



Position of Initiative Urheberrecht on European policy

Starting point:

Communication by the Commission from December 9, 2015 regarding the modernization of European copyright legislation¹.

In its communication, the European Commission proposes the creation of a “fairer marketplace.” The most important points of the strategy announced are as follows:

1. Assessment whether the online use of copyrighted works is authorized according to existing legislation and remunerated through licenses;
2. Review of the role of news aggregators and platform operators

We expect that the role of services such as YouTube, and platform operators which profit from the use of unlicensed content, will also be included in the review.

3. Assessment whether EU-level solutions are needed to increase legal certainty, transparency, and economic balance within the system governing the remuneration of authors and performers in the EU.
4. The communication also refers to the additional, more particular need for reform, arising from the specifications outlined in the document in order to enforce the position of authors and their interest in gaining fair remuneration for the use of their works

Initiative Urheberrecht has drafted the following proposals in response to the strategy outlined in this communication:

1. Remuneration of authors and performers

- Creators must receive a share of the value created by the use of their works and services following the principle of “appropriate remuneration for each use.”
- Enforcement of effective contract law, which enables the economically weaker, creative party to negotiate on a level playing field, which guarantees a fair basis for the enforcement of appropriate remuneration.

¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, AND THE REGIONS Steps towards a modern, more European copyright law // http://europa.eu/rapid/press-release_IP-15-6261_de.htm // retrieved March 31, 2016

- Moreover, the principle of enabling organizations and unions of authors and performers to conclude agreements with the cultural industry regarding remuneration policies and contractual terms on behalf of the entire group of creatives working in the respective sector and in as many areas of use as possible should be implemented.
- The Commission should support the German concept of a copyright contract law and also analyze the current legislation in the Netherlands and the long-standing regulations in French law and use these to establish a copyright contract law at EU level.
- The Commission must continue to strengthen and expand systems introduced previously that ensure secure income for authors and the cultural industry. We refer to remuneration for private copying, the stake of creatives in the proceeds from the rental of works, and remuneration for the lending of works – the Public Lending Right. These proven remuneration systems, which have been accepted by consumers, have not lost their relevance as a result of the development of the information society but should be adapted accordingly.

The Commission must therefore resist the efforts of those who pay, particularly the equipment and blank media manufacturers, who want to abolish these fees.

- In this context, the following issues regarding the distribution of music and movies online gain particular relevance:

In enforcing its objective of expanding the dissemination of European works with the help of digital network operators throughout Europe, the Commission encounters the problem of hitherto unharmonized and therefore differing forms of acquisition of the respective required rights of use.

The situation is exacerbated by the fact that numerous works suitable for online distribution and the databases in which they are stored date from an era in which rights transfers were carried out for analog uses only. Therefore, the use of these works in digital networks is fraught with legal and practical difficulties.

Authors and performers have a great interest in ensuring that their works can be made available to as many users as possible without restrictions as long as they are compensated for the use of these works. They want to contribute to overcoming existing obstacles.

Initiative Urheberrecht therefore recommends that the Commission grant producers and broadcasters the right to distribute works online in the EU, following the model outlined in the EU Directive on Rental and Lending Rights. In return, authors and performers should be entitled to the non-transferable right to equitable remuneration from the online companies to be administered by their collecting societies in the EU, which would distribute the payments promptly and without substantial administrative outlay.

This proposal is also supported by the SAA (Society of Audiovisual Authors / www.saa-authors.eu) and the “Fair Internet Campaign” (www.fair-internet.eu), whose members are AEPO-ARTIS Association of European Performers' Organizations, the International Artists Coalition (IAO), the European sections of the International Federation of Musicians (FIM) umbrella organizations, and the International Federation of Actors (FIA).

The EU had introduced an indispensable right to remuneration for performers in 1992 with its Directive on Rental and Lending Rights (92/100/EWG), under which remuneration was payable to performers' collecting societies and therefore benefitted the performer. This right is independent of

the obligation of video stores to pay licensing fees for rentals to movie producers.

The amount received by authors and performers has, however, decreased by more than 70% in recent years in Germany, since video rentals have been replaced by online use, which is not covered by this right to compensation. Although movies are still being watched - though now online - authors and performers no longer receive compensation when this content is accessed. Clearly, we must keep up with technological developments and introduce an additional indispensable right to compensation pertaining to online use.

Music composers are already being represented by their collecting societies with regard to such use. However, there are still problems in assessing the appropriateness of the compensation received in this area.

2. Responsibility of platform operators for securing remuneration for authors for the use of works on their platforms

It is important for authors and performers alike that the initiated review of the responsibilities of platform operators and the regulation of their activities by the EU also include an examination of how to ensure that compensation or remuneration is paid for the unauthorized use of protected works for private purposes on these platforms.

This requirement is based on the following considerations:

According to Art. 12 of the E-Commerce Directive of 2000, hosting services and service providers transmitting information or offering access to a network via which information can be accessed currently enjoy a general exemption from liability for content that is uploaded by third parties and transferred unchanged. On this basis, business models have emerged, the use of which takes place at the expense of the author. It is important to correct this.

One online platform business model is designed in such a way that end consumers upload content to the platform, which is then made available to other end consumers (these are known as "social media platforms"). This model pertains to proprietary content created by end consumers ("user generated content"). However, end consumers are uploading third-party content ("user uploaded content") to an increasing extent. In these cases, the end consumers have usually not acquired any licensing rights. It does not matter whether the content is made available via streaming or download

Third-party content uploaded by end consumers is subject to a serious gap in protection: under current law, the end consumer is responsible for the acquisition of licenses, but this law cannot be enforced for practical reasons. Those who take advantage of this unlawful conduct - the platform operators - are not responsible under the law for the acquisition of licenses. Thus, they benefit directly from the unlawful conduct of third parties.

A policy that truly does justice to the interests of authors must seek to enforce the interests of the aggrieved rights holders and ensure adequate compensation for the use of their works. This objective could conceivably be achieved through two approaches. In both cases, the authors and rights holders would waive their right to prohibition so as to receive at least monetary compensation for the use of their works:

- **Limiting the liability privilege (or increasing the responsibility of online platforms):**

The forthcoming revision of the EU regulatory framework must ensure that platform operators who are actively involved in making available copyrighted content and who enjoy the resultant economic benefits are made responsible for acquiring the corresponding rights. It should be made clear that these platform operators are liable for content as content providers. This would result in equal treatment of platforms and traditional media providers and eliminate the massive distortion of competition.

- **Inclusion of a new paywall:**

Where the above is not feasible, this behavior by end consumers (uploading external content for private, non-commercial purposes) could be permitted within certain limits by means of a copyright paywall. In this regard, the introduction of opt-out models should be considered where appropriate.

As compensation, rights holders and authors as well as performers should receive fair remuneration, which should be paid by the platform operators, since they benefit economically from the behavior of the end consumers (similarly to how device manufacturers benefit from the mass copying made by end consumers).

Collecting societies should be tasked with administering the remuneration processes. These should then ensure as part of their international cooperation that creators receive their compensation payments promptly and without substantial administrative outlay.

3. Exceptions for educational and scientific work

In realizing its plans to further develop exceptions in this area for the fields of education and science, thus facilitating greater access to relevant works, the Commission must do justice to the claim of authors, performers, and other rights owners to appropriate remuneration.

Provided that the Commission can ensure that this is the case, the creatives support the plans of the EU and the national legislators to develop these exceptions. They will resolutely oppose any solutions that lead to subsidization of the educational and scientific systems at the expense of the weakest participants in the process behind the creation of the works in the value chain in question (i.e. the creatives), as such solutions would contradict not only the three-step test, but also undermine the objective that is being discussed here in a wider context, namely to strengthen the position of authors and performers.

4. Other proposals of the EU Commission

1. Assuming that the aforementioned ideas of creators are incorporated into the Commission's legislative process, the authors can agree to further plans that are included in the policy paper, namely:
 - Enabling wider access to digital content across the EU (improving portability);
 - Creating exceptions for the enforcement of accessibility (measures for making works available to people with disabilities)

2. The creators support the Commission's anti-piracy efforts;
3. however, the creators are skeptical of the Commission's plans to create a unitary European copyright title: the remaining differences in national copyright laws that have not yet been harmonized by relevant directives and are to be further harmonized on the basis of the points outlined above are part of the cultural diversity of the Member States. Further harmonization should therefore be considered carefully and reviewed with regard to its necessity; such harmonization can only be achieved through a lengthy, democratically legitimate process of progressive EU integration.

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April 15, 2016 / updated May 20, 2016

The initiative comprises more than 35 organizations and unions, representing the interests of about 140,000 authors and performers.

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