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Intellectual property rights in the digital era

Report[1]
Committee on Culture, Science, Education and Media
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Summary

Despite their erosion in the digital era, intellectual property rights are human rights protected under Article 1 of the Protocol to the European Convention on Human Rights. Intellectual property is an important cultural value and economic asset in Europe and an erosion of intellectual property rights would have a negative impact on all Europeans.

In accordance with Article 10 of the Convention on Cybercrime, member States must adopt legislative and other measures to establish the infringement of intellectual property rights as a criminal offence under domestic law. Special attention should be given to operators of Internet-based social networks and platforms with user-generated content, which benefit financially from illegal content posted on their sites. Intellectual property rights must also be respected when member States negotiate, accede to and implement international legal obligations in this field.

Authors of creative works must have the right to use the potential of the Internet. Too often, the main benefit from the dissemination of works on the Internet accrues to a few big Internet companies, while authors, performers and other rightholders suffer dramatic losses of income.

1. Reference to committee: Doc. 13448, Reference 4042 of 11 April 2014.

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A. Draft resolution[2]

1. The Parliamentary Assembly welcomes the fact that, thanks to the Internet, authors of creative works and holders of intellectual property rights are able to offer their works globally and users can access creative works instantly – and through inexpensive fixed or mobile access devices – anywhere in the world. The Assembly notes with concern, however, a decrease in the production and diversity of creative works as a result of geographical imbalances and shifts in their production, leading to the emergence of a few excessively dominant market players and a concentration of creative industries in a few parts of the world.

2. The Assembly is also concerned by a *de facto* erosion of intellectual property rights in the digital era, which has been facilitated by legislative reforms weakening intellectual property rights. Intellectual property is an important cultural value and economic asset in Europe and an erosion of intellectual property rights would have a significant negative impact on Europeans.

3. The Assembly recalls that intellectual property is protected under Article 1 of the Protocol to the European Convention on Human Rights (ETS No. 9); the effective exercise of this human right may require positive measures of protection by member States against interference by others.

4. The Assembly reaffirms that digital services do not take place in an imaginary borderless cloud, but are real services with real producers, distributors and customers, all of which are based in countries with their specific legal systems. It is therefore necessary and legitimate for States to apply their laws to such services, including laws on intellectual property, consumer protection and taxation. The geographical location of digital services and content, as well as their possible geo-blocking, are hence an appropriate way to prevent the circumvention or violation of national laws, because intellectual property rights have their territorial application also online.

5. The Assembly values the growth in human communication resulting from the use of Internet-based social networks and platforms with user-generated content; it recalls that users are the rightholders of their creative works uploaded on such networks and platforms, as well as of their personal data, unless they expressly waive such rights. Users are likewise primarily responsible for respecting the intellectual property rights of others, especially if they play an active role in content dissemination. Recalling the case law of the European Court of Human Rights, the Assembly emphasises that Internet service providers are also liable for intellectual property rights violations, if they commercially or otherwise benefit knowingly from such violations by their users.

6. The Assembly acknowledges that open licensing of creative works can be an option for the respective copyright-holders in order to voluntarily share their work with others. As this option is easier for financially well-established individuals, institutions or companies, its potentially limiting impact on the pluralism of creative works should nevertheless be taken into account. The Assembly also considers that, by offering technological solutions against the *de facto* erosion of intellectual property rights, the private sector can play an important role in avoiding stricter legislation and stricter case law by competent courts.

7. Having regard to the current legislative initiatives within the European Union by its Commission and Parliament, and referring to the protection of intellectual property rights under Article 17.2 of the Charter of Fundamental Rights of the European Union, which binds all organs of the European Union, the Assembly stresses that:

7.1. national transpositions and applications of European Union law must comply with the European Convention on Human Rights and in particular Article 1 of its Protocol;

7.2. the European Patent Office, and Directive 2004/48/EC on the enforcement of intellectual property rights, should be strengthened in the framework of Article 118 of the Treaty on the Functioning of the European Union, which calls for measures for the creation of European Union-wide intellectual property rights and for the setting up of centralised European Union-wide authorisation, co-ordination and supervision arrangements;

7.3. the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (ETS No. 178), which entered into force in the European Union on 1 January 2016, should be used for strengthening the protection of intellectual property rights;

2. Draft resolution adopted by the committee on 14 March 2016.

7.4. efforts to create a digital single market within the European Union should not privilege online services over offline print media, film and cinema or terrestrial audiovisual services, but avoid a distortion of competition by taking due account of the possible dominance of gatekeepers to online services and the latters' impact on the pluralism of creative work and cultural expression;

7.5. Europe-wide licensing arrangements should be supported in order to facilitate the cross-border portability of online content and services.

8. The Assembly therefore recommends that member States:

8.1. promote public awareness, especially among Internet users, of the human right to the protection of intellectual property and the importance of this right for the cultural diversity and the economic well-being of our societies;

8.2. promote the electronic identification of intellectual property rights on the Internet by supporting widely accessible technical facilities for this purpose and raising awareness among authors of creative works;

8.3. adopt such legislative and other measures as may be necessary to establish as criminal offences under domestic law the infringement of intellectual property rights;

8.4. adopt dissuasive measures towards operators of Internet-based social networks and platforms with user-generated content which benefit financially from illegal content posted on their sites;

8.5. promote procedures to lodge complaints online with law-enforcement authorities as well as user hotlines by Internet service providers to report violations of intellectual property rights on their services;

8.6. devise online dispute resolution procedures for online violations of intellectual property rights, in accordance with Assembly Resolution 2081 (2015) on access to justice and the Internet: potential and challenges;

8.7. reinforce in an open and transparent manner their multilateral work on international co-operation in the field of intellectual property rights;

8.8. ensure that Article 1 of the Protocol to the European Convention on Human Rights is respected in law and in practice when negotiating and implementing international treaties affecting intellectual property rights, including free trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP);

8.9. ensure that the protection of trade secrets, for example under Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), does not unduly limit the public's right to access information under Article 10 of the European Convention on Human Rights.

9. The Assembly calls on authors of creative works, rightholders, collective rights agencies and licensing agencies, as well as on Internet service providers, including social networks and platforms with user-generated content, to use technical facilities for the identification of intellectual property rights online, such as digital rights management technologies for providing necessary information to users and preventing unauthorised action on their part. Social networks and platforms with user-generated content should empower their users in this respect by providing such identification automatically by default. The Assembly also calls on them to adhere to the self-regulatory "Principles for User-Generated Content Services" established in 2007 against illegal user-generated content.

B. Draft recommendation[3]

1. Referring to its Resolution … (2016), the Parliamentary Assembly emphasises the importance of the right to the protection of intellectual property in accordance with Article 1 of the Protocol to the European Convention on Human Rights (ETS No. 9) and Article 10 of the Convention on Cybercrime (ETS No. 185), which must be respected when member States negotiate, accede to and implement international legal obligations affecting intellectual property rights.

2. The Assembly therefore recommends that the Committee of Ministers:

2.1. invite the Cybercrime Convention Committee to draw up guiding principles on legal and practical measures against the infringement of copyright and related rights, in accordance with Article 10 of the Convention on Cybercrime;

2.2. invite the Parties to the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (ETS No. 178) to study the effectiveness of domestic law and practice in accordance with Article 4 of that convention as regards the protection of intellectual property rights;

2.3. follow up, through practical action, its Recommendation Rec(2001)7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment; in this context, practical co-operation should be sought with the European Observatory on Infringements of Intellectual Property Rights and Europol;

2.4. reinforce co-operation with the European Union in this field;

2.5. transmit to the competent domestic ministries and agencies this recommendation and Assembly Resolution … (2016) on intellectual property rights in the digital era.

3. Draft recommendation adopted by the committee on 14 March 2016.

C. Explanatory memorandum by Mr Axel E. Fischer, rapporteur

1. Introduction

1. Intellectual property is a non-tangible property which typically belongs to the owner or rightholder of creative or artistic works such as music, literature, pictures or images. It also includes industrial design, computer software and certain trade secrets. Intellectual property rights are mainly copyrights, patents, trademarks and industrial design rights.

2. In today's knowledge-based society, intellectual property rights are extremely valuable business assets. On 6 May 2015, the European Commission issued its Communication on "A Digital Single Market Strategy for Europe" and an accompanying staff working document which deals with "access to and use of copyright-protected content". It estimates that copyright-intensive industries generate 7 million jobs and contribute approximately €509 billion to the gross domestic product of the European Union.

3. However, there are noticeable factors which challenge intellectual property rights today. First, they are threatened by the global expansion of trade in counterfeit products and the technological simplicity of sharing some types of copyright protected material through the Internet. The Internet has become the pre-eminent medium for selling counterfeit products globally. Between the launch of its international co-operation project in this field in 2012 and the end of 2014, Europol identified a total of 1 829 domain names which were used for selling counterfeit products online.[4]

4. For consumers, unlike in the analogue world, it has become very easy (and is continuously getting easier through greater bandwidth and accessibility of works on mobile devices) not only to access works and to make digital copies thereof, but also to rediffuse them on the Internet. This is often likely to occur without the authorisation of the rightholders. To the extent that this occurs illegally, end users may not only deprive rightholders of their revenues from exploitation, but in fact may also step into the author's or other rightholder's shoes as "distributors" of his work on the Internet by posting it on their websites, in social media, blogs, etc. or when participating in file sharing services. Internet service providers, such as online platforms, might support consumers (even if not necessarily in a directly visible way), given their regular financial benefits from the operation of such platforms or other services without acquiring licenses.

5. Secondly, many business models are based on the online exploitation of copyright-protected works of other rightholders. In addition, user-generated content, which is in principle copyright-protected, becomes of growing business value for some online industries. The International Chamber of Commerce in Paris stated in its Intellectual Property Roadmap 2014 that "the emergence of new Internet applications and platforms, the increasing ubiquity of mobile devices and Internet, ever-increasing bandwidth and changing consumer behaviour are making intellectual property owners reconsider their strategies and models for distributing, commercialising and controlling their intellectual assets in the electronic environment". The European Audiovisual Observatory of the Council of Europe showed through its MAVISE Database that accessing digital copyright protected content is one of the most popular online activities, with 35% of Internet users engaging in playing or downloading games, images, films or music.

6. Thirdly, intellectual property rights are protected for a certain duration and geographic territory; thus, as long as harmonised international standards on intellectual property do not exist, the Internet will in principle enable users in one country to access content which would be lawfully inaccessible in other countries due to different copyright protection. Even if legal standards on intellectual property rights online and their territorial application were clarified at international level, the enforcement of such standards would still be a major challenge in a globalised market, where illegal copies of such content can be accessed and purchased online.

7. As outlined in the background report by Professor Silke von Lewinski (whom I particularly thank for her work and on which I will draw extensively), it is difficult for rightholders to control uses on the Internet and thus to implement their rights so as to be able to benefit from them effectively. Although they may protect their content by technical protection measures, such as by encryption or copy-protection measures, and although the law legally protects them against circumvention and related acts, the use of such measures is unpopular with consumers, and the music industry in particular no longer applies them to end users. Internet service providers benefit from generous safe harbour provisions in the European Union's e-commerce Directive of 2001, according to which they are exempted from liability for the use of infringing content via their services under certain conditions, especially if they remain passive.

4. https://www.europol.europa.eu/content/292-internet-domain-names-seized-selling-counterfeit-products.

8. Not least, intellectual property may be restricted in the public interest, such as for educational or scientific purposes. In addition, the right to freedom of information has led to the limitation of exclusive audiovisual transmission rights of major events which are of public interest, such as the right to short television reporting about major sports events.

9. Through discussions and opinion making in social media by end users, pressure has been built up in favour of free access to creative content; authors who wanted to defend their rights were intimidated by offensive reactions (like for example the massive wave of insults addressed to the musician and author Sven Regner). Overall, public debate has shown a certain tendency towards putting authors and other rightholders into a defensive position, and favouring quite far-reaching rules in favour of free access by users and through certain intermediaries (and their business models), to the detriment of authors and other rightholders.

10. As proposed in the motion for a resolution underlying this report (Doc. 13448), we shall review the existing legal standards of intellectual property rights (section 2 below) and discuss and propose strategies for parliaments in all European States on how to ensure effective protection of these rights at national, European and global levels (sections 3 to 6 below).

2. The protection of intellectual property rights by international treaties

11. At global level, intellectual property rights are protected primarily by the revised Berne Convention for the Protection of Literary and Artistic Works, which has been signed and ratified by virtually all the countries in the world, and the conventions of the World Intellectual Property Organisation (WIPO). In addition, the World Trade Organization (WTO) has set standards through its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

12. Article 15.1.*c* of the United Nations International Covenant on Economic, Social and Cultural Rights recognises the fundamental right of everyone "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". Therefore, the report of 24 December 2014 on copyright policy and the right to science and culture[5] by the Special Rapporteur of the United Nations in the field of cultural rights cannot convincingly claim that intellectual property rights are not human rights. Cultural diversity and individual creative freedom would be at stake if States redirected financial support from proprietary publishing models to open publishing models, as called for by the Special Rapporteur.

13. Article 1 of the Protocol to the European Convention on Human Rights (ETS No. 9) protects property. The European Court of Human Rights has stressed that intellectual property benefits from the protection afforded by Article 1.[6] Moreover, the Court reiterated the principle that genuine, effective exercise of the rights protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection by States, which can include making copyright violations a criminal offence.[7]

14. Article 10 of the Convention on Cybercrime (ETS No. 185) specifically addresses this issue by penalising the violation of copyright and related rights "by means of a computer system", for example by making electronic copies accessible online or by selling online hard copies or counterfeit products. Article 10 contains the obligation to establish as criminal offences the infringement of copyright and related rights, where such acts are committed wilfully, on a commercial scale and by means of a computer system.

15. Article 17 of the Charter of Fundamental Rights of the European Union protects the right to property and includes expressly intellectual property. The major copyright legislation of the European Union can be found in Directive 2001/29/EC, which implements the Copyright Treaty and the Performances and Phonograms Treaty of WIPO, as well as Directive 2004/48/EC on the enforcement of intellectual property rights. In addition, intellectual property questions are addressed by Directive 2009/24/EC on the legal protection of computer programmes, the Orphan Works Directive 2012/28/EU and the Collective Rights Management Directive 2014/26/EU

16. On 9 December 2015, the European Commission presented its proposal for a regulation on ensuring the cross-border portability of online content services in the internal market as well as its communication "towards a modern, more European copyright framework". As far as intellectual property rights constitute

5. www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_57_ENG.doc.
6. See, for example, *Anheuser-Busch Inc. v. Portugal* (Application No. 73049/01), paragraph 72.
7. *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden* (Application No. 40397/12, decision of 19 February 2013), in which the Court upheld the punishment under Swedish penal law of the applicants for having provided and commercially exploited an Internet platform (called "Pirate Bay") for the illegal sharing of copyright-protected material.

cultural expressions in accordance with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which has been signed by the European Union, Article 167 of the Treaty on the Functioning of the European Union confirms subsidiarity in this field.

3. Current problems

3.1. Exceptions to and limitations of intellectual property rights

17. Different user groups, often backed by Internet service providers which have a commercial interest in unrestricted circulation of works on the Internet, have expressed their interest in new mandatory and broadly worded exceptions and limitations of authors' rights. However, exceptions and limitations of a right must be justified by sound policy reasons, such as education, research or news reporting. In contrast, for example, mere entertainment, the mere technical possibility to access or use works in a given way, or the pursuit of new business models by Internet service providers as such may not generally be considered as sufficient reasons to restrict the rights of authors, who need to be able to benefit from their creations also on the Internet.

18. Furthermore, even where it is decided to remove an obstacle to trade caused by different authors' rights legislation, one should take into account the fact that exceptions or limitations are not the only possible means of doing so, but that a frequently appropriate measure may instead be different kinds of licensing, including individual or (voluntary or mandatory) collective licensing, which might be encouraged.

19. In general, national rules on exceptions and limitations of authors' rights vary to a great extent, *inter alia* due to their close link to culture and cultural policy, and are based on different concepts. In particular, under the Anglo-Saxon copyright system, the laws regularly contain very detailed provisions on exceptions and limitations, supplemented by a number of somewhat broader clauses called "fair dealing" to apply to certain well-defined situations (unlike the much broader concept of "fair use" in United States law). There is no tradition of statutory remuneration rights as a compensation for the loss of exclusivity through exceptions and limitations. In contrast, national laws under the authors' rights system in continental Europe only contain quite specific exceptions and limitations rather than fair dealing or other flexible clauses, and yet differ among themselves in several aspects, such as in the scope and detail of the regulation of exceptions and limitations and in the extent to which statutory remuneration rights are provided in connection with exceptions and limitations.

20. It has been claimed that rendering facultative exceptions or limitations mandatory would enhance legal certainty. However, the mandatory or facultative character does not affect the legal certainty; in both cases, a particular provision exists, be it a different one in each EU member State or the same one in all of them. Still, it is true that the mandatory character could facilitate exploitation across borders by creating a similar legal situation in the member States (although different interpretations may remain for some time), while the facultative character in this case results in the need to ascertain different national laws rather than one law; at the same time, businesses always needed and will further need to take into account the laws of countries to which they want to export, including on issues other than intellectual property, and will have to do so also for exploitation beyond the European Union.

21. In the framework of the WIPO, certain countries have called for a binding treaty on certain exceptions and limitations. While a treaty on access to special format copies was adopted in favour of visually impaired persons (Marrakesh Treaty of 2013), which relates to a very narrow area of little economic importance, a treaty on exceptions, in particular in the fields of education and public libraries, meets major, justified objections including at governmental level. Such objections are due not least to the larger, negative economic impact of such a treaty on these culturally important fields, but equally due to the close connection of these fields with general cultural policy, which is and should remain a matter of sovereign, national decision-making, which guarantees a certain level of cultural diversity.

22. Another proposal backed in particular by Internet service providers has been the introduction of broad, flexible clauses for exceptions and limitations, following the US-American "fair use"-concept or other kinds of flexible exceptions or limitations. It is argued that this would facilitate a faster adaptation of copyright to the challenges of new technologies, since judges could react faster than legislatures in interpreting such broad clauses. However, the disadvantages of this approach for all stakeholders are likely to prevail. In particular, flexible, broadly worded clauses will result in reduced legal certainty; also consumers will not easily know what is permitted and what is not. As a consequence, problems will also arise regarding the application of criminal law, which requires clear provisions regarding infringements. In addition, problems will arise for the application of any statutory remuneration rights related to such exceptions and limitations, such as for private copying, since debtors of such remuneration will try to argue that a particular use is not covered by the exception or

limitation and thus the related remuneration right does not exist. Flexible exceptions or limitations will mean years of legal proceedings needed to find clarification of their meaning, resulting in high transaction costs, and this each time only for very specific situations in individual cases brought before the courts. Therefore, clear and final reactions to technical or other changes are likely to take even longer through the courts than through legislative amendments.

23. In fact, the legal system on the European continent (and even to a large extent in the United Kingdom and Ireland), which is based on precisely drafted legal language in the field of authors' rights (while it can still be technically neutral) has shown that it has so far successfully adapted 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 judiciary on the other. 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. They might also in a given case result in decisions against users. They do not therefore appear to be an option to be pursued.

3.2. Text and data mining

24. Text and data mining is usually done for business and scientific and other research purposes and involves scanning (and thus reproduction) of large amounts of texts with a view to automatic analysis thereof; the results of such processes may then be used further for the development of new products or services and often create enormous economic value. Relevant industries such as the pharmaceutical industry have sought licences for such uses. Then, certain Internet industries interested in mass digitisation and mass use of digitised texts, later joined by libraries, have claimed the need for a new exception or limitation for this purpose or at least for clear rules on the possibilities of making these reproductions and on how to document the validity of results obtained through automatic analysis. The Reda report of the European Parliament on the implementation of the Information Society Directive proposed to consider the enabling of text and data mining for research purposes. However, if such enabling were to be assured via an exception or limitation, it could have far-reaching negative consequences for the exploitation of contents in related markets by rightholders. At the same time, in the field of commercial research, text and data mining and further uses of the results already occur on the basis of licenses;[8] there would appear to be no need for an exception. As for non-commercial research, an appropriate solution could be the application of a similar service, combined with a commitment by rightholders to grant licences that are appropriate for non-commercial research, in the framework of self-regulation.

3.3. "Geo-blocking" and cross-border access

25. In broader terms, "geo-blocking", as understood by the European Commission in its Digital Single Market communication of May 2015, refers to the practice of denying cross-border access to works as a result of territorial exploitation of copyright in certain fields, in particular of the audiovisual industry. As a consequence, consumers may not access content that is available on a given website for free (such as a television programmes via Internet) or offered on the basis of a subscription (such as Netflix) in one member State from another member State. This practice, according to the film industry, enables and is essential for the financing of European film productions. Before considering any interference with the territorial exploitation of works on the Internet in order to reach simultaneous availability of works throughout the European Union or even beyond, one should therefore take into account the likely negative impact on European cultural (and in particular film) production and act so as to refrain from causing damage to European culture, even if not every work would be available at the same time beyond national borders.

26. In general, one should also take into account the fact that territorial exploitation often corresponds to the demands of consumers. To a broad extent, there is no "single market", whether digital or analogue, in European reality today, since most local films or music in a given country are not in a measurable demand in other countries; a licensee in these cases would not even want to have (and pay for) an EU-wide licence if he cannot get clients who would subscribe for such local films or music in another country – due for example to the language barrier for foreign films (and disproportionate costs for subtitles or dubbing) and lyrics associated with music, and due to different cultural traditions. In fact, the mainstream (mostly US) films or music would be best placed to survive any compulsory rules that would prevent territorial licensing (and the Internet platforms and other service providers who have driven the debate on geo-blocking would benefit therefrom). This effect

8. See, for example, the model developed by the Copyright Clearance Center in the United States, https://www.copyright.com/.

would seem contrary to the aim of safeguarding and promoting cultural diversity in Europe, to which the European Union and its member States, and other European countries, have subscribed in the UNESCO Convention on Cultural Diversity.

27. For these reasons, also the – separate – current reflections of the European Commission on a possible extension of rules of the EU Satellite and Cable Directive to on-demand offers by broadcasters raise serious doubts: their extension to the Internet was already rejected in the context of the e-commerce Directive 2001 and should also now be avoided.

3.4. Portability of content

28. To be distinguished from general cross-border access described above is the case in which users who subscribe to an online service in their home State would like to access the service while temporarily present in another member State, for instance while on holiday or away on business. Users who have a subscription for example for online access to films or music with a provider in their country have complained that often they cannot access these works once they are in a foreign country; that content is thus not "portable". Rightholders or service providers may have restricted such access on the basis of exclusive licences per country for economic reasons; in particular in the film industry, financing largely depends on territorial exploitation. It should be possible to reconcile both interests in this very specific case, either on the basis of a memorandum between the stakeholder groups on voluntary agreements that would enable, despite otherwise exclusive licences, such uses for their private purposes by the subscribed consumers, or by legislative action; still, it is doubtful whether a new exception to exclusive rights could be justified in this case by reasons of public interest. In any case, account will have to be taken of existing exclusive licence agreements.

3.5. Research and education

29. Although most countries already provide for exceptions and limitations for the purposes of research and teaching, and Article 5.3.*a* of the Information Society Directive allows member States to do so within a given framework, some claim that respective exceptions and limitations should be made mandatory and uniform in the European Union, in order to facilitate cross-border teaching and research. However, Article 165 of the Treaty on the Functioning of the European Union limits its legislative powers in the field of education.

30. To the extent that a real (or even possible) need exists to use foreign rather than domestic material for school or university teaching, it would seem appropriate to consider whether a system of licensing would not be practicable and preferable. In fact, in certain countries such as the United States, licensing is being practised without noticeable problems for university course materials. Also, it must be taken into account that for school books and part of material used at universities, these educational uses constitute the core possibility of exploitation, that is the core market, which must not be negatively affected. Accordingly, a balanced exception or limitation – for example regarding small parts of works (that are not specifically made for school or other teaching use) to be used for non-commercial online teaching that would not affect the market for such works – may be useful where it does not yet exist, unless a licensing mechanism can be established for this purpose.

3.6. Public libraries

31. Public libraries, archives and similar institutions have called for mandatory and broad exceptions and limitations of authors' rights, in particular to make full use of digital technology without the need to acquire licenses. For example, these institutions would like to digitise their collections or make available online digitised works to users not only in their own community or country, but across borders, both in the European Union and – in the context of WIPO – worldwide. They have been co-operating with major Internet companies which have a strong commercial interest in digitising books from libraries, not least in order to get even more content to search for on the Internet. In fact, well-known United States companies have sponsored book digitisation in many countries.

32. Not only since public libraries are funded by public money, but also because of their role for the culture of a given country, each country has an interest in regulating aspects related to public libraries in the framework of its national cultural policy and to keep this freedom in order to adapt the law in the best manner to its national cultural policy. One may also observe that the infrastructure for public libraries as well as their local importance varies enormously among countries both within the European Union and beyond; a uniform, mandatory regulation may thus not be appropriate.

33. Even if there were a considerable demand for cross-border online availability of works, it is necessary to assess the impact of any possible exception or limitation on authors' rights. In particular, if online availability, whether worldwide or not, of digitised works through public libraries (and thus free of charge for users) were permitted by law through an exception or limitation, it is likely that authors would no longer have any real opportunities to market their works normally and thereby to benefit from their rights. In fact, one cannot economically compare lending in the analogue world (for which in most EU member States a remuneration right rather than an exclusive right exists) and making available books and the like by online transmission. The uses in the analogue world are much less intense than online uses; users need to visit the library instead of having access from their home, and the borrowed book is not as vulnerable to further uses as a digital copy. In the analogue world, a library would acquire new copies after some years of use, while this would not be needed in case of a digital copy. Given these differences, it would be very risky to apply the same regime (a simple remuneration right) as mostly applies to analogue public lending also to "e-lending"; this is particularly true since in an economic crisis, public money (from which such remuneration is paid) is usually restricted and rightholders in this case would suffer from revenue cuts, while libraries could legally continue to make available their collections online, with a likely strong impact on the sales market.

34. At the same time, licenses for public libraries for the online environment already exist; rightholders may thereby grant access while trying to secure, on the basis of fine-tuned contractual conditions, that uses will not negatively affect normal exploitation. If not all publishers have granted such licenses for online uses yet, or not all libraries can afford to pay for such licenses, one should consider that also in the analogue world, not every public library can afford to acquire all existing works for the purpose of lending.

35. Overall, any addition or widening of an exception or limitation regarding digital uses by public libraries and similar institutions would require very careful consideration of its possible impact on the relevant market; the normal exploitation must not be affected by any exception or limitation.

3.7. "User-generated" content (UGC)

36. Users often combine their own material, such as a home video, with protected works they access from the Internet, such as music, or they may use their own text to which they add pictures from a website, and make such content available on the Internet themselves. They often do not acquire the rights for such uses and thus, in principle, infringe these rights. Some have called for an exception to the exclusive rights of authors to allow such practices. However, this approach does not seem justified. The fact that such practices have become widespread and serve the entertainment of the Internet community does not appear to be a sufficient public policy reason to restrict the rights of authors. In addition, even if users' activities are non-commercial, the platforms on which they post them are usually commercial ones, all the more so since they place advertising in context with content. While some platforms are ready to acquire licenses, many of them argue that they would enjoy a safe harbour under the e-commerce Directive and are not ready to pay the appropriate license fees. It would seem appropriate to clarify their often rather active role, in order to refute this argument.

37. It should also be mentioned that there are already possibilities for users to use protected works legally without a lot of effort. For example, many authors have granted licenses to everyone, such as Creative Commons licenses. Authors may also grant licenses through websites to any individual user in a simple procedure, such as via the Bridgeman Art Library.

3.8. Equitable participation in remuneration for authors and performers

38. Often, authors and performing artists cannot properly participate in revenues from the exploitation of their works, since they are regularly not in a sufficiently strong bargaining position vis-à-vis their contractual partners. In order to improve this situation at least for Internet uses, one should consider applying the model of Article 4 of the EC Rental Rights Directive 1992 (now Article 5 of the Directive as consolidated in 2006). It has shown to be effective in the context of rental rights. Basically, it guarantees that the author and performer keeps, when licensing his exclusive right, a kind of statutory "residual right" of equitable remuneration, which he cannot waive and which should ideally be subject to mandatory management by a collective management organisation. The latter, which has a stronger bargaining power than any given individual author, would collect the money from the exploitation businesses and transfer the money back to authors and performers.

3.9. Enforcement of authors' rights and liability of Internet service providers

39. The above-mentioned participation rule for authors and performers may however only show the desired effect if the overall revenues from exploitation are more than modest. On the Internet, to date, revenues are often still modest, due to insufficient enforcement possibilities and revenue streams that go to Internet platforms and other intermediaries rather than to rightholders. Rights enforcement is a challenge, since it is easy for anyone to copy protected works in digital form and to upload them on their websites or any other platforms to make them available to the public. Although procedures exist to have illegal content removed from such sites, such content is easily placed on new sites, where infringements continue. Considerable costs are incurred to continuously search for new illegal content and to follow these procedures – costs that rightholders could better invest in new creative content to enrich cultural diversity. The permanent existence of a considerable amount of illegal content on the Internet, often offered free of charge, renders it quite difficult for rightholders to compete with their legal (paying) offers on the Internet.

40. Furthermore, under the e-commerce Directive, Internet service providers enjoy quite comfortable safe harbours from liability for infringements on their platforms through consumers, and regularly reap considerable economic benefits from the circulation of protected content on their platforms, in particular through advertising. Rightholders are thus deprived of income from the exploitation of their content to the benefit of intermediaries.

41. This imbalanced situation needs to be remedied by improving enforcement measures and clarifying the broad safe harbour rules of the Directive on electronic commerce. In particular, site-blocking measures which are covered by Article 8.3 of the Information Society Directive (application for an injunction against intermediaries) are only available and applied effectively in some EU member States (such as the United Kingdom) and function well there, but should be so everywhere; in certain countries, restrictions of the right to information on infringers may also be a stumbling block to enforcement of rights on the Internet. In addition, the safe harbours under the e-commerce Directive have often been applied to certain Internet service providers that initially had not been foreseen by these rules and for which these exemptions from liability do not seem appropriate. In particular, platforms on which users place content should be made subject to wide responsibilities, since they usually do not just play a passive, but an active role in content dissemination. Also, concentrating attention on companies that earn money from sites with illegal content, such as through advertising or offering credit card services (when payment is required, for example for faster downloads or streaming of films), called the "follow-the-money" approach, is to be strongly recommended in order to avoid platform operators continuing to free-ride on right holders' content without their authorisation on a commercial scale.

42. Such protection is also justified against the background of human rights. According to the European Court of Human Rights, the protection of authors' rights on the Internet may justify an interference with the right of freedom of expression under Article 10 of the Convention, in particular through enforcement measures and especially where it is not a political debate that is at stake, but commercial exploitation of cultural content.[9]

4. Authors' rights for journalists and news media

43. Freedom of expression and information through the media is an essential requirement of a democratic society, requiring transparency, pluralism and independence of the media. The advent of digital online media has strongly changed the news media markets and the employment situation of journalists. Newspapers are seeing their revenues dwindling, hence causing a difficult economic situation for several of them, and the number of professional journalists is declining. At the same time, multinational Internet companies have soaring shareholder values and produce immense amounts of cash revenues, while producing virtually no original news content. European politicians cannot be indifferent towards such a deterioration of the news media situation in a sector which is of vital importance for a democracy.

44. The European Newspaper Publishers' Association (ENPA) prepared in May 2015 10 policy recommendations concerning copyright in the EU digital single market.[10] Text and data mining by users through search engines and by specialised Internet service providers is growing rapidly. Therefore, ENPA regretted that search engines and text and data mining companies participated commercially in the exploitation of news contents while refusing to pay for the use of the copyrights. ENPA also saw legal

9. *Neij and Sunde Kolmisoppi v. Sweden*, op. cit.; and *Ashby Donald v. France* (Application No. 36769/08, judgment of 10 January 2013). Of course, the blocking of all sites of a company including those that were not infringing would not be justified, see *Ahmet Yildirim v. Turkey* (Application No. 3110/10, judgment of 18 December 2012).
10. www.enpa.be/uploads/enpa_copyright_epub_2015.pdf.

uncertainties if the US-American concept of "fair use" were to be introduced into European copyright laws in order to restrict copyright and neighbouring rights. As this concept was unknown in Europe, it would require lengthy and costly litigation in order to clarify it through case law of the highest courts in member States.

45. Instead, licensing agreements should be concluded; they provide better, faster and more adaptable solutions than the introduction of new exceptions. Such agreements are successfully used in the United States for example. However, many news media are in a weaker position when negotiating such agreements with large multinational Internet companies.

5. The digital economy

46. All sectors of the economy have benefited from the advent of digital technologies and the Internet. The media landscape has been changed dramatically through a technological convergence of print and broadcast media with the Internet and mobile telephony. Individual freedom of expression and information has been advanced exponentially. These changes cannot be reversed.

47. Nevertheless, one has to recognise that digital companies are flourishing enormously today, far beyond the "dot com bubble" more than a decade ago. A true globalisation of the digital economy would still appear to be a policy objective, due to the apparent geographic concentration of the big market players. From a market economy perspective, general support for the digital industry does not seem necessary. Therefore, the economic impact of legislative changes of intellectual property rights should be taken into account, because such changes would create indiscriminate benefits for Internet companies to the detriment of rightholders and traditional media.

6. Self-regulatory industry initiatives

48. As stated by the Assembly report on "The protection of freedom of expression and information on the Internet and online media" (Doc. 12874 Add), Internet piracy of copyright protected works became a widely publicised issue through the huge sharing of files among users on the YouTube network. YouTube was purchased by Google in 2006 for US$1.76 billion and subsequently developed a software programme called Content ID that scans and compares videos to material provided by copyright owners, for instance in order to place specific advertisements on the screens of its users who have posted those videos. This software allows YouTube to gain revenue from advertisements and identify copyright violations when videos are posted by users. YouTube also introduced the "YouTube Copyright School" for copyright violators, who are asked to watch on its website a four-and-a-half minute video and answer questions concerning copyright, as an educational exercise.

49. The Court of Justice of the European Union decided on 16 February 2012 that the owner of an online social network cannot be obliged to install a general filtering system covering all its users in order to prevent copyright infringements by users.[11] Nevertheless, Internet companies which benefit commercially from copyright violations of their users can be held liable under penal law, as the European Court of Human Rights has found in the case concerning "Pirate Bay".[12] Therefore, technological initiatives for the protection of copyright do not seem to be an undue burden for Internet companies which otherwise benefit from the actions of their users.

50. Internet service providers hosting user-generated content established in 2007 the self-regulatory "Principles for User-Generated Content Services" against illegal user-generated content.[13] More Internet companies should adhere to these principles. Social networks and platforms with user-generated content should empower their users in this respect by providing digital identification tools automatically by default.

7. Conclusions

51. Following the committee hearing in Paris on 3 December 2015, I concur with Professor von Lewinski that the Internet has brought enormous opportunities for global dissemination of works to users. However, the main benefit from the dissemination of works on the Internet still accrues to the powerful Internet companies and indirectly their users, while authors, performers, and other rightholders suffer dramatic losses of income.

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11. Court of Justice of the European Union, *SABAM v. Netlog* (C-360/10), http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-02/cp120011en.pdf.
12. *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden*, op. cit.
13. www.ugcprinciples.com.

Therefore, any legislative action with respect to exceptions and limitations should be conducted on the basis of a thorough analysis of the relevant situation and take into account all the consequences thereof. While tailor-made and carefully drafted (rather than vague, flexible) exceptions and limitations may be appropriate in given situations, there is no overall need to redraft the existing ones, to render them mandatory or to introduce new ones. Authors of creative works should have a fair chance to benefit from the potential that the Internet offers. This is the aim of the proposals included in the draft resolution and draft recommendation.