

Mr. Thierry Breton
Commissioner for Internal Market
European Commission
Brussels

Leuven 24 April 2023

Subject: Future agenda in the field of copyright law

Dear Mr. Breton,

The members of the European Copyright Society (ECS) take the liberty of addressing this letter to you in your capacity as Commissioner with responsibility for the EU copyright policy, with the intention of presenting to you what we see as priorities for future action.

Our society was founded in January 2012 with the aim of creating a platform for independent and critical scholarly thinking on European copyright law¹. Our members are leading European scholars and academics from various European countries seeking to share their views with the public and decision makers and to pursue the overall public interest on all topics concerning the authors' rights, neighboring rights, and related matters. Our Society is not funded, nor do any stakeholders instruct it.

With this letter, we do not want to look back at the many past initiatives, which were undeniably of great importance in realizing the harmonization of national copyright laws since 1988². Instead, we would like to reflect constructively on further legislative and other actions that can complete and optimize this harmonization process and to contribute to establishing a truly Digital Single Market for creative content.

First, we think the EU legislator should give primary attention to **optimizing the level of harmonization achieved thus far**. This goal remains ambitious and would require reassessing the *acquis* with a view to (1) consolidation of the *acquis* built up by 15+ Directives and Regulations, (2) further developing the *acquis* by filling-in gaps in areas that currently lack harmonization, and (3) taking some preparatory initiatives for areas or phenomena that cause legal uncertainty today, but

¹ See for example our website with the various Opinions on legislative initiatives in the EU as well as on the judgements of the CJEU dealing with fundamental copyright issues and notions (<https://europeancopyrightsociety.org/>).

² The process started with the Commission's Green paper on copyright and the challenge of technology – Copyright issues requiring immediate action, 7 June 1988, COM(88) 172 final.

require more in-depth research and/or impact assessments before regulatory action. For each of these steps, we have made some suggestions in the annex to this letter, and we remain of course willing to enter into discussion or provide our cooperation in this regard.

In addition to these various rather technical suggestions, our association hopes that further policy initiatives **reflect clear general principles on future European copyright law**. The ECS would in particular advocate that the copyright system facilitates research, education and maybe more broadly creativity, as this is the key for innovation and cultural development. This includes a reassessment of the existing exceptions and limitations of course (in particular for research including text and data mining, education, libraries, and journalism, but also to imagine new mechanism to facilitate creative reuse), but also the facilitation of open access policies for research purposes and the implementation of copyright rules that facilitate this important policy objective (such as e.g. granting authors the digital secondary republication right in open access format of their research outputs).

Another principle that the ECS would like to stress is to better secure the author's participation to the exploitation of his work. The EU copyright framework needs to be ameliorated in this regard and the articles 18 sq of the CSDM directive (the so-called “copyright contract law” rules) cannot be the final word on this issue. Other mechanisms securing that a fair remuneration flows directly back to creators should be additionally considered in the future. More generally, the ECS urges the European legislator to be mindful of the EU treaties and their protection of all fundamental rights equally and of the general principles on which the EU was build, such as the promotion of technological advancement and progress, the fight against “social exclusion and discrimination”, and a will to “promote social justice and protection, equality between women and men, solidarity between generations” (Article 3(3) TEU). In this regard, a clear reflection on the preservation and legal protection of the public domain against undue appropriations seems necessary.

Secondly, in several of its earlier papers, the ECS has intervened to recommend **introducing a unitary title**. Consolidation, by way of harmonising measures, and unification are two different aspirations that can be pursued either one after the other or simultaneously.

The most efficient way to ensure that a fully functioning Digital Single Market for copyright-based goods and services can ultimately be achieved is to replace the multitude of national rules that continue to exist by a single EU-wide copyright title. The ECS already pointed to this goal of a union-wide unification of copyright in a letter sent to Commissioner Günther Oettinger in December 2014. The ECS believes the time is now ripe to prepare initiatives to realize this ambition (following the ambition of EU trade marks, EU designs, and unitary patents) based on Article 118 TFEU. The various laudable achievements realized during more than 35 years of copyright harmonizing initiatives do not take away the persisting negative effects of territoriality of the different national laws resulting in the fragmentation of markets along national borderlines.

Overcoming the adverse effects of the principle of territoriality has long been a concern that the ECS has pointed out in its opinions. This principle, dictating that copyright protection is granted on a national basis with different rules and regulations applying in each county, creates fragmentation of the Digital Single Market, hindering the distribution of content across different countries and making it difficult for creators to manage their rights in a cross-border context. Some copyright mechanisms have already been adopted in the long course of copyright harmonization that mitigate the negative effects of territoriality. These include the so-called country of origin which is a fictive localization rule (satellite communications, Portability Regulation, ancillary broadcasting, and cross-border use for education³), the rule of mutual recognition linked to pan-European licensing (orphan works), and of

³ Art. 1.1, sub c Satellite Directive 1993; Art. 3 Portability Regulation 2017; Art. 3 Directive 2019/789; Art. 5.3 and 9.2 DSM Directive.

course, the rule of exhaustion as a limitation to the right of distribution. However, this multitude of different mechanisms does not make the solution to the territorial problem any easier. If the idea of unification is to succeed, a more general approach in the form of a comprehensive pan-European copyright system that would replace, or complete, existing fragmented legislation, seems the preferred solution, as the Commission itself has considered in earlier documents⁴.

Thirdly, while the above aspirations centered on copyright law already involve a considerable effort, attention to **copyright's relationship with other fields and regulations** should be kept on the radar. There are obviously relationships with the themes that are getting much attention today, such as (generative) artificial intelligence, the effects of the Digital Services Act on the liability of platforms, and the different instruments resulting from the European Data Strategy (Data Act, Data Governance Act, Open Data directive, Regulation on free flow of non-personal data, Interoperable Europe Act, Artificial Intelligence Act ...). We do not think these should hastily be addressed by (hard or soft law) copyright instruments, but further developments and their interaction with copyright should be closely monitored and addressed. Copyright policy - such as regarding models of remuneration for rightholders - can indeed have a decisive impact on future initiatives regulating access to/use of information (e.g. fight against fake news, access to information for indexing, ...).

Finally, there are some critical societal challenges that should be prioritized. These would include **sustainable development and copyright**. The climate and environmental crisis forces us to review all our regulatory environments to make our modes of living more sustainable. Copyright is no exception, even if at first sight, it seems less concerned by ecological matters. Yet, some rules - or the absence thereof - in copyright lead to an adverse environmental impact, such as the lack of interoperability, the destruction of goods instead of recycling as a remedy to infringement, the effects of TPMs/DRMs. To review how the copyright rules fit with the new horizontal "right to repair" proposed by the Commission and help pursuing the goal of 'recycling' should be a priority, e.g. upcycling in line with the EU's Waste Directive and Textile Strategy.

The members of the European Copyright Society would be pleased to discuss the abovementioned topics with you if you so desire. A copy of the present letter will also be sent to Mr. Marco Giorello, head of the Copyright Unit at DG CNECT.

Sincerely,

Prof. Marie-Christine Janssens,
Chair acting on behalf of the members of the European Copyright Society

- Prof. Lionel Bently, Professor, University of Cambridge, United Kingdom
- Prof. Valérie Laure Benabou, Professor, Université Paris Saclay / UVSQ, France
- Prof. Estelle Derclaye, Professor of Intellectual Property Law, University of Nottingham, United Kingdom
- Prof. Thomas Dreier, Director, Institute for Information and Economic Law, Karlsruhe Institute of Technology (KIT), Germany
- Prof. Séverine Dusollier, Professor, School of Law, SciencesPo, Paris, France
- Prof. Christophe Geiger, Professor of Law, Luiss Guido Carli University, Rome, Italy

⁴ See, e.g., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a modern, more European copyright framework, 9 December 2015, COM(2015) 626 final, nr. 6.

- Prof. Jonathan Griffiths, Professor of Intellectual Property Law, School of Law, Queen Mary University of London, United Kingdom
- Prof. Reto Hilty, Director, Max Planck Institute for Innovation and Competition, Munich, Germany
- Prof. Martin Husovec, Assistant Professor, London School of Economics and Political Science (LSE), Department of Law, United Kingdom
- Prof. Marie-Christine Janssens, Professor of Intellectual Property Law, Head of CiTiP (Centre for IT & IP Law), University Leuven (KU Leuven), Belgium
- Prof. Martin Kretschmer, Professor of Intellectual Property Law, University of Glasgow; and Director, CREATE, United Kingdom
- Prof. Axel Metzger, Professor of Civil and Intellectual Property Law, Humboldt-Universität, Berlin, Germany
- Prof. Péter Mezei, Professor of Law, University of Szeged, Hungary; Adjunct professor (Dosentti) University of Turku, Finland
- Prof. Alexander Peukert, Goethe-Universität Frankfurt am Main, Germany
- Prof. João Pedro Quintais, Assistant Professor, University of Amsterdam, Institute for Information Law (IViR), Netherlands
- Prof. Ole-Andreas Rognstad, Professor of Law, Department of Private Law, University of Oslo, Norway
- Prof. Martin Senftleben, Professor of Intellectual Property, VU University Amsterdam, Netherlands
- Prof. Caterina Sganga, Associate Professor of Comparative Private Law, Scuola Superiore Sant'Anna, Pisa, Italy
- Prof. Alain Strowel, Professor, Saint-Louis University and UCLouvain, Belgium
- Prof. Tatiana Eleni Synodinou, Associate Professor, University of Cyprus, Cyprus
- Prof. Mireille van Eechoud, Professor of Information Law, University of Amsterdam, Institute for Information Law (IViR) Netherlands
- Prof. Raquel Xalabarder, Chair on Intellectual Property, Universitat Oberta de Catalunya, Barcelona, Spain

Annex – Steps to optimize the current harmonization status

- (1) **Consolidation of the *acquis*** built up by 15+ Directives and Regulations, whereby attention should be given to:
 - i. Removal of inconsistencies, e.g.
 - rules in the different directives regarding exceptions (e.g. disability exceptions in InfoSoc and Marrakesh; digital education in CDSM and education in InfoSoc...)
 - different definition or scope of similar notions (e.g. right of reproduction in copyright and related rights)
 - measures to prevent circumvention of technical protection measures
 - ii. Elimination of overlapping regimes, e.g.
 - sui generis right for databases and slavish imitation
 - the different regimes of anti-circumvention provisions as regards works in general and computer programs
 - iii. Clarification of important notions to terminate endless debates, e.g.
 - The notion of protected works and the (improper) overlap between definition of copyrighted subject matter and requirements of protection (originality/expression)⁵
 - the right of communication and making available to the public⁶
 - the notion, scope and admissibility of digital exhaustion
 - the notion of lawful user
- (2) **Further developing the *acquis*** by filling-in gaps in areas that currently lack harmonization, including:
 - i. Recommending revisions, such as
 - the possibility of digital public lending
 - a more comprehensive positive protection of the public domain as cautiously initiated by Art. 14 DSMD
 - changing the optional character to a mandatory character for (essential⁷) exceptions in Art. 5 of the 2001/29 InfoSoc Directive
 - ii. Legislating on issues left open today, including those relating to
 - initial ownership
 - eligible subject matter
 - the exclusive right of adaptation
 - moral rights
 - iii. Provide solutions for persisting visible problems on the market, e.g. issues relating to
 - territoriality and geo-blocking (see also point (3) below)
 - diverging approach to (mandatory) collective management
 - diverging applications of the private copy exception and private levy schemes
- (3) Taking **preparatory initiatives** for areas or phenomena that cause legal uncertainty today, but require more **in-depth research and/or impact assessments** before regulatory action, such as:
 - i. The issue of geoblocking of audio-visual works,
 - ii. Revenue distribution from exploitation through streaming platforms to authors and performers

⁵ This is an aspect harmonized by the CJEU, in spite of the full lack of harmonization on matters excluded from protection by single Member States.

⁶ This remains one of the most litigated topics in copyright proceedings in member states.

⁷ See also point (3), iv below.

- iii. Analysis of now adopted EU regulations on online platforms that have a relationship with or impact on copyright (e.g. the Digital Services Act)
- iv. Impact of fragmentation of limitations and exceptions on cross-border uses and derivative markets
- v. Approach to transformative uses