



**Reaction of CEIPI to  
the Resolution on the  
Implementation of  
Directive 2001/29/EC on the Harmonisation of  
Copyright in the Information Society adopted by the  
European Parliament on the 9<sup>th</sup> July 2015**

Christophe Geiger, Oleksandr Bulayenko, Théo Hassler, Elena Izyumenko,  
Franciska Schönherr, Xavier Seuba\*

*The Centre for International Intellectual Property Studies (CEIPI) is an institute devoted to education and research in intellectual property and is a constituent part of the University of Strasbourg. CEIPI analyses and comments the main developments in the area of intellectual property at national, European and international levels. From this perspective, the Resolution adopted by the European Parliament on 9<sup>th</sup> July 2015 on the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, and more generally any step towards copyright reform in the European Union, is of particular interest to CEIPI, which hereby intends to react on the content of the Resolution.*

---

\* Christophe Geiger is Associate Professor, Director General and Director of Research Department of CEIPI; Oleksandr Bulayenko is Researcher and PhD candidate at CEIPI; Théo Hassler is Professor at CEIPI; Elena Izyumenko is Researcher and PhD candidate at CEIPI; Franciska Schönherr is PhD Candidate at CEIPI; Xavier Seuba is Senior Lecturer at CEIPI. All signatories are members of the Research Department of CEIPI. This opinion was sent to the European Parliament end July 2015.

## Abstract

In order to make the European Union (EU) copyright framework fit for the Internet environment and to make a single digital market a reality, it has become obvious that reform is needed.<sup>1</sup> CEIPI thus highly welcomes the initiative of the European Parliament to support a revision of the copyright acquis in the EU through its Resolution on the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society adopted 9<sup>th</sup> July 2015.<sup>2</sup> A democratic debate on questions of immediate relevance for Europeans such as copyright law is without any doubt necessary in a modern society and strengthens the legitimacy (and thus the acceptance) of the system adopted.<sup>3</sup>

While acknowledging the importance of many timely and innovative proposals voted by the Parliament, the Resolution can still be described as a missed opportunity to make a stronger statement on some essential issues of copyright law in the EU, such as its territoriality and the related consequences on cross-border access to copyright protected content. Indeed, a more unified approach to copyright law in the EU seems crucial for the development of a truly European information society. Moreover, while taking on board a timely call for revision of some of exceptions and limitations and making some important statements in that regard, the

---

<sup>1</sup> CEIPI repeatedly endorsed the need of a revision of the EU copyright framework for achieving an appropriate balance between all interests concerned, in particular in light of the technologic changes, and to achieve a true internal market for cultural goods and services. See for example the Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014, p. 2, available at: [http://www.ceipi.edu/uploads/media/Response\\_of\\_CEIPI\\_to\\_the\\_Public\\_Consultation\\_EN\\_.pdf](http://www.ceipi.edu/uploads/media/Response_of_CEIPI_to_the_Public_Consultation_EN_.pdf). (short version in French published: Stéphanie Carre, Christophe Geiger, Jean Lapousterle, Franck Macrez, Adrien Bouvel, Théo Hassler, Xavier Seuba, Oleksandr Bulayenko et Franciska Schönherr (2014), 'Quelques principes clefs concernant l'élaboration d'un droit d'auteur de l'Union européenne', *La Semaine Juridique (JCP)*, n° 15, pp. 706-708); See also the Comment of the CEIPI on the European Commission's Green Paper on 'Copyright in the Knowledge Economy', published in French: Christophe Geiger, Franck Macrez, Adrien Bouvel, Stéphanie Carre, Théo Hassler et Joanna Schmidt-Szalewski (2009), 'Quelles limites au droit d'auteur dans la société de l'information ? Réponse au Livre Vert sur 'le droit d'auteur dans l'économie de la connaissance', *Propr. intell.*, n° 32, pp. 231-244 and in English: 'What limitations to copyright in the information society? A comment on the European Commission's Green Paper "Copyright in the knowledge economy"', *IIC*, Vol. 40, No. 4, pp. 412-433).

<sup>2</sup> European Parliament resolution of 9 July 2015 on the implementation of 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 (2014/225(INI)), P8\_TA-PROV(2015)0273 (Resolution).

<sup>3</sup> See further on the issue of copyright reform in the EU: Christophe Geiger (2010), 'The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information', *Intellectual Property Quarterly*, Vol. 1, pp. 1-14; Mireille van Eechoud, P. Bernt Hugenholtz, Stefan van Gompel, Lucie Guibault and Natali Helberger (2009), *Harmonizing European Copyright Law: The Challenge of Better Lawmaking*, Aalphen aan den Rijn, The Netherlands: Kluwer Law International, a consolidated version of two studies carried out by the Institute for Information Law (IVI), University of Amsterdam, for the European Commission and containing interesting proposals for improving the legal framework of copyright in the European Union; European Copyright Society (2014), *Answer to the EC Consultation on the review of the EU copyright rules*, available at: [http://typodun2009.unistra.fr/fileadmin/upload/DUN/CEIPI/Documents/European\\_Law\\_Institute/ECS\\_answer\\_to\\_EC\\_consultation\\_on\\_copyright\\_Review.pdf](http://typodun2009.unistra.fr/fileadmin/upload/DUN/CEIPI/Documents/European_Law_Institute/ECS_answer_to_EC_consultation_on_copyright_Review.pdf).

adopted text appears to be unfortunately less ambitious and courageous in several regards than the original Draft Report proposed by the Rapporteur.<sup>4</sup>

In fact, being the result of difficult political compromises, the Resolution in its final version contains some polarised and, sometimes, contradictory statements, making European legislature's message to the European Commission not easy to follow. It can also be observed that, in spite of its title, the scope of the Resolution extends beyond InfoSoc Directive<sup>5</sup> into areas regulated by other copyright instruments, notably the E-Commerce Directive<sup>6</sup> and the Computer Programs Directive<sup>7</sup>.

Nevertheless, the Resolution still contains some very important statements and thus deserves full attention. One of them is certainly a strong call for evidence-based norm-setting, the European Parliament rightly underlining the need for impact assessments before taking legislative actions.<sup>8</sup> Indeed, some complex issues involving intertwined interests cannot be dealt on mere ideological grounds and the future of copyright in the European Union is of such importance that it needs to rely on serious and independent data.

It is thus hoped that the European Commission, encouraged on its way to copyright reform by the Parliament and taking into due consideration its Resolution,<sup>9</sup> will make a historic step towards creation of a true single digital space for culture and commerce in Europe.

---

<sup>4</sup> Draft Report on the implementation of 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 (2014/2256(INI)) of 15 January 2015 (Draft Report). Nevertheless, the Resolution greatly expanded in its length, from 25 paragraphs to 68, by virtue of numerous amendments proposed.

<sup>5</sup> 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 [2001] OJ L 167/10.

<sup>6</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] L 178/1.

<sup>7</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) (text with EEA relevance) [2009] OJ L 111/16.

<sup>8</sup> The European Observatory on Infringements of Intellectual Property Rights, entrusted to the OHIM by the Commission in 2012, and which mission is to provide “[e]vidence-based contributions and data to enable EU and national policymakers to shape effective IP enforcement policies and to support innovation and creativity”, could play an essential and increased role in this regard, by carrying on these studies themselves or to act as facilitators. European Observatory on Infringements of Intellectual Property Rights, Multiannual Plan 2014-2018, p. 4, available at: [https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/about\\_us/observatory\\_multiannual\\_plan\\_en.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/about_us/observatory_multiannual_plan_en.pdf)

<sup>9</sup> It has to be reminded that the legislative initiative is still to be taken by the Commission, as the Resolution is a political document of non-binding nature based on an own-initiative report drawn up by the Committee on Legal Affairs (JURI) according to Rule 52 of the Rules of Procedure of the European Parliament (8 July 2014).

## Table of Contents

Abstract .....	2
Introductory Remarks.....	5
<i>Evidence-based policy-making in the domain of copyright</i> .....	5
<i>Terminology</i> .....	6
I) Territoriality.....	7
<i>Territoriality of rights</i> .....	7
<i>EU copyright title</i> .....	9
<i>Territorial licensing</i> .....	9
<i>Geoblocking and portability</i> .....	10
II) Protection of Creators.....	10
III) Development of a Robust Public Domain.....	11
<i>Term of protection</i> .....	11
<i>Re-use of public sector information</i> .....	13
<i>Preservation of public domain</i> .....	13
<i>Dedication of works to the public domain</i> .....	13
IV) Exceptions and Limitations .....	14
<i>Common rules for exceptions and limitations</i> .....	14
<i>Access for persons with disabilities</i> .....	18
<i>Images of copyrighted works in public places</i> .....	18
<i>Education and research, including online and cross-border activities</i> .....	19
<i>Unwaivability of exceptions and limitations</i> .....	20
<i>Text and data mining</i> .....	20
<i>Liability of Internet intermediaries</i> .....	20
<i>Interoperability</i> .....	21
Conclusions .....	22

## Introductory Remarks

### *Evidence-based policy-making in the domain of copyright*

The Resolution contains multiple references to the necessity to make impact studies and to rely on evidence when undertaking legislative efforts. This high-level political call for evidence-based policy-making can only be praised.<sup>10</sup>

Nevertheless, while the Resolution on six different occasions stresses the need to rely on prior studies before legislative actions,<sup>11</sup> paragraph 19 still “[e]mphasises that any reform of the copyright framework *should be based on a high level of protection*” (emphasis added). This seems contradictory, as “high level of intellectual property protection” cannot be an end in itself and should be ensured *only* when it is appropriate and leads to the expected results,<sup>12</sup> a change in the socio-economic conditions should therefore encourage the lawmakers to recalibrate the legislation, and even if needed, to revise it.<sup>13</sup> Hence, this dogmatic, ideologically charged statement stands out of the overall wording and spirit of the Resolution calling for research-supported law-making.<sup>14</sup>

---

<sup>10</sup> See in this sense Christophe Geiger (2013), ‘The construction of intellectual property in the European Union: searching for coherence’, in Christophe Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, EIPIN Series Vol. 1, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, p. 20. More generally on the importance of evidence based policies, see recently Joost Poort (2015), *Empirical Evidence for Policy in Telecommunication, Copyright and Broadcasting*, Amsterdam, Amsterdam University Press, p. 9: “Increasingly, politicians, judges and stake holders require economic analysis and economic evidence to make informed decisions about new policy measures, to make optimal decisions within the legal boundaries and to fathom the proposed consequences of proposed legal interventions. Without empirical evidence *they may simply assume the effects of a policy measure as an article of faith*” (emphasis added).

<sup>11</sup> - Paragraph 8 of the Resolution: “notes that cross-border access to the diversity of uses that technological progress offers to consumers *may require evidence-based improvements* to the current legal framework” (emphasis added);

- paragraph 13: “calls on the Commission to ensure that any initiative to modernise copyright is *preceded by a wide-ranging study of its likely impact* on the production, financing and distribution of films and television content, and also on cultural diversity” (emphasis added);

- paragraph 21: “any legislative initiative to modernise copyright be *preceded by an exhaustive ex-ante assessment of its impact* in terms of growth and jobs, as well as its potential costs and benefits” (emphasis added);

- paragraph 22: “any revision of EU copyright law must be properly focused and *must be based on convincing data*” (emphasis added);

- paragraph 52: “any new exceptions or limitations introduced into the EU copyright legal system needs to be *duly justified by a sound and objective economic and legal analysis*” (emphasis added);

- paragraph 57: “to analyse, *on the basis of scientific evidence*” (emphasis added).

<sup>12</sup> Interestingly, later at paragraph 33 of the Resolution, the European Parliament calls on the EU legislator to provide “adequate” protection for copyright and neighbouring right, which is a far better and balanced notion. This different policy understanding, results of the political compromise, however risk diluting the message to the Commission and the EU citizens at the end.

<sup>13</sup> A notable example of intellectual property protection which has proven to be of little use for EU’s economy is a *sui generis* legal protection of databases. European Commission (2005), *First evaluation of Directive 96/9/EC on the legal protection of databases*, DG Internal Market and Services Working Paper, pp. 24-25. On this text, see Annette Kur, Reto M. Hilty, Christophe Geiger and Matthias Leistner (2006), ‘First Evaluation of Directive 96/9/EC on the Legal Protection of Databases - Comment by the Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich’, *IIC*, Vol. 37, No. 5, pp. 551-558.

<sup>14</sup> For a criticism of this rhetoric often used in the past by the EU legislator, see Alexander Peukert (2011), ‘Intellectual Property as an End in Itself?’, *EIPR*, Vol. 33, pp. 67-71.

The importance of considering carefully independent studies was previously underlined by CEIPI in its response to the Commission’s Public Consultation,<sup>15</sup> as in the past many of successive academic studies commissioned and produced for the purpose of informing the norm-setting process hardly had any effect.<sup>16</sup> Moreover, accurate reading of the already conducted studies and appropriate use of their conclusions are of equal significance.<sup>17</sup>

## *Terminology*

The Resolution introduces in European copyright discourse several new terms.

Terms such as “transformative work” (paragraph 31), “transformative use” (paragraph 42) and “user-generated content” (recital O and paragraph 60) are not to be found anywhere in the EU copyright acquis. The Resolution also refers to “consumer rights”. Although other EU copyright instruments refer to “consumers”, the use of the concept “consumer rights” in the context of copyright is novel (paragraphs 59 and 67).

While the new concepts might not have a long-term impact in the political discourse, they can have serious consequences once transposed into legal texts, especially when interpreted by judges. In general, the introduction of new notions can be welcomed when it is appropriate to more adequately describe new phenomena or a change in the approach. With regard to the term “consumer rights” however, it would have been more coherent for the purpose of legal certainty and consistency with recent European case law to refer to them as “rights of users / users’ rights”.<sup>18</sup>

---

<sup>15</sup> Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014, pp. 1 and 5.

<sup>16</sup> Response of CEIPI to the Public Consultation, *supra*, pp. 2-3.

<sup>17</sup> For example, recital G of the Resolution mentions the authoritative EPO-OHIM (2013), *Intellectual Property Rights Intensive Industries: Contribution to Economic Performance and Employment in the European Union*, Industry-Level Analysis Report referring to the *total economic contribution of all IPR-intensive industries*: “whereas the September 2013 joint EPO and OHIM study shows that about 39 % of total economic activity in the EU, worth some EUR 4 700 billion a year, is generated by *IPR-intensive industries*, as is, in addition, 26 % of direct employment (or 56 million jobs), with indirect employment accounting for a further 9 % of the total number of jobs in the EU” (emphasis added). The data from the Study is of course accurately reproduced in the Resolution but since the Resolution deals with the revision of *copyright norms only*, it would have been more appropriate to refer to the *economic contribution of copyright-intensive industries only*: “whereas the September 2013 joint EPO and OHIM study show that about 4,2% of total economic activity in the EU, worth some EUR 510 million a year, is generated by *copyright-intensive industries*, as is, in addition, 3,2% of direct employment (or 7 million jobs), with indirect employment accounting for a further 1 % of the total number of jobs in the EU” (pp. 7-8 of the Study).

<sup>18</sup> See e.g. Judgement in Deckmyn, C-201/13, EU:C:2014:2132, at para. 26, referring to “the rights of users of protected subject-matter”; Judgement in UPC Telekabel, C-314/12, EU:C:2014:192, at para. 57, recognizing the cause of action for those Internet users whose information rights might be affected by certain copyright enforcement measures; Judgement in Ulmer, C-117/13, EU:C:2014:2196, at para. 43, bringing up an “ancillary right” of users to digitize works contained in publicly accessible libraries’ collections. Further on users’ rights, see European Copyright Society (2015), ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn’, *EIPR*, Vol. 37, No. 3, pp. 129-133, paragraph 22. On this opinion, see also J. Griffiths, Christophe Geiger,



A brief remark can be made on the terms used to refer to copyright infringement. Paragraph 18 employs “piracy” and paragraph 23 “copyright infringing activities”. The latter term is to clearly be preferred as it is more neutral and its scope is more certain.<sup>19</sup>

## I) Territoriality

### *Territoriality of rights*

On the matter of territoriality of copyright and related issues, the Resolution appears unfortunately to be less ambitious than the strategy of the European Commission,<sup>20</sup> as it reaffirms the principle of territoriality of rights in the EU.

In fact, paragraph 6 of the Resolution “[p]oints out that the *existence of copyright and related rights inherently implies territoriality*; emphasises that there is no contradiction between that principle and measures to ensure the portability of content” (emphasis added). Firstly, it should be clarified that the establishment of a multi-territorial copyright title, such as a unified copyright law for the entire EU, is not prohibited by the international intellectual property framework; territoriality is thus not necessarily “inherent” to the copyright system, since multi-territorial copyright titles can thus be introduced if an appropriate agreement is reached between countries.<sup>21</sup> Secondly, territoriality is linked to the way in which rights are traditionally cleared in the EU (i.e., on a country-by-country basis). Although the territoriality of rights is not the only cause for difficulties related to cross-border accessibility of copyright-

---

Martin Senftleben, Raquel Xalabarder and Lionel Bently (2015), ‘The European Copyright Society’s “Opinion on the Judgment of the CJEU in Case C-201/13- *Deckmyn*”’, *EIPR*, Vol. 37, No. 3, pp. 127-129.

<sup>19</sup> In this spirit, Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (Text with EEA relevance) [2012] OJ L 129/1 replaced “Piracy” in the name of the European Observatory by “Infringements of Intellectual Property Rights” reflecting and institutionalising a political choice towards use of more neutral terms. See on the unclear meaning of the term “piracy” in the context of the copyright debate, Franck Macrez (2014), ‘De la “piraterie”, brèves remarques sur une métaphore endormie’, in Christophe Geiger and Caroline Rodà (eds.), *Intellectual Property Law in a Globalized World : Mélanges en l’honneur du Professeur Joanna Schmidt-Szalewski*, Collection of CEIPI, No. 61, Paris, France: LexisNexis, pp. 221-231.

<sup>20</sup> See in this sense the declaration of the President of the European Commission in his message to the Commission: Jean-Claude Juncker (2014), *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session, 15 July 2014, pp. 5 and 18: “[W]e will need to have the courage to break down national silos in [...] copyright”.

<sup>21</sup> The EU has all the necessary competence under Article 118 of the Treaty on the Functioning of the European Union (consolidated version). It can even be argued that the EU legislator has a mandate to create a uniform protection for copyright law in the EU, as according to Art. 118 he “*shall* establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union” (emphasis added). See in this sense the Open letter of the European Copyright Society to the Commissioner for Digital Economy and Society concerning the need for a unified copyright law in the European Union: [http://www.ceipi.edu/uploads/media/ECS\\_letter\\_to\\_Oettinger\\_FIN-1.pdf](http://www.ceipi.edu/uploads/media/ECS_letter_to_Oettinger_FIN-1.pdf).

related services, it is certainly an important factor that reinforces territorial rights clearance in the EU (other reasons include the linguistic diversity of the EU market and the possibility to exercise rights on a national basis only).<sup>22</sup> The unification of certain rights would imply a much greater certainty for rightholders and users alike. Even in case of multi-territorial licensing of rights in musical works for online use,<sup>23</sup> under the most optimistic scenario of aggregation of rights for all the member states, licensors would grant authorizations under 28 different national copyright titles with different scope.<sup>24</sup>

Paragraph 7 “calls for a reaffirmation of the *principle of territoriality, enabling each Member State to safeguard the fair remuneration principle within the framework of its own cultural policy*” (emphasis added). While it is up to policy-makers to keep territoriality or not, the accuracy of the statement about the principle of territoriality being an enabler for safeguarding the fair remuneration principle within nation’s own cultural policy is very doubtful. Further adjustments to the EU copyright framework are needed to enhance the fairness of the revenue flow to creators (notably though improving their position in the value chain), but *creation of a single title is not by itself contrary to the principle of fair remuneration* (as it is rather the content of the copyright legislation that is of higher importance for influencing the share that creators get and what system of participation of creators to the revenue generated by the exploitation of their works that it implements). Furthermore, the substantial copyright law is not the only tool at the disposal of national law-makers in the domain of cultural policies. Contract law,<sup>25</sup> quotas on use of national content in broadcasting activities<sup>26</sup> and obligation on cultural actors, such as collective management organisations, to undertake different activities of general interest<sup>27</sup> are just a few of national legal tools currently used.

---

<sup>22</sup> Estrella Gomez and Bertin Martens (2015), *Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film*, JRC Technical Reports, Digital Economy Working Paper 2015-04, pp. 21-22.

<sup>23</sup> Facilitated by 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 (text with EEA relevance) [2014] OJ L 84/72.

<sup>24</sup> Rita Matulionyte (2009), ‘Cross Border Collective Management and Principle of Territoriality: Problems and Possible Solutions in the EU’, *The Journal of World Intellectual Property*, Vol. 11, No. 5-6, pp. 467-497.

<sup>25</sup> Silke von Lewinski (2012), ‘Collectivism and its role in the frame of individual contracts’, in Jan Rosén (ed.), *Individualism and Collectiveness in Intellectual Property Law*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 117-127.

<sup>26</sup> For example, Article 16(1) of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (codified version) (Text with EEA relevance) [2010] OJ L 95/1 provides that all the member states should reserve more than 50 per cent of the transmission time by broadcasters for European works. Then member states may provide for quotas with regard to works in national language. For example, in France, private radios are obliged to use at least 40 per cent of musical works in French or in a regional language used in France (Article 28 Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (version consolidée au 9 août 2014)).

<sup>27</sup> Adolf Dietz (2007), *Cultural Functions of Collecting Societies*, available at: [http://www.ip.mpg.de/shared/data/pdf/2\\_dietz\\_-\\_cultural\\_functions.pdf](http://www.ip.mpg.de/shared/data/pdf/2_dietz_-_cultural_functions.pdf), Fabrice Siirainen (2006), *Théorie générale de la gestion collective : Logique de droit exclusif de la gestion collective*, JurisClasseur Propriété littéraire et artistique, Fasc. 1550, para. 5.



## *EU copyright title*

Yet, the Resolution asks the European Commission to make an impact assessment of a single European Copyright Title.<sup>28</sup> In this context, it is worth noting that there are already EU titles for almost all the other intellectual property rights, e.g., Community trade marks, Community designs and Community plant variety protection. Important efforts have been made in order to reach a more unified system in the field of patent law. Copyright and related rights remain thus the only fragmented intellectual property right in the EU.<sup>29</sup>

Repeated calls to conduct an assessment for a possibility of implementation of a unitary copyright title have been made in the past.<sup>30</sup> If a replacement in the long run of national copyright laws by a performing EU copyright legislation appears desirable in order to ensure the proper functioning of an internal market for cultural goods and services, it is certainly a sensitive issue. Thus, a step by step approach could be adopted, by replacing first the most important rights for cross-border access (e.g., the right of making available to the public of literary and musical works) and using it as a test-case for evaluating further actions in other domains where territoriality is of higher importance. It is clear however, that the establishment of any EU copyright titles would need to go hand in hand with unification of corresponding exceptions and limitations in order to safeguard the balance of interests. A certain codification of a first set of unified, mandatory copyright provisions would thus be desirable.<sup>31</sup> A more ambitious and detailed mandatory EU copyright law could be the long term project.

## *Territorial licensing*

Furthermore, in addition to reaffirming the territoriality of rights, the Resolution justifies territorial licensing practices, notably in the audiovisual sector.<sup>32</sup>

Even if territorial contractual arrangements can be of importance for financing audiovisual production,<sup>33</sup> there is no reason to extend this argument to other types of works (e.g., literary).

---

<sup>28</sup> Paragraph 28 of the Resolution. This request was kept from paragraph 4 of the Draft Report, but has a more cautious language in the final version.

<sup>29</sup> Christophe Geiger (2013), 'The construction of intellectual property in the European Union: searching for coherence', in Christophe Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, EIPIN Series Vol. 1, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 5-23.

<sup>30</sup> Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014, pp. 1, 3 and 7; Open letter of the European Copyright Society to the Commissioner for Digital Economy and Society concerning the need for a unified copyright law in the European Union: [http://www.ceipi.edu/uploads/media/ECS\\_letter\\_to\\_Oettinger\\_FIN-1.pdf](http://www.ceipi.edu/uploads/media/ECS_letter_to_Oettinger_FIN-1.pdf).

<sup>31</sup> A useful analytical source when considering unification of any rights can be European copyright code developed by a group of academics through the collaborative Wittem Project, available at: <http://www.copyrightcode.eu>. For a comment see Thomas Dreier (2013), 'The Wittem Project of a European Copyright Code', in Christophe Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, EIPIN Series Vol. 1, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 292-313.

<sup>32</sup> Paragraphs 13 and 17 of the Resolution.

## *Geoblocking and portability*

The Resolution calls on the European Commission to address the hot issues of cross-border accessibility related to portability of services and blocking of access based on geographical location within the EU.<sup>34</sup>

Policy-makers have a democratic mandate to determine whether to continue with territoriality of rights and of their exercise or not, but from the legal perspective affirmation of territoriality in all its manifestations contradicts the overarching aim of tackling obstacles to cross-border access in the EU. *On the opposite, implementing a single copyright law in the entire EU is one of the most efficient ways to address the issue of geoblocking in the long run.* None of the member states can tackle this issue on its own.

## **II) Protection of Creators**

Overall, the Resolution rightly puts a great emphasis on the protection of creators (authors and performers).

While acknowledging valuable contribution of all types of rightholders and, on a few occasions, calling for protection of interests of all rightholders in general<sup>35</sup>, the Resolution clearly distinguishes between different actors involved in creative production<sup>36</sup> and manifests a political choice to emphasise protection of original creators (including towards other undertakings in the creative sector).

The Resolution, from the first paragraph of its part titled “Exclusive rights”, acknowledges the necessity for the protection of *authors and performers* and proposes a concrete measure to reinforce their contractual position towards *intermediaries* and *other rightholders* (e.g., publishing and recording companies): to introduce “a reasonable period for the use of rights transferred by authors to third parties, after which those rights would lapse”.<sup>37</sup> These

---

<sup>33</sup> While linguistic differences between EU member states are of some significance for non-interactive terrestrial broadcasting of audiovisual works (since viewers cannot choose the language of the broadcast and broadcasters need to adapt to a prevailing taste in a territory that can be reached by traditional means), they are of lower importance in case of online on-demand services (e.g., French-speaking citizens living in a German-speaking member state can and might prefer sometimes to watch audiovisual works of their choice in French, and vice versa). The conduct of a study on economic and cultural implications of territoriality in audiovisual sector should thus be conducted, making a distinction between traditional and online uses of audiovisual works, in order to assess the statement made in the resolution on a more firm basis.

<sup>34</sup> Paragraphs 9, 10, 14 and 15 of the Resolution.

<sup>35</sup> E.g., paragraphs 7 and 15 of the Resolution.

<sup>36</sup> E.g., recital H of the Resolution refers to the “three-way relationship between *creators, cultural entrepreneurs* and users” (emphasis added) instead of a commonly used generalized reference to “rightholders” and “users”.

<sup>37</sup> Paragraph 25 of the Resolution. This is an important precision suggesting a concrete measure to take, in addition to a more general call for improvements to the contractual position of authors and performers expressed in the Draft Report.

proposals have to be welcomed. Further, a certain harmonisation or unification of the copyright contract norms might be desirable for the purpose of creating a true single market,<sup>38</sup> and specific references to creators for the purpose of safeguarding their respective interests need to be inserted in the copyright acquis, as creators can have very different interests than derivative rightholders. These differentiations have hardly been made in past initiatives of the EU legislators.<sup>39</sup>

Special attention is devoted to ensuring *a fair share of revenue for creators in the digital value chain*. Noting unfair revenue distribution by digital intermediaries using copyright protected works,<sup>40</sup> the Resolution rightly underlines that it is “indispensable to strengthen the position of *authors and creators* and improve their remuneration *with regard to the digital distribution and exploitation of their works*”<sup>41</sup> observing that “authors and performers must receive *fair remuneration in the digital environment and in the analogue world alike*”<sup>42</sup>.

While the Resolution requests the European Commission to improve contractual position of creators through legislative measures regulating copyright contracts as well as to ensure fair remuneration to creators in the digital value chain through other appropriate measures, it stresses that “exclusive rights and freedom of contract are key components”,<sup>43</sup> which seems contradictory. In order to effectively achieve the established policy objectives, the Commission will surely need a stronger and clearer democratic mandate in order to regulate the relationship between creators and derivative rightholders, *since exclusive rights and their individual exercise through contracts is not always the most suitable legal tool for achieving the given objectives*.<sup>44</sup>

### III) Development of a Robust Public Domain

#### *Term of protection*

Regarding the term of protection, the message of the Resolution is rather unclear, probably as a consequence of a political compromise in the JURI committee. The Resolution calls on the

---

<sup>38</sup> Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014, pp. 4-5.

<sup>39</sup> Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014, p. 4.

<sup>40</sup> Recital O of the Resolution. The shift in the value chain is being confirmed by some relatively recent studies. E.g., in the domain of musical rights: Christian Phéline (2013), *Musique en ligne et partage de la valeur – État des lieux, voies de négociation et rôles de la Loi*, Rapport à Madame la Ministre de la Culture et de la Communication, p. 121.

<sup>41</sup> Paragraph 24 of the Resolution (emphasis added).

<sup>42</sup> Paragraph 27 of the Resolution (emphasis added). Paragraph 9 of the Draft Report contains an identical line.

<sup>43</sup> Paragraph 29 of the Resolution.

<sup>44</sup> For detailed analysis of this issue, see Pablo Mohr (2014), *L'harmonisation européenne du droit des contrats d'auteur – Etude de droit comparé à partir des droits allemand, anglais, espagnol et français*, PhD Thesis CEIPI, University of Strasbourg.

Commission “to further harmonise the term of protection of copyright, while *refraining from any further extension of the term of protection* [the current term of protection in the EU is 70 years post mortem], *according to the international minimum standards set out in the Berne Convention* [50 years post mortem]” (emphasis added).<sup>45</sup>

The original text of the Draft Report proposed to reduce the term of copyright protection to the term established by the Berne Convention, that is from 70 years post mortem to 50 years post mortem.<sup>46</sup> Indeed, most of economic studies point to economic inefficiencies caused by the increase of copyright duration, indicate the value of long term of protection for a minority of best-selling works and the necessity to have different term for different types of works.<sup>47</sup>

With regard to the term of protection, it is important to observe from a legal perspective that since the EU concluded several trade treaties requiring contracting parties to establish a minimum term of copyright protection at the level of 70 years post mortem,<sup>48</sup> the reduction of the term of protection has become a more complex undertaking today than it was in the past, when the EU was not bound by treaty obligations imposing the minimum term above the international standard of the Berne Convention.

Nevertheless, in spite of these constrains, it is worth considering possible ways for reducing terms of protection, where it is appropriate according to evidence-based studies.<sup>49</sup> Reduction of the term of protection should contribute to creation of a robust public domain<sup>50</sup> and to

---

<sup>45</sup> Paragraph 32 of the Resolution.

<sup>46</sup> Paragraph 7 of the Draft Report.

<sup>47</sup> E.g., Edward Rappaport (1998), *Copyright Term Extension: Estimating the Economic Values*, Congressional Research Service Report No. 98-144E, William M. Landes and Richard A. Posner (2003), *The Economic Structure of Intellectual Property Law*, Cambridge, MA, USA: The Belknap Press of Harvard University Press; Centre for Intellectual Property and Information Law, University of Cambridge (2006), *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, Review for Gowers Review of Intellectual Property, available at: [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/gowers\\_cipilreport.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/gowers_cipilreport.pdf), Rufus Pollock (2007), ‘Optimal Copyright Over Time: Technological Change and the Stock of Works’, *Review of Economic Research on Copyright Issues*, Vol. 4, No. 2, pp. 51-64, Christopher Buccafusco and Paul J. Heald (2013), ‘Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension’, *Berkeley Technology Law Journal*, Vol. 21, Issue 1, pp. 1-44. Although much less numerous, there are also opposing views, e.g., Ivan P. L. Png and Qiu-Hong Wang (2006), *Copyright Duration and the Supply of Creative Work*, available at SSRN: <http://ssrn.com/abstract=932161>. Studies made or commissioned by associations of rightholders always argue for the term extension, e.g., LECG (2007), *The economics of copyright term extension: A review of the economic submissions regarding the extension of copyright for sound recordings*, available at: <http://www.ifpi.org/content/library/legc-study.pdf>.

<sup>48</sup> E.g., Article 10.6 of the EU - Korea Trade Agreement (2011), Article 218 of the EU - Peru and Colombia Trade Agreement (2012), Article 230 of the EU - Central America Association Agreement (2012) and Article 162 of the EU - Ukraine Association Agreement (2014).

<sup>49</sup> For example, a term of protection of 70 years post mortem for computer programs goes beyond what is necessary for achieving a fair balance between interests concerned.

<sup>50</sup> See for example for further arguments, the joint position adopted by a number of European academics: ‘Creativity stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings’ (2008), *EIPR*, Vol. 30, No. 9, pp. 341-347; Christophe Geiger, Jérôme Passa and Michel Vivant (2009), ‘La proposition de directive sur l’extension de la durée de certains droits voisins: une remise en cause injustifiée du domaine public’, *Propr. intell.*, No. 31, p. 146, Christophe Geiger (2009), ‘The Extension of the Term of Copyright and Certain Neighbouring Rights – A Never Ending Story?’, *IIC*, Vol. 40, No. 1, pp. 78-82.

tackling of issues partly caused by the increased term of protection, such as the problem of orphan and out-of-commerce works.

### *Re-use of public sector information*

The Resolution asks the Commission to inquire “how to further lower the barriers to the re-use of public sector information”, keeping in mind the public security and privacy concerns.<sup>51</sup> Such measure is justified since the general public has already paid for collection and organisation of this information in orderly manner through taxes and other contributions to public funds. Facilitation of re-use of the public-sector information should provide creators and companies with valuable resources for their creative activities.<sup>52</sup>

### *Preservation of public domain*

Paragraph 31 of the Resolution asks the Commission to safeguard public domain works and to clarify that the mere digitisation of a work in the public domain does not change the status of the work.<sup>53</sup> Making this statement by a public authority should not change the prevailing legal interpretation of the standing copyright norms<sup>54</sup> but could put an end to a certain trend by some economic actors to claim copyright protection after a digitization process.<sup>55</sup> Therefore, this clarification might help protecting the public domain from undue privatization and can thus be welcomed.

### *Dedication of works to the public domain*

The Commission is asked to examine the possibility for rightholders to dedicate their works to the public domain.<sup>56</sup> Currently, creators who wish to facilitate free access to their creative efforts do not have a statutory mechanism to do so in the EU. They need to resort to licensing of their works through a range of so-called “open-content” licenses, for example those promoted by Creative Commons, such as CC 0 and CC BY, which achieve somewhat similar

---

<sup>51</sup> Paragraph 30 of the Resolution. This request was kept from paragraph 5 of the Draft Report.

<sup>52</sup> See in this sense Paul Keller, Thomas Margoni, Katarzyna Rybicka and Alek Tarkowski (2014), ‘Re-Use of Public Sector Information in Cultural Heritage Institutions’, *International Free and Open Source Software Law Review*, Vol. 6, Issue 1, pp. 1-9, Marco Ricolfi (2013), ‘Public Sector Information as open data: Access, re-use and the third innovation paradigm’, in Dana Beldiman (ed.), *Access to Information and Knowledge: 21<sup>st</sup> Century Challenges in Intellectual Property and Knowledge Governance*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 23-62.

<sup>53</sup> This suggestion was kept from paragraph 6 of the Draft Report.

<sup>54</sup> Séverine Dusollier (2010), *Scoping Study on Copyright and Related Rights and The Public Domain*, WIPO Doc. No. CDIP/4/3/REV./STUDY/INF/1, p. 46.

<sup>55</sup> Kenneth D. Crews and Melissa A. Brown (2011), ‘Control of Museum Art Images: The Reach and Limits of Copyright and Licensing’, in Annette Kur and Vytautas Mizaras (eds.), *Structure of Intellectual Property Law: Can One Size Fit All?*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 269-284, Lionel Bently and Brad Sherman (2009), *Intellectual Property Law*, 3<sup>rd</sup> edition, Oxford University Press, New York, USA, p. 100.

<sup>56</sup> Paragraph 31 of the Resolution. This suggestion was maintained from paragraph 6 of the Draft Report.

results. Although some of such licenses do help to achieve creators' objectives of accessibility, they still, as any licenses, imply certain constraints, often unintended (e.g., the issue of compatibility between works published under different licenses<sup>57</sup>). This request of the Resolution coincides with recommendations of previous authoritative studies on the matter.<sup>58</sup>

Establishment of a national legislative mechanism for devoting a work to the public domain would not be very helpful for cross-border use in the EU, because of the territoriality of rights (national mechanism would have effect in one member state only and, hence, would not enhance multi-territorial use). A good starting point for examining the possibility for introduction of a union-wide voluntary mechanism for devotion of works to the public domain is a study commissioned in 2014 by the World Intellectual Property Organization (WIPO).<sup>59</sup> A proper public authority to register works dedicated to the public domain in the EU would be the Office for Harmonization in the Internal Market (OHIM), which already possesses invaluable experience in establishing and managing multi-lingual databases and registration procedures.<sup>60</sup>

## IV) Exceptions and Limitations

### *Common rules for exceptions and limitations*

The Resolution states that “some exceptions and limitations may [...] benefit from more common rules”<sup>61</sup> and asks the Commission to consider “the application of minimum standards across the exceptions and limitations, and further to ensure the proper implementation of the exceptions and limitations”,<sup>62</sup> as their different transposition into national legislation prevents proper functioning of the single market and cross-border access.

A unified approach in this field is crucial and has been requested by numerous scholars, as “limitations are a crucial element of any copyright system: they not only play an important role in access to culture and education but they also stimulate the creation of new works, which in most cases builds on already existing works. Other than exclusive rights, limitations

---

<sup>57</sup> Melanie Dulong de Rosnay (2010), *Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions*, Study of the Institute for Information Law of the University of Amsterdam.

<sup>58</sup> Séverine Dusollier (2010), *Scoping Study on Copyright and Related Rights and The Public Domain*, WIPO Doc. No. CDIP/4/3/REV./STUDY/INF/1, p. 71, Recommendation 76 of Pierre Lescure (2013), *Mission « Acte II de l'exception culturelle » : Contribution aux politiques culturelles à l'ère numérique*, Tome 1, Mission confiée par le Président de la République, p. 460.

<sup>59</sup> Andres Guadamuz (2014), *Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment*, WIPO Doc. No. CDIP/13/INF//6.

<sup>60</sup> In the field of copyright the OHIM was already entrusted with creation and maintenance of the Orphan Works Directive, according to Article 3(6) of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (text with EEA relevance) [2012] OJ L 299/5.

<sup>61</sup> Paragraph 37 of the Resolution.

<sup>62</sup> Paragraph 38 of the Resolution.



are not truly harmonised: the European legislator chose the approach of an optional exhaustive list from which Member States were free to implement the ones they found most suitable. This is particularly problematic in the digital environment as the internet involves uses that, most of the time, affect several copyright legislations, leading to a major insecurity regarding what is allowed”.<sup>63</sup>

As it has been stated by the European Copyright Society, “a more comprehensively harmonized legislative framework would be advantageous for authors and right holders (including the copyright industry). It would enable increased lawful cross-border online exploitation of works. Users would also benefit from clear, simple, and accessible rules clarifying the situations in which a work can be used without infringement”.<sup>64</sup>

Discrepancies among copyright levy systems across the member states, implemented under the private copying exception or limitation,<sup>65</sup> are a good example of potential consequences of unharmonised framework to exceptions and limitations. National tariffs for importation or manufacturing of devices used for private copying and lists of levied devices are specific to each member state (some devices are levied in one member state but not in another). Some member states do not have such systems in place at all.<sup>66</sup> Because of this law-made reality, importers and producers do not (and reasonable cannot) treat the EU as a single market. No Commission’s action has followed consultations with the stakeholders,<sup>67</sup> and EU standards in the domain of private copying levies continue to be shaped by the Court of Justice of the European Union (CJEU) rather than by a democratic legislative action.<sup>68</sup> In relation to the

---

<sup>63</sup> Christophe Geiger and Franciska Schönherr (2014), ‘Limitations to Copyright in the Digital Age’, in Andrej Savin and Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 110-142. See also Christophe Geiger, Franciska Schönherr, Irimi Stamatoudi and Paul Torremans (2014), ‘The Information Society Directive’, in: Irimi Stamatoudi and Paul Torremans (eds.), *EU Copyright Law: A Commentary*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 395-528.

<sup>64</sup> European Copyright Society (2015), ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn’, *EIPR*, Vol. 37, No. 3, pp. 129-133.

<sup>65</sup> Optional provision of Art. 5(2)(b) of the InfoSoc Directive.

<sup>66</sup> de Thuiskopie and WIPO (2013), *International Survey on Private Copying: Law and Practice 2013*, WIPO Publication No. 1037E/14, p. 3, Martin Kretschmer (2011), *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, report commissioned by the Intellectual Property Office of the UK, p. 14.

<sup>67</sup> António Vitorino (2013), *Recommendations Resulting from the Mediation on Private Copying and Reprography Levies*, commissioned by the European Commission.

<sup>68</sup> Judgments in Copydan Båndkopi, C-463/12, EU:C:2015:144, ACI Adam and Others, C-435/12, EU:C:2014:254, VG Wort, C-457/11, EU:C:2013:426, Amazon.com International Sales and Others, C-521/11, EU:C:2013:515, Luksan, C-277/10, EU:C:2012:65, Stichting de Thuiskopie, C-462/09, EU:C:2011:397 and Judgment in Padawan, C-467/08, EU:C:2010:620, as well as pending cases Hewlett-Packard Belgium, C-572/13 and EGEDA and Others, Case C-470/14. On these cases, and more generally on recent case law of the court of Justice in the field of copyright, see Stéphanie Carre (2013), ‘Le rôle de la Cour de justice dans la construction du droit d’auteur de l’Union’, in Christophe Geiger (ed.), *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe*, Collection of the CEIPI, No. 60, Paris, France: LexisNexis, pp. 1-58; Christophe Geiger (2015), ‘The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union’, in Irimi Stamatoudi (ed.), *The Future of Copyright: A European Union and International Perspective*, Alphen aan den Rijn, The Netherlands: Kluwer Law International (forthcoming).

private copying levies, the Resolution makes a specific, much appreciated, request to increase the transparency of their administration and public awareness.<sup>69</sup> Regrettably, the suggestion of the Rapporteur to adopt a “harmonised criteria for defining the harm caused to rightholders in respect of reproductions made by a natural person for private use”<sup>70</sup> was not supported, leaving also this important matter for courts to define.

The Resolution gives mandate for strengthening of exceptions and limitations for the benefit of public interest institutions, such as libraries, museums and archives,<sup>71</sup> and emphasises importance of the exception for caricature, parody and pastiche for a democratic debate.<sup>72</sup> The Commission is moreover requested to consider making exceptions serving *protection of fundamental rights*, “particularly to combat discrimination or protect freedom of the press”, subject to a fair compensation.<sup>73</sup> While making all the exceptions or limitations mandatory (as proposed in paragraph 11 of the Draft Report) may be politically difficult, harmonisation of exceptions and limitations is nevertheless a must and of particular concern for EU citizens and companies. It is thus to *recommend making at least limitations and exceptions justified by the public interest mandatory*.<sup>74</sup> Nevertheless, making exceptions and limitations fulfilling EU’s and member states’ fundamental rights obligations<sup>75</sup> subject to payments in all cases will inevitably run against some of those obligations. Quotations or parodies, which benefit from a very strong freedom of expression rationale and are essential to any democratic society<sup>76</sup>, should remain free of any charge.

Of course, the Resolution at the same time is cautious about introduction of remuneration schemes for uses that are currently permitted under exceptions or limitations not requiring compensation, and calls to permit requirement of compensation to rightholders only in cases

---

<sup>69</sup> Paragraphs 58-61 of the Resolution. Paragraph 60 in this regard makes an important statement by stressing “the importance of bringing *more clarity and transparency* to the copyright regime for copyright users, in particular with regard to user-generated content and *copyright levies*” (emphases added). Indeed, the copyright regime in the EU as it is today is very complicated and hardly understandable by the EU citizens, what of course make the compliance with the legal framework more difficult. See for example the very interesting Report OHIM (2013), *European Citizens and Intellectual Property: Perception, Awareness and Behaviour*, stating that “only 13% of Europeans demonstrating a good knowledge of what is behind the term IP” and that “IP and its main related terms are more heard of than really understood in detail by Europeans” (p. 11).

<sup>70</sup> Paragraph 22 of the Draft Report.

<sup>71</sup> Paragraph 39 of the Resolution.

<sup>72</sup> Paragraph 47 of the Resolution. Currently, an *optional* exception or limitation for use of protected works for the purpose of caricature, parody or pastiche is provided by Art. 5(3)(k) of the InfoSoc Directive.

<sup>73</sup> Paragraph 40 of the Resolution.

<sup>74</sup> Christophe Geiger, Franck Macrez, Adrien Bouvel, Stéphanie Carre, Théo Hassler et Joanna Schmidt-Szalewski (2009), ‘What limitations to copyright in the information society? A comment on the European Commission’s Green Paper “Copyright in the knowledge economy”’, *IIC*, Vol. 40, No. 4, pp. 412-433; and Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014, p. 6. See also the European Copyright Society (2015), ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn’, *EIPR*, Vol. 37, No. 3, pp. 129-133.

<sup>75</sup> Some of such obligations are cited in Recital 5 of the Resolution.

<sup>76</sup> On the consequences of freedom of expression for the design of limitations in copyright law, see Christophe Geiger and Elena Izyumenko (2014), ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression’, *IIC*, Vol. 45, No. 3, pp. 316-342.

when they sustain some harm.<sup>77</sup> If this approach needs to be generally supported, the notion of harm is not always easy to determine; thus, it is rather the justification of the limitation and a fair balance of all interests involved which should be the determinant factor, as a certain loss in remuneration might in exceptional circumstances be justified by higher principles of constitutional value.<sup>78</sup>

The Resolution also requests the Commission to examine a number of exceptions and limitations with the aim of better *adapting them to the digital environment*.<sup>79</sup> Furthermore, to make sure that exceptions and limitations would stand in time and would not become obsolete with development of new technologies, the Resolution calls for their *technological neutrality*.<sup>80</sup> This work is considered indispensable for safeguarding validity of exceptions and limitations on the Internet, where EU citizens undertake increasingly large portion of their cultural and economic activities. In this context it can be observed that an initial proposal of the Rapporteur to introduce “an open norm introducing flexibility in the interpretation of exceptions and limitations”<sup>81</sup> was abandoned. Luckily, the Resolution maintained at least the request for a flexible interpretation of existing limitations and exceptions in order to accommodate new uses of works which are similar to existing uses covered by an exception, in order to improve legal certainty.<sup>82</sup> It would have been interesting to go one step further and in fact *guarantee legal certainty* through a list of further harmonised or unified exceptions and limitations, but to combine it with a certain dose of *flexibility* of the EU legal framework, in order to ensure its capacity to adapt to a rapidly changing environment. This limited “opening” of the list of exceptions and limitations could have possibly been based on the “three-step test”.<sup>83</sup>

One of the exceptions and limitations that deserve to be explicitly mentioned in the context of the digital environment is the one benefiting libraries and archives. Given the public importance of preserving Europe’s cultural heritage for future generations, exceptions and limitations permitting libraries to *digitalise works for the purpose of consultation, cataloguing*

---

<sup>77</sup> Paragraph 56 of the Resolution. Kept from paragraph 21 of the Draft Report.

<sup>78</sup> The typical examples here are again the right to make quotations and parodies.

<sup>79</sup> Paragraph 35 of the Resolution.

<sup>80</sup> Paragraphs 43, 44 and 64 of the Resolution.

<sup>81</sup> Paragraph 13 of the Draft Report.

<sup>82</sup> Paragraph 43 of the Resolution, which also stresses that the flexible interpretation “may permit the adaptation of the exceptions and limitations in question to different national circumstances and social needs”.

<sup>83</sup> European Copyright Society (2015), ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn’, *EIPR*, Vol. 37, No. 3, pp. 129-133, paragraphs 10-12. See also on this issue with further references Christophe Geiger and Franciska Schönherr (2012), ‘Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions’, in Tatiana-Eleni Synodinou (ed.), *Codification of European Copyright Law, Challenges and Perspectives*, Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 133-167.

and archiving proposed by the Resolution<sup>84</sup> will be indispensable for the fulfilment by those institutions of their public mission.<sup>85</sup>

Finally, it is rather unfortunate that the policy-makers ignored the *opportunity to address referencing by means of hyperlinks and to clarify that it does not fall within the scope of the right of communication to the public*,<sup>86</sup> and hence left this important issue for the proper functioning of the Internet to disputes and litigation.

### *Access for persons with disabilities*

In particular, a great importance is put in the Resolution on the need to ensure *access to content for people with disabilities*<sup>87</sup> (not only for persons with visual impairments, as it is required by the Marrakesh Treaty<sup>88</sup> signed by the EU and most of its member states). To ensure cross-border access for those people with special needs, who often find themselves in a financially disadvantaged situation, it is desired to make the exception or limitation provided by Article 5(3)(b) of the InfoSoc Directive mandatory.

### *Images of copyrighted works in public places*

This is one of the issues where members of the European Parliament did not manage to reach any consensus.

Paragraph 16 of the Draft Report proposed to “ensure that the use of photographs, video footage or other images of works which are permanently located in public places is permitted” (regardless of whether they are made for *commercial or non-commercial use*). After discussions in the JURI Committee, the provision was amended so as to state that the *commercial use* of images of works permanently located in physical places should be subject

---

<sup>84</sup> Paragraph 54 of the Resolution.

<sup>85</sup> Implementation of this provision may require an amendment to Article 5(2)(c) of the InfoSoc Directive.

<sup>86</sup> This was proposed in paragraph 15 of the Draft Report. In its Opinion on the Reference to the CJEU in case 466/12 Svensson of 15 February 2013, the European Copyright Society underlined that inclusion of hyperlinking in the scope of the exclusive right of communication to the public would imply that all hyperlinks would need to be licensed, leading to a dysfunction of the digital space: [http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Statement/European\\_Copyright\\_Society\\_Opinion\\_in\\_Case\\_C-466\\_12\\_Svensson-1.pdf](http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Statement/European_Copyright_Society_Opinion_in_Case_C-466_12_Svensson-1.pdf). This exclusion was confirmed by the Judgment in Svensson, C-466/12, EU:C:2014:76. However there is no unanimous view on this important issue. For example, the Association Littéraire et Artistique Internationale (ALAI) adopted a dissenting opinion, see the ALAI Opinion adopted by the Executive committee at its meeting 17 September 2014 on the criterion “New Public” developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, available at: <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>.

<sup>87</sup> Paragraphs 33 and 36 of the Resolution.

<sup>88</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted in Marrakesh on 27 June 2013.

to prior authorization.<sup>89</sup> If this provision would have been implemented across all the EU member states, it would have created additional costs and burden for filmmakers and photographers rather than encourage creativity, while not generating any substantial revenues for architects and sculptors.<sup>90</sup> Literary interpretation of the wording adopted by the JURI Committee would still have permitted member states to exclude non-commercial uses from the need to obtain prior authorization. However, practice has showed that it is extremely difficult to reach a common definition of “commercial use” between parties with often polar interests.<sup>91</sup>

However, the European Parliament finally deleted reference to this issue, and approaches to this question in Europe will thus remain fragmented.

Although a political compromise could not be achieved on a broad exception or limitation proposed by the Draft Report, given the practical impossibility of rightholders to control millions of non-commercial uses (from the point of ordinary citizens), *it would still have been desirable to make the aforementioned acts explicitly permissible, at least in relation to non-commercial uses.*<sup>92</sup>

### *Education and research, including online and cross-border activities*

The Resolution calls for “an exception for research and education purposes, which should cover not only educational establishments but also accredited educational or research activities, including online and cross-border activities”.<sup>93</sup> References to online and cross-border educational activities are motivated by the current trend of providing online education by universities and other organisations. Increased mobility of students as a result of EU framework programmes simplifying student exchanges, such as Bologna process and Erasmus, created new cross-border rights clearance issues for educational establishments trying to engage with students through virtual classroom environments and other modern distance-learning tools. This proposal goes hand in hand with the enabling of *e-lending services* (lending of works to the public in digital formats for personal use, subject to fair remuneration to authors<sup>94</sup>).

---

<sup>89</sup> Paragraph 46 of the Resolution on the implementation of 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 (2014/2256(INI)) of 24 June 2015.

<sup>90</sup> Joshua Lobert, Bianca Isaias, Karel Bernardi et al. (2015), *The EU Public Interest Clinic and Wikimedia Present: Extending Freedom of Panorama in Europe*, HEC Paris Research Paper No. LAW-2015-1092.

<sup>91</sup> For example, citizens sharing with their friends through Internet social networks photos taken in front of famous landmarks of Europe do not obtain any commercial benefits but enterprises managing such networks are for-profit entities gaining revenues thanks to such activities. On these grounds, some of rightholders may argue that the activity has commercial character.

<sup>92</sup> Bryce Clayton Newell (2011), ‘Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography’, *Creighton Law Review*, Vol. 44(2), pp. 405-428.

<sup>93</sup> Paragraph 51 of the Resolution.

<sup>94</sup> Paragraph 53 of the Resolution, which calls upon the Commission to assess the adoption of a compensated exception “allowing public and research libraries to legally lend works to the public in digital formats for

Such an approach needs to be supported in order to create an online education-friendly copyright framework in the EU, enabled through harmonised exceptions and limitations and providing for compensation to rightholders where there is an unjustified substantial harm to their interests.

### *Unwaivability of exceptions and limitations*

Paragraph 61 stresses that exercise of exceptions or limitations should not be waived by means of contracts. Such provision is crucial to ensure that the balance of interests democratically decided by policy-makers is not unilaterally amended by stronger market actors.

### *Text and data mining*

The Commission is invited to consider enabling application of “automated analytical techniques for text and data (e.g. ‘text and data mining’ or ‘content mining’) for research purposes, provided that permission to read the work has been acquired”.<sup>95</sup> In the context of this novel notion, it is crucial to highlight that text and data mining for research purposes are permitted in major trade partners of the EU (in the US under “fair use” exception, in Canada under “fair dealing” exemption and in Japan under a special statutory exception introduced in 2009).<sup>96</sup> In order to enable a nourishing environment for science and innovation in Europe, it is important to create a legislative framework not less favorable than in the top innovative economies abroad and thus the implementation of an exception for data mining needs to be encouraged.

### *Liability of Internet intermediaries*

While acknowledging an important role that digital intermediaries (“such as search engines, social media and platforms for user-generated content”<sup>97</sup>) play in the modern world, the Resolution highlights the growing market power of the digital intermediaries,<sup>98</sup> and calls on the Commission *to review the liability of internet service providers and other intermediaries*

---

personal use, for a limited duration, through the internet or the libraries’ networks, so that their public interest duty of disseminating knowledge can be fulfilled effectively and in an up-to-date manner”. Introduction of this exception or limitation was suggested by paragraph 20 of the Draft Report. See more generally on this issue, Séverine Dusollier (2014), ‘A manifesto for an e-lending limitation in copyright’, *JIPITEC*, Vol. 5, Issue 3, pp. 213-229.

<sup>95</sup> Paragraph 48 of the Resolution (emphasis added). Kept from paragraph 18 of the Draft Report.

<sup>96</sup> Ian Hargreaves, Lucie Guibault, Christian Handke et al. (2014), *Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining*, Report from the Expert Group for the European Commission, pp. 44-48. This study also shows that overall performance of European academia in data mining is noticeably lower than in the US (pp. 29-32).

<sup>97</sup> Recital O of the Resolution.

<sup>98</sup> Recital R of the Resolution.



on the Internet to ensure that proper remuneration is attributed to creators,<sup>99</sup> as concerns are frequently being expressed over the income that creators receive through the online platforms hosting copyrighted content.<sup>100</sup> The Commission is asked “to consider solutions for the displacement of value from content to services”; and to “adjust the definition of the status of intermediary in the current digital environment”.<sup>101</sup>

From the legal perspective, it is worth noting that this recommendation goes beyond the scope of the InfoSoc Directive, and if a political decision is reached to narrow the scope of the limitation of responsibility of digital intermediaries, *appropriate amendments would need to be made to Section 4, Chapter II of the E-Commerce Directive.*

The responsibility of Internet intermediaries is one of the most contentious and difficult issues in the contemporary copyright debate in Europe and beyond. An impartial impact assessment would be absolutely necessary before any legislative effort in this domain is undertaken.

### *Interoperability*

The Resolution “[c]alls on distributors to publish all available information concerning the technological measures necessary to ensure interoperability with their content”.<sup>102</sup> This important proposal is a result of a political compromise, limiting a recommendation of the Rapporteur to “making legal protection against the circumvention of any effective technological measures conditional” upon publication of information easing interoperability.<sup>103</sup> In the domain of software, the European Parliament stresses further the necessity of taking measures for facilitating interoperability between products of different software producers.<sup>104</sup> The Resolution does not require creation of a new exception to the exclusive rights but rather mandates the Commission to take actions necessary for effective availability of the existing measures to safeguard interoperability, such as for example the rule on decompilation. This should enhance the competition on the market and foster development of new products.<sup>105</sup>

---

<sup>99</sup> Paragraph 45 of the Resolution.

<sup>100</sup> From a legal perspective, it can be observed that the amount of revenue that creators (authors and performers) receive is not only the matter of how much Internet intermediaries pay for monetising copyrighted content but also from how the revenue is shared with creative enterprises (e.g., publishers and recording companies). See on this issue a recent publication by the Assistant General Secretary of the British Musician’s Union, Horace Trubridge (2015), ‘Safeguarding the Income of Musicians’, *WIPO Magazine*, Issue 2, pp. 8-11.

<sup>101</sup> Paragraph 66 of the Resolution.

<sup>102</sup> Paragraph 62 of the Resolution.

<sup>103</sup> Paragraph 24 of the Draft Report.

<sup>104</sup> Paragraphs 63 of the Resolution.

<sup>105</sup> Mikko Valimäki and Ville Oksanen (2006), ‘DRM Interoperability and Intellectual Property Policy in Europe’, *European Intellectual Property Review*, Vol. 26, No. 11, pp. 562-568. Interestingly, the Resolution contains a very straight forward and welcomed statement condemning the lack of interoperability, as it “hampers innovation, reduces competition and harms the consumer [and] leads to market dominance of one particular product or service, which in turn stifles competition and limits consumer choice in the EU” (paragraph 63).

*Alike in the case of the previously discussed provision, implementation of this proposal goes beyond InfoSoc Directive only, and is likely to require amendments to the Computer Programs Directive (an appropriate amendment can be made to Article 6, for example).*

## Conclusions

The revision of the EU copyright framework in light of the changed socio-economic circumstances and political objective to create a functioning digital single market enjoys a broad support, as the Commission's public consultations demonstrated. The adopted Resolution of the European Parliament constitutes an important milestone in this direction.

The four founding freedoms of the single market enable EU citizens to enjoy goods and services provided by suppliers from all the member states. However, as the importance of Internet communications is growing and cross-border mobility of people becomes more frequent, increases also their frustration with the absence of a single European digital space. Reflecting this popular discontent, the European Parliament sends a democratic message to the Commission to address issues preventing EU-wide enjoyment of cultural goods and services.

Although the Resolution is clear on its objectives, the means for achieving them are somewhat not adequately defined. Reaffirming the territoriality of rights and of their exercise in all their manifestations (in particular in the audiovisual sector) – the primary causes of erection of digital frontiers in Europe – the text only requests the Commission to make an impact assessment of a single European Copyright Title. While the accuracy of statements on the importance of territoriality for securing national cultural policies or remuneration to creators is doubtful, it is certain that the *status quo* of the EU legislation will not by itself attain the aforementioned objectives and the legitimacy of common copyright norms will continue to be undermined by the evolving reality.

With regard to protection of creators, the Resolution manifests a strong emphasis on the interest of creators (authors and performers), distinctly differentiating them from interest of other economic actors involved in cultural production and dissemination (phonogram producers, recording companies, etc.). This is an important shift away from a generalized approach of treating all rightholders (original and derivative) as having the same interests and thus a good step towards more transparency with regard to the beneficiaries of the copyright system.

One of the important considerations of the document is a call to examine the scope of responsibility of internet intermediaries in order to address the distribution of revenues in the

digital value chain. This proposal, going beyond the scope of the InfoSoc Directive, will deserve a special attention in the future and will need to be treated with great care, relying on some strong and independent impact assessments, as it touches upon not only the core interests of rightholders but also of new economic actors enabling a vibrant digital culture and realization of fundamental rights.

To conclude, the Resolution establishes a broad programme for revision of EU framework for exceptions and limitations, although reduced and amended in comparison to the original proposal of the Rapporteur. Notable examples of deleted proposals are completing of the existing list of exceptions and limitations with an open norm adding flexibility to the overall framework and a so-called “freedom of panorama” exception. While adaptation of exceptions and limitations to the digital environment is crucial, it is equally important for cross-border access that they are applied in a harmonised way throughout the EU, otherwise European citizens will continue to be discriminated on the basis of the place of their residence. For enabling equal access across the EU and to secure in a harmonised way core democratic values enclosed in the Charter of fundamental rights, at least some exceptions and limitations would need to be mandatory.

Ordinary Europeans do not perceive the European project through ambitious political declarations but through their everyday life reality. If “an ever closer union among the peoples of Europe”<sup>106</sup> is to be achieved in the XXI century, it cannot be done while digital curtains are maintained. It is hoped that European and national leaders will have the courage to create a common digital space, as no member state can change this by a unilateral action. Now it is the turn for the European Commission to make an ambitious proposal drawing on the Parliament’s Resolution.

---

<sup>106</sup> Article 1 of the Treaty on European Union (consolidated version).