
9. If all you have is a hammer: promoting the creative industries through copyright reform

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The European Union (EU)'s first major copyright reform since the InfoSoc Directive of 2001¹ was launched with the objective not to encourage the growth of the Creative Industries in particular but rather to foster growth and jobs in the wider economy. Both business and consumers were supposed to be benefitting from a harmonised legal framework. This ambition culminated in Commission President Jean-Claude Juncker's vow to 'break down national silos'² in copyright legislation in 2014. In the two years leading to the presentation of the European Commission proposals on September 14, 2016,³ this focus saw a significant shift. While the original approach was backed by the results of an extensive public consultation in early 2014,⁴ showing great demand for copyright harmonisation particularly from copyright users and stiff resistance from Creative Industries and even some government officials,⁵ the final proposal deviates from the

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167 22 June 2001 1–019. For a more general discussion of copyright and the Creative Industries, see contribution to this collection by Pavis.

² The 'Digital Single Market' was presented as the first of five priorities for Jean-Claude Juncker's Commission presidency during the election campaign <<http://juncker.epp.eu/my-priorities>> accessed 19 November 2016.

³ The proposals consist of four draft legislative acts, the most general of which is the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – COM(2016)593. Specific issues were addressed in the Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes – COM(2016)594, Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society – COM(2016)596 and Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled – COM(2016)595.

⁴ Report on the responses to the Public Consultation on the Review of the EU Copyright Rules. Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright July 2014 <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf> accessed 19 November 2016.

⁵ Discours de Fleur Pellerin, ministre de la Culture et de la Communication, prononcé devant le Conseil supérieur de la propriété littéraire et artistique, à Paris, le 18 novembre 2014. <www.culturecommunication.gouv.fr/Presse/Discours/Discours-de-Fleur-Pellerin-prononce-devant-le-Conseil-superieur-de-la-proprieete-litteraire-et-artistique> accessed 19 November 2016.

original goals significantly. This change is reflected in the title, dropping the notion of copyright harmonisation and modernisation⁶ in favour of promoting a ‘copyright-based economy’.⁷ The three sectors print publishing, music and film, discussed below, stand out for having made their mark on this proposal. The European Parliament and the Council will now (writing in 2016) have to debate whether these suggested measures are indeed suitable for fostering growth.

THE PUBLISHING SECTOR

The proposed directive on copyright in the Digital Single Market addresses publishers’ demands in two articles: Article 11 introducing a new neighbouring right for press publishers and – as a direct reaction to the *Reprobel* decision of the European Court of Justice⁸ – Article 12 allowing Member States to afford publishers a share of the compensation paid for use of works under an exception or limitation. This exemplifies the very narrow view of the Creative Industries that excludes the financial interests of authors themselves, who will likely be left with less income, if the revenue from compensation for copyright exceptions would not have decreased because of the *Reprobel* ruling.

As the introduction of a neighbouring right for press publishers in the form of a directive leads to further fragmentation in the EU *aquis*, it is clearly at odds with the original intention of the copyright reform. It was preceded by a public consultation that cast some doubt on the suitability of such a neighbouring right for addressing the challenges in the advertising market faced by publishers, particularly the reaction from academic experts has been very negative.⁹ A neighbouring right for press publishers already introduced in Germany several years ago and a similar provision in Spain¹⁰ have failed to achieve the desired results.¹¹ Nonetheless, all major interest groups of the publishing industry at a European level welcomed the proposal.

⁶ Cf, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework. COM(2015) 626 final, 09 December 2015.

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market. COM/2016/0592 final, 14 September 2016.

⁸ Judgment of the Court (Fourth Chamber) of 12 November 2015; *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] C-572/13 ECLI:EU:C:2015:750.

⁹ Opinion of the CEIPI on the European Commission’s copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law <www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/CEIPI_Opinion_on_the_introduction_of_neighbouring_rights_for_press_publishers_in_EU_final.pdf> accessed 09 December 2016.

¹⁰ R Xalabarder, ‘The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law’ (2014) IN3 Working Paper Series, Barcelona: Universitat Oberta de Catalunya 1–40.

¹¹ Expert hearing at the German Federal Parliament, committee on digital agenda on 3 December 2014 <www.bundestag.de/ada?url=L2F1c3NjaHVlc3NiMTgvYTIzL2FuaG9lcuVuZ2VuLzAzMTIyMDE0X2luaGFsdC8zNDIzOTI=&mod=mod441454> accessed 9 December 2016.

THE MUSIC SECTOR

One of the most controversial proposals of the copyright package is the provision on ‘certain uses of protected content by online services’ in Article 13. The purpose of this measure is to encourage licensing agreements between platforms for user-uploaded content and rights holders, who are not obliged to conduct licensing agreements if they fall under the limited liability regime of the e-commerce directive, by imposing the use of content filtering technologies on those platforms that do not conclude such agreements. Many academics have raised fundamental rights concerns about this provision¹² or issued warnings of its potential negative effects on legal certainty and innovation.¹³ The Commission’s impact assessment illustrates that the measure is mainly aimed at addressing complaints about insufficient revenues from the music industry,¹⁴ although it applies to all user-uploaded works or subject-matter.

THE FILM SECTOR

The film sector’s interests are mostly present in the copyright package in the form of the measures it does not contain: the Commission’s original ambition to end geoblocking has been transformed into a more piecemeal approach that will leave most instances of geoblocking of films intact, following significant opposition from the film sector to the Commission’s initial announcements. The absence of specific copyright measures that are supposed to promote the interests of the film industry should nevertheless not be misunderstood as a lack of commitment by the European Commission. In fact, several measures to promote the European film industry can be found outside copyright law, such as facilitation of subtitling and dubbing through the Creative MEDIA programme,¹⁵ or the promotion of tools to increase the visibility of European films online. The fact that several of these initiatives have been announced in the umbrella communication accompanying the copyright package¹⁶ illustrates that copyright policy is still seen as the natural place to address the promotion of the Creative Industries.

¹² S Stalla-Bourdillon and others, ‘Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society’ (2016) <<https://ssrn.com/abstract=2850483>> accessed 20 November 2016.

¹³ M Senftleben, ‘Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?’ *Tijdschrift voor auteurs-, media- en informatierecht* (2016) 130–33 <<https://ssrn.com/abstract=2865258>> accessed 9 December 2016.

¹⁴ Commission staff working document: Impact Assessment on the modernisation of EU copyright rules. SWD(2016) 301 final, Part 1/3, 137 et seq <http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17211> accessed 01 December 2016.

¹⁵ European Commission, MEDIA sub-programme of Creative Europe <<https://ec.europa.eu/digital-single-market/en/media-sub-programme-creative-europe>> accessed 09 December 2016.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market. COM/2016/0592 final, 14 September 2016.

This approach can be limiting, because not all challenges faced by the Creative Industries have their root in copyright law, and often copyright reform is not the most suitable instrument to address them. Hence, it would not be surprising if the measures in the Creative MEDIA programme end up being much more effective at promoting the creative industries than the controversial copyright proposals aimed at supporting the press publishing and music industries.

CONCLUSION

The Commission took great care in addressing the needs of the Creative Industries, through controversial extensions of copyright law in the case of the publishing and music industries, and through soft-law measures and backtracking from user-oriented proposals to completely abolish geoblocking in the case of the film industry. By choosing this Creative Industries-centred approach, it lost focus on many other areas where a badly needed reform was promised, including the completion of a digital single market favourable also to new market players and users' interest in a simplified legal framework.

This raises the question whether the E is capable of a copyright reform that follows any other public policy concern than promoting these Creative Industries. Regardless how valid that may be as a goal, the proposals by the European Commission have the potential to exacerbate the problems faced by industry and copyright users. If every proposal to address those issues is side-tracked into a measure for the Creative Industries, the legislator is failing the rest of society, which has a legitimate interest in policies that strike a fair balance between all actors affected by copyright law. In the end, protecting the traditional Creative Industries may end up doing the entire sector a disservice, as innovation is disincentivised and the necessary structural adaptation to the digital environment is slowed down.¹⁷

¹⁷ Senftleben (n 13).