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Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules

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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 has a research team that studies and analyses the main developments in the area of intellectual property at national, European, European Union and international levels. From this perspective, the public consultation on the review of the European Union copyright rules is of particular interest to CEIPI which hereby submits its opinion to the Commission. Indeed, while determining the future contours of copyright in the European Union, the Commission should consider carefully academic studies and analysis. In this regard, one of the objectives of this response is to emphasise that substantial academic work is needed to determine the possibility and implementation of a unitary copyright title in the European Union.

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The public consultation initiated by the Commission on 5 December 2013 is as indicated part of the Commission's efforts to review and modernise EU copyright rules. In line with the aim declared by the consultation, the press release announcing its publication mentions the statement of the Internal Market and Services Commissioner Michel Barnier, who confirmed his conception of copyright as “a modern and effective tool that supports creation and innovation, enables access to quality content, including across borders, encourages investment and strengthens cultural diversity”.¹ The Commission endorses the words of the Commissioner when it expresses the necessity of an EU copyright policy that keeps up with the times. It underlines, in the presentation of the context of the public consultation, the changes brought over the last two decades by digital technology and the Internet to the way “content” is created, distributed, and accessed. According to the Commission, the notable two challenges of this new environment are, on the one hand, for the markets to continue to adapt to the new forms of distribution and use, and on the other hand, for the legislator to guarantee that the system of copyright protection, the limitations to copyright and its enforcement remains appropriate and is adapted to this new environment. The Commission also expects that the current consultation focuses on the second challenge.

Indeed it is essential to consider adaptations or modifications of copyright rules which have become necessary due to the technical developments prompting changes of business models, uses and needs.

However, considerations on the adaptations of copyright rules, especially in the legal framework of the European Union, presuppose that common objectives of copyright and a common definition of its function(s) are determined, and that furthermore, a balance of interests is guaranteed.

For now, these determinations are lacking. The harmonisation of copyright, although significant, has been nevertheless limited. If the Directive 2001/29 marks an essential step in the long process of harmonisation, its limits explain the efforts undertaken by the Commission to continue to strengthen harmonisation as well as the boldness of the jurisprudence of the Court of Justice of the European Union (CJEU) in the creation of the unified understanding of copyright rules.

While welcoming the efforts of the Commission to consult, it should be noted that the multiplicity and the succession since 2000 of different documents, programmes, working groups, communications and consultations has not translated into sufficiently concrete results, in order to meet the expectations of economic actors and citizens in

¹ Press release, Copyright: Commission launches public consultation, Brussels, 5 December 2013 (IP/13/1213).

particular. Moreover, the successive academic studies commissioned and produced in this context have hardly had any effect. CEIPI can only call upon the Commission to give greater consideration to such scientific studies. The construction of the EU copyright, harmonised or unified, presupposes some fundamental reflections, analysis and studies that only independent research institutes are able to provide.

The harmonisation of copyright rules is necessary and the(ir) unification appears to be an ideal; otherwise the development of the European Union itself would be called into question. Currently, EU copyright law is mainly designed by the CJUE², and although its intervention is with no doubt necessary and its interpretation efforts are remarkable, its bold jurisprudence can not substitute the necessary political and legal choices. The role of the CJEU is without doubt to oversee the implementation of the law of the European Union, and notably the harmonising directives in the domain of copyright, and to provide uniform interpretation in cases of contradictory, imprecise or obscure provisions. However, it is not its role to provide the harmonisation or the unification, which, if is undoubtedly missing, was neither decided nor carried out by the Member States and the bodies of the European Union, whose competence and legitimacy enable them to do so. The intervention of the Court should be welcomed, in particular to advance the debate as well as to fill some gaps, but its legitimacy to undertake the unification of the EU copyright rules in the absence of a sufficient legislative framework is disputable.

This unification of the rules, which can result either from the “integral” harmonisation or from the creation of a unitary European title, should be initiated by the Commission and decided by the Member States and their representatives in the European Parliament. Only this legislative intervention will give full legitimacy to the existence of copyright of the European Union.

Such intervention presupposes an important and delicate substantive work. Compromise solutions have to be found between the Member States, which have different legal systems and copyright traditions. In this spirit, the Commission raised the question of the opportunity of a unitary European title. Such an initiative should be welcomed since it can mark an essential change in the process of elaboration of the EU copyright rules. CEIPI wishes to encourage this move and to provide its support in the delicate task that is awaiting the Commission and the European Parliament.

In this context, and in light of the questionnaire submitted by the Commission in the framework of the public consultation, we believe that it is important to emphasise:

² See, on this point, the publication of the Research Department of CEIPI: Ch. Geiger (ed.), *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe*, Collection du CEIPI, Paris, Litec, 2013, and in particular the contribution of S. Carre, *Le rôle de la Cour de justice dans la construction du droit d’auteur de l’Union*, p. 1.

- **The importance of the cultural, social and economic objectives of copyright**

The cultural and social objectives of copyright presuppose that the rules of copyright both encourage the creation of works and their dissemination in a manner permitting access to them by the public³, as well as protect the special connection that unites, in the domain of literary and artistic works, the creative work and its author.

From this point of view, it is essential that the author is recognized as such and that the regime of copyright is constructed in a way which protects his legitimate interests (notably his moral interests) with regard to the protection of his work.

Although creators, like other actors of the digital market, are addressed by the questionnaire of the consultation and can respond to it, they seem to be almost absent from the document published by the Commission. The figure of the author, like the notion of a work, tends to disappear from proposed texts of the Commission. Of course, the digital environment is special and this explains an evolution of business models, uses, etc. but in our view it does not justify that the consultation document mainly refers to “content” and “content producers”, and not to creators or creative works.

It is to be welcomed that the aim of the promotion of cultural diversity is affirmed, but the cultural objective of copyright goes beyond this. The copyright regime from this perspective is intimately linked to the financing of creation. National particularities are important from this point of view and it seems that the establishment of a common regime of copyright cannot be considered in an isolated manner, without taking into account the means to finance creativity.

The economic objective of copyright implies that the author of a work can obtain legitimate remuneration for the use of his work and that the actors enabling its distribution are encouraged to do so and can obtain some legitimate revenue from the use of the work.

In this spirit, the Commission also considers the opportunity to establish a harmonized/unified framework for copyright contracts. It appears to us that the

³ Ch. Geiger, *L'avenir du droit d'auteur en Europe : Vers un juste équilibre entre protection et accès à l'information / The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information*, Report for the Committee on Culture, Science and Education – Parliamentary Assembly, Council of Europe, Strasbourg, July 2009 (revised and updated version, October 2009), www.ceipi.edu (short version was published in French in *JCP G* 2009, No. 48, 493; extended and modified version was published in English in *Intellectual Property Quarterly (IPQ)* 2010, p. 1).

elaboration of such a framework, even if it is difficult to implement at this moment due to the different traditions of the Member States, is certainly necessary in order to guarantee creators a fair distribution of revenues generated by the exploitation of their works.

- **The importance of a right that secures remuneration of authors**

The Commission's objective of promoting and enhancing the development of a single digital market is laudable. Copyright, in its economic dimension, is an important aspect of the single market; therefore, the Commission's inquiry into the appropriateness of the legal framework in the field of copyright is legitimate and timely. In order to realise the full potential of the digital single market, adapting the Union rules relating to copyright is certainly necessary.

It is essential that enforcement of copyright not become an obstacle to the effective exploitation of works. Copyright law must, on the contrary, enhance use of works, and ensure that authors have the possibility to receive remuneration when their work is being exploited. It is critically important to make sure that copyright law does not make the use of works – i.e., the public's access to works - impossible or very difficult.

On the one hand, economic studies, in particular those carried out by independent university centres, are necessary to identify possible difficulties, changes in business models relating to the development of the digital market, as well as innovative business models. Knowledge of business realities and their possible development would allow for informed adoption of rules that are appropriate for the digital environment. These rules will derive from policy choices which need to be made; as long as the specificity of the digital environment is considered thoroughly.

On the other hand, legal studies are necessary in advance in order to suggest how the legal framework could develop. The Commission asks about difficulties related to the fact that various rights are involved in digital transmissions, about uncertainties related to the definition of rights, about difficulties related to differing national definitions, and to the territoriality of rights.

It is certainly useful to know stakeholders' positions on these questions; however, independent research is also indispensable. Indeed, the difficulties related to the application of rules defining the author's rights need to be clearly identified. It is crucial not to establish a less protective system, or rules which offer less protection to authors where the provisions currently applicable allow exploitation of works and remuneration of authors and legitimate right holders. Equally, the practice of neighbouring rights, as well as the question of their coexistence with copyright, also needs to be addressed.

- **The importance of a balanced copyright law**

Copyright law's cultural, social and economic objectives imply that copyright must be balanced. It is crucial that a fair balance of interests be ensured. 'Balance' does not necessarily refer to equal weight: but in any case, a justified and legitimate weighting is necessary, which might differ depending on the justification underlying the rule.

Legislative intervention is necessary in order to define the balance to be preserved within copyright law. Balance is the result of the rights' definition – both positive and negative, i.e., by clarifying limitations and exceptions as well as the term of protection.

As to limitations and exceptions, CEIPI responded to the Green Book on 'Copyright in the Knowledge Economy' published in 2008 by the European Commission.⁴ CEIPI highlighted the importance of true harmonisation of national laws and made some recommendations; attention was drawn to the importance of declaring that limitations and exceptions justified by the public interest be mandatory.⁵ The Commission itself emphasised the urgency of addressing the question of exceptions and limitations. This urgency of a more substantial review probably explains why the questionnaire of the public consultation of 5 December, 2013 was only published in English. It is certainly still useful to inquire, with new questions, into the issue of exceptions and limitation; yet, it should be noted that, besides CJEU case-law, no measure has been adopted more than five years after the Green Book. 'Legislative' intervention would at this point not only be welcomed, but is absolutely necessary.

Legislative intervention would be more critical concerning the term of protection, another element of balance. Member States and the Union must respect obligations deriving from international conventions.

It is, nonetheless, important to emphasise that the term of protection of economic rights of 70 years *post mortem* is long and should certainly not be extended any further⁶; it is not appropriate for certain digital works such as software or databases. Moreover, the term of protection of neighbouring rights is excessive – except considering the

⁴ Green Paper of the European Commission, *Copyright in the Knowledge Economy*, COM(2008)466 final.

⁵ Ch. Geiger, F. Macrez, A. Bouvel, S. Carre, T. Hassler et J. Schmidt, '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', *Propriété intellectuelle* 2009, n° 32, p. 231 (also published in English: *IIC* 2009, p. 412).

⁶ At least longer than prescribed by the international legal framework.

situation of performing artists.⁷ In our view, the term of copyright protection in the EU must be reconsidered. Besides, it should be remembered that – within the limits of the Union’s and the Member States’ international obligations – there are alternatives to a long term of protection. It would be appropriate to study alternative ways of securing efficient protection of the creators’ interests; one possibility would be to foresee that the author/creator may, if the right holder has not exploited the work during a certain period of time, exploit his/her work once again; the term of protection could also be reduced in order to establish a ‘*domaine public payant*’.

The discussion about the term of protection leads to the distinction between different objects of protection. Yet, the definition of the object of protection will be a crucial question with a view to total harmonisation of copyright law or to the creation of a unitary copyright title.

- A turning point in the construction of a copyright law of the European Union: towards a unitary copyright title

The creation of a unitary EU copyright title is the crucial question raised by the consultation. The Commission thus clearly identifies the ideal to be attained. For years, CEIPI has been educating professionals in the field of European patent law, and to research concerning IP law in the European Union. CEIPI consider that its mission is to educate European students with a view to promoting the emergence of a true European intellectual property law.

Convinced of the need for change in the process of construction of an EU copyright law, CEIPI’s members can only welcome the Commission’s brave proposition. Unless calling into question the European construction itself, the creation of a unitary EU title in the field of copyright law must be contemplated and prepared. It is a priority.

The opportunity of creating a unitary copyright title must be discussed from a political point of view. From a legal point of view, thorough studies and analyses must now be carried out, and concrete solutions must be suggested. The issue is delicate and a compromise needs to be found: conditions of unification must urgently be studied in a precise manner. Independent copyright experts should be entrusted with this task in advance, so as to identify substantive aspects of an EU copyright title. In this perspective, the object of rights and the conditions for access to protection, the content of rights and limitations, the term of protection, as well as appropriate and balanced sanctions need to be defined. In developing autonomous concepts of Union law, the Court of Justice has

⁷ See the common text signed by the members of CEIPI’s Research Team: ‘La proposition de directive sur l’extension de la durée de certains droits voisins: une remise en cause injustifiée du domaine public’, *Propriété intellectuelle* 2009, n° 31, p. 146.

attempted to define certain common aspects of copyright law; it is now up to the EU institutions in their legislative role, at the initiative of the Commission, to adopt a proper legal framework for copyright in the information society.