.

## What do we need?

We need a regulation which ensures that TV-retransmission via open networks (e.g. the internet) and mobile networks are treated in the same way as the traditional cable retransmission with regard to the licensing process. What is provided in the Satellite and Cable Directive has to equally apply to Web-TV services – in other words: TV licensing has to be regulated in a technologically neutral manner.

## What are the good reasons?

The provider of transmission of live TV channels to end-users for reception via any end-user device always faces the same (legal, commercial, and/or practical) challenge: a huge group of different right holders with (not only sometimes) diverse interests. If one individual right holder neglects a single license, the provider is completely barred from transmitting the program. This conflict of interests is always the same – no matter whether the transmission is operated via cable or via internet or mobile networks. A competitive market is constrained by unequal treatment as it exists in Europe. The constraining effect becomes obvious when comparing the German Web-TV market with the markets in Austria and Switzerland.

## Which actions does the EU-legislator have to take?

There is an urgent need to provide for a technologically neutral interpretation of the Satellite and Cable Directive. All scenarios where a live TV channel is transmitted in an unaltered and unabridged way should be considered as a »cable« (re-)transmission within the meaning of the Directive.

5 Directive 93/83/EC of the of European Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.



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