

Kluwer Copyright Blog

European Copyright Society letter to Commissioner Breton on a future agenda in the field of copyright law

Kluwer Copyright Blogger · Thursday, June 1st, 2023

The members of the European Copyright Society (ECS) have recently sent a letter to Mr. Thierry Breton (Commissioner for Internal Market, European Commission) outlining their view of what should be the priorities for a future agenda in the field of copyright law.



The letter is available [here](#) and its contents are reproduced below.

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 law[1]. 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 1988[2]. 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 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[1]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 education[3]), the rule of mutual recognition linked to pan-European licensing (orphan works), and of 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 documents[4].

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.

[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.

[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.

[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.

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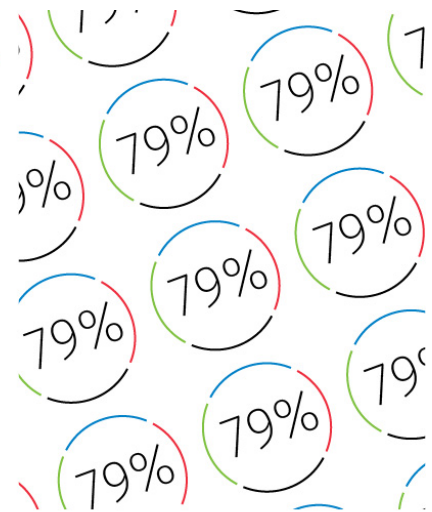
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