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# Comments on the Reflection Document of DG INFOSO and DG MARKT on Creative Content in a European Digital Single Market: Challenges for the Future

## Introduction; the Hungarian Copyright Experts Council and its comments

The Hungarian Copyright Experts Council performs its functions under Articles 101 to 105/A of the Hungarian Copyright Act of 1999 (amended up to 2008) as an expert body for courts, prosecutors and other authorities, and a mediation forum (*inter alia*, for disputes mentioned in Article 11 of the Satellite and Cable Directive and Article 6(4) of the Information Society (Copyright) Directive. Its 200 members, its 15-member board and its President are appointed by the Minister of Justice in agreement with the Minister of Culture, and it is linked to the Patent Office the Copyright Division of which serves as its secretariat. Its membership and Board are composed of leading copyright experts of the country, the representatives of the various stakeholders interested in the field of copyright, as well as the representatives of the Ministry of Justice and the Minister of Culture.

The Copyright Experts Council presents its opinion on the Reflection Document below. The comments made on behalf of the Hungarian government have reached the Council in the last moments before the expiry of the deadline to submit comments to the Commission. Therefore, those comments are not taken into account and reflected in the Council's comments. The comments made on behalf of the Council do not necessarily are in accordance with the comments made on behalf of the Government

## General comments

The Reflection Document (hereinafter: RD) describes certain challenges concerning creative contents and outlines possible responses to them. It seems, however, that it does not cover all the relevant aspects. The focus its attention is to guarantee as easy *access* to "creative content" as possible in the European single market "anywhere, any time." Rightly enough, it states the principle that this should take place in accordance with the copyright and related norms through legal distribution and communication systems.

It seems to us, however, that

(i) the RD – probably because it is intended just as the first outline of possible legal-political options – does not take into account all the legitimate interests involved (in particular the interests of owners of rights and those related to the protection of cultural diversity) in a duly balanced way and in a manner that would duly reflect the nature and importance of those interests;
(ii) the RD does not deal with the necessary conditions for the viability of legal distribution and communication systems;

(iii) certain objectives and suggested solutions are not duly developed and the meaning of certain concepts used in the RD is not sufficiently clear; they would need further clarification in order that the RD may become an adequate basis for serious reflection;
(iv) some of the ideas outlined (as it is partly recognized also in the RD itself, since it presents certain ideas as of a *de lege ferenda* nature) – in particular the apparent central idea of transforming exclusive rights into simply rights to get paid somehow – are not in accordance with the existing international norms and the *acquis communautaire*;
(v) the other basic suggestion of the RD aimed at abandoning the territoriality of copyright protection and to replace national laws by an all-EU copyright legislation is not timely and justified.

It is, therefore, suggested that the RD be revised and further developed in order that it may serve as a more complete basis for further reflection on the important policy issues involved.

More in detail:

*ad (i): the RD – probably because it is intended just as the first outline of possible legal-political options – does not take into account all the legitimate interests involved (in particular the interests of owners of rights and those related to the protection of cultural diversity) in a duly balanced way and in a manner that would duly reflect the nature and importance of those interests.*

The RD mainly pays attention, on the one hand, to the interests of the IT industries, online users and their consumers and, on the other hand, to the regulation of the internal market. There are references to the need for effective protection of copyright and related rights and to cultural considerations, but those aspects do not seem to be taken into account in due accordance with their importance.

We do agree that the consumers' demand to get access to "creative content" "anywhere and at any time" – which is stressed as a prior objective in the RD – be fulfilled as much as possible. However, in our view, it should not take place in no matter how and at no matter at what price.

The populist pressure (sometimes also mixed with some neo-anarchist and/or utopian-collectivist ideas) for free access – or as a minimum "looking free" access – to "creative content" is a political reality which is inevitable to count with. There are certain possible ways and means to satisfy such demands to a certain reasonable extent. Nevertheless, it is not advisable to simply give in to such pressure by neglecting certain other important aspects and long-term considerations.

First of all, it would be necessary to discuss more thoroughly what options may be acceptable from the viewpoint of the existing system of copyright. Under the international treaties and the *acquis*, copyright and related rights are construed as basically a bunch of exclusive rights of authorization or prohibition of certain acts and not just as mere rights to remuneration. It does not change the fundamental nature of this branch of law that certain rights (such as the resale right or the single equitable remuneration of performers and

producers of phonograms for broadcasting and communication to the public of phonograms) are provided exceptionally as mere rights to remuneration. Neither is this nature of copyright and related right changed by the fact that the international treaties and, in accordance with them, the EC directives provide for certain exceptions to and (in the form of reducing certain exclusive rights to mere rights to remuneration, of compulsory licenses or mandatory collective management) limitations of exclusive rights. Such exceptions and limitations, however, may only be applied in certain special cases as discussed under point (v) below. The international treaties and the *acquis* do not allow the general transformation of exclusive rights – such as the right of reproduction or the right of interactive making available to the public – into some kind of generalized right to remuneration.

Secondly, the RD itself refers to the important contribution of the copyright industries to the economy and employment in the European Union. It is submitted that it is in the interest of the Union to strengthen rather than weaken the legal basis for those industries. Therefore, in our view, it would be necessary to thoroughly consider the possible impact of the solutions outlined in the RD which, in certain aspects, seem to question whether its is justified to continue following the "European way of protecting copyright" (see page 7) and which seem to tend to weaken protection by transforming exclusive rights into some "alternative forms" of remuneration.

Thirdly, but not less importantly, although the works protected by copyright and the objects of related rights usually appear as goods and services in the internal market, they have a specific double nature. Their creation, production and dissemination cannot be duly regulated automatically in the same way as any other products. The principles on which the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is based and which are fully shared by the European Union and its Member States should be duly taken into account.

As the Preamble of the Convention states it was adopted by the Contracting Parties on the basis of their conviction "that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value." Then, Article 2(2), (3) and (5) of the Convention provides as follows:

> „States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."
>
> „The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples."
>
> „Since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy."

The Preamble of the UNESCO Convention equally points out the language aspects of the protection and promotion of cultural identity and its close relationship with the educational

systems of the country concerned: "*Recalling* that linguistic diversity is a fundamental element of cultural diversity, and *reaffirming* the fundamental role that education plays in the protection and promotion of cultural expressions."

The regulation of copyright protection is one of the possible means for the various countries to exercise their "sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory." The Preamble also recognizes "the importance of intellectual property rights in sustaining those involved in cultural creativity," and this obviously mainly means copyright and related rights.

This is one of the reasons for which the ideas of giving up the principle of territoriality and of providing a uniform copyright law are hardly realistic. The existing rich cultural diversity is a great asset of the Union which should not be weakened but rather protected and promoted. In certain aspect, this requires specific cultural policies and legal measures in smaller countries with smaller cultural markets usually determined by national languages that are not equally needed in bigger countries with bigger, sometimes even worldwide, markets based on widely spoken languages. All this may influence, *inter alia*, the way in which exceptions and limitations are fine-tuned and the exercise of rights – in particular, regarding collective management – is regulated.

The RD, at certain points, very briefly refers to cultural aspects but it does not elaborate at all on how they are supposed to taken into account for, and how they may be concerned by, the various policy options outlined in it.

In view of what is discussed above, we suggest that the interests of copyright and related rights owners (along with the basic economic, social, cultural and human-rights aspects of copyright protection) and the protection and promotion of cultural diversity should be taken into account with greater attention, at least with the same attention as the interests of IT industries, online users and the easiest possible access by consumers. We submit that, if this takes place, it will become clear why it is necessary to maintain the "European way of copyright protection" with a bunch of exclusive rights as its main characteristic and why it is not justified to consider a uniform regulation of copyright as a realistic option with abandoning the principle of territoriality. Furthermore, we also submit that, by such broadening of the consideration of policy options may also reveal that the maintenance and reinforcement of a balanced but adequate and effective protection of exclusive rights – with appropriate exceptions and limitations, of course – and the measures serving the protection and promotion of cultural diversity is also a long term interest of consumers.

*ad (ii): the RD does not deal with the necessary conditions for the viability of legal distribution and communication systems*

This seems to us the most important lacuna of the RD. Legal distribution and communication systems can only be viable if adequate protection and effective legal remedies are applied against the brutally unfair completion of ever more widespread online misappropriation and illegal use of works and objects of related rights with growing detrimental conflicts with the normal exploitation of rights by their legitimate owners. The legal and technological means are available. Now it is clear that, in addition to DRM systems, filtering and blocking technologies may also be efficiently used – without raising any relevant privacy issues – and

that, in view of this, the issues of the obligations to cooperate and the liability of service providers and other intermediaries emerge in a new way. Several court decisions have been adopted to confirm this, new brave legislative regulations have been introduced or are considered and new forms of cross-industry cooperation have been worked out, frequently with government encouragement and contribution.

We suggest that, before trying to reach any conclusions on the basis of the RD, the above-mentioned lacuna be eliminated and the indispensable means for guaranteeing the vitality of legal services (and not just in the form of mere remuneration systems, but basically through the exercise of exclusive rights) be presented in due detail and with due emphasis.

*ad (iii): certain objectives and suggested solutions are not duly developed and the meaning of certain concepts used in the RD is not sufficiently clear; they would need further clarification in order that the RD may become an adequate basis for serious reflection.*

The RD, with a brief reference to the existence of exclusive rights, mainly or nearly exclusively concentrates on the right of owners of copyright and related rights to remuneration. Also "alternative forms of remuneration" are suggested and preference is expressed to "feel free" systems. It is not clear what objectives and suggested solutions may be found behind these broadly presented ideas and how the authors of the RD foresees achieving that these may become the dominant ways of exercising copyright and related rights rather than what is characterized by the RD as traditional European way.

It is also unclear which aspects of the traditional European way of exercising copyright the RD – as it seems to be on the basis of the relevant remarks – considers out of date and ripe to be abandoned. The clarification seems to be particularly justified in view of the fact that the said European way corresponds to the principles and provisions of the Berne Convention, the TRIPS Agreement and the WIPO "Internet Treaties." Does the apparent view about the out-of-date nature of the European way of exercising rights also mean the intention of proposing a revision of the international norms in order to transform exclusive rights into more generally applicable rights to remuneration?

If this is the case, we are of the view that this line should not be pursued since it would not serve the interest of the EU with its important cultural production capacity.

As discussed below, the RD does not seem to offer sufficient details on the possible options foreseen for the intended framework regulation concerning "user generated contents" (see the comments regarding pages 3, 4 and 10, below).

The concepts of extended and mandatory systems of collective management do not seem to be duly clarified and differentiated either (see the comments regarding page 20, below).

*ad (iv): some of the ideas outlined (as it is partly recognized also in the RD itself, since it presents certain ideas as of a de lege ferenda nature) – in particular the apparent central idea of transforming exclusive rights into simply rights to get paid somehow – are not in accordance with the existing international norms and the acquis communautaire.*

See the comments made on the proposed "alternative forms of remuneration" concerning page 19, below and on mandatory collective management concerning page 20 below.

> *ad (v): the other basic suggestion of the RD aimed at abandoning the territoriality of copyright protection and to replace national laws by an all-EU copyright legislation is not timely and justified.*

See the comments on the issue of territoriality and the idea of an all-European copyright law concerning pages 10 to 13 and 17, below.

**Page by page comments**

*Page 2*

The objectives of the RD are presented in the following way:

> "The starting point of this reflection paper is therefore the objective of creating in Europe **a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online**, in particular by:
> – creating a favourable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;
> – encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content through digital networks anywhere and at any time;
> – promoting a level playing field for new business models and innovative solutions for the distribution of creative content.
> As part of the ongoing discussions on the priorities for the European Digital Agenda, and adding to similar debates currently taking place at national level [footnote 5 added], the Commission services now wish to focus the debate on practical solutions to encourage new business models, promote industry initiatives and innovative solutions, as well as on the possible need to harmonise, update or review legislation."

The problem that we can see and that we have outlined in the general comments – namely that mainly or nearly the interests of IT industries, online users and consumers are taken into account without sufficient attention to the interest of owners of rights and the cultural aspects – is reflected in this part of the RD in a condensed way:

- the RD suggests that it is sufficient to guarantee "favourable environment" for owners of rights by simply ensuring "appropriate remuneration," there is no word about the need for an adequate and effective protection of the essence of copyright; namely the bunch of exclusive rights to be granted by the international treaties and the *acqui*;
- the RD speaks about "favourable environment" for "culturally diverse European market;" it is not clear, however, whether or not also the protection and promotion of cultural diversity is a relevant aspect in the borderless all-European cultural market to the RD intends to achieve; and definitely there is no indication in the document on

how its authors imagine the protection an promotion of cultural diversity in the community market;

- the rest of the above-quoted part of the RD is just about the interests of consumers, business models, industry initiatives (in the given context, it seems that mainly IT industry initiatives are meant) and "innovative solutions" (without identifying in what the inventiveness may consist).

To the text quoted above, as indicated, a footnote (footnote 5) is added which reads as follows: "See the recent reflection started by the 'mission Zelnik' in France. As it can be seen in the context, the "mission Zelnik" is presented as an example of "practical solutions to encourage new business models, promote industry initiatives and innovative solutions." The way we understand, however, what has only emerged in connection with the "mission Zelnik" is just the idea of obligating internet service providers and other intermediaries to pay a contribution to the owners of rights – through a collective management system – to compensate for the losses suffered due to the illegal use of works and objects of related rights through their systems (of which they usually, or at least frequently, gain profit from advertisement money). It does not seem to be suggested that this would be a suitable *alternative* to the enforcement of rights against infringers. That is, a somewhat-better-than-nothing subsidiary and temporary solution is foreseen rather than an ideal and desirable alternative remuneration system (an "alternative system" that would be similar then to the – fortunately – rejected idea of "global license"). It would depend on the details of such a compensation system whether or not they would be acceptable as such a temporary solution from the viewpoint of the international treaties and the *acqui.* In any way, even if it were applied, it would have to be guaranteed that it is not considered and does not function as a viable alternative "business model" and "innovative industry initiative." Unfortunately, however, the RD seems to refer to it as an example of such model and initiative.

Reference should be made here to the comments made by the member of the Board of the Council representing Artisjus received before the expiry of the deadline for submissions of comments on the RD. As it can be seen the said member of the Board seems to consider the compensation system mentioned above as a possible new form of "global license" and seems to support it as such.

The comments presented by the President of the Council obviously reflect a contrary opinion which the President intends to maintain.

*Pages 3, 4 and 10*

These are the pages where the RD deals with "user-created content." At the bottom of page 3 and the beginning of page 4, the following is stated:

> New content is being created by traditional players such as authors, producers, publishers; but **user-created content** [footnote 6 added] is playing a new and important role, alongside **professionally produced content**. The co-existence of these two types of content needs a framework designed to guarantee both freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity.

This is the very rare places where the expression “cultural diversity” is used; however, as it can be seen not in a context of discussing how cultural diversity may be duly protected and promoted in the cross-border internal market.

The essence of the quoted text is, however, concerns “user-created content.” It is in view of this text and the below-mentioned reference to the need for copyright protection of such “content” that it is indicated above that it is not sufficiently clear what kind of “framework” the authors of the RD have in mind.

Article 12 of the Berne Convention provides for an exclusive right of authors to authorize the adaptations, arrangements and other alterations of their works. The RD in footnote 6 defines “user-created content” in such a broad way (as content „made publicly available through communication networks, which reflects a *certain amount* [emphasis added; that is: even the slightest possible amount] of creative efforts, and is created outside of the professional practices”) that, by extending the above-mentioned “framework” to any “content” covered by it, there may be conflicts with this provision – and therefore also with Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT. It would facilitate comments on this aspect of the RD if it had indicted at least the outline of possible options foreseen to solve such problems.

The same may be said on the statements included in page 10 which deal with the demand of UGC creators to enjoy copyright protection for the “content” created by them (even with minimal creative contribution) – on the basis of the proposed “framework,” apparently without the need for any authorization by the owner of rights in the original work. It would be necessary to know how the RD foresees the co-existence of the rights of the original owner and the UGC contributor We submit that the model of the provision of Article 5(3)(k) of the Copyright in the Information Society Directive on parody would not be suitable to use for such a broad category of unauthorized derivative alterations.

*Page 4*

It is stated that “[m]aking professionally produced creative content available online is proving to be a high-risk business,” and the first reason for this that is mentioned is “market fragmentation.” It is not explained why and how market fragmentation increases the risk of online piracy and why and how this risk could be diminished if licensing did not take place on the basis of territorial and frequently language-related rights by representatives who may more closely control and enforce rights in the country concerned. In fact, we have serious doubts that this is truly the case.

However, there are certain aspects of exploiting rights in different national and language-based markets separately which is definitely not a source of risk but rather the most adequate basis for the viability of productions with big amount of creative and financial investments. This is particularly the case as regards film production based on pre-financing agreements covering various markets and distribution “windows.” The RD does not seem to offer adequate options how to maintain sustainable audiovisual production – without limiting it to subsidy-based projects – if its two apparent objectives are pursued, namely the transformation of exclusive rights into some remuneration systems and the elimination of territorial rights applied in the various Member States.

*Page 5*

Footnote 11 contains a statement that does not seem to be sufficiently clear and, in certain aspects, even seems to be imprecise. It reads as follows: „The right of communication to the public of performers does not cover non-interactive streaming activities. For such activities, performers rely on their reproduction right for remuneration. The same applies to the right of communication to the public of record producers."

We can see two problems with this statement. First, it does not seem to be in accordance with the definition of "communication to the public" included in Article 2(g) of the WPPT which reads as follows: "'communication to the public' of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or representation of sounds of sounds in a phonogram." We believe that – while interactive transmissions are covered by the separate exclusive right of performers and producers of phonograms as provided in Article 10 and 14 of the WPPT to authorize the "making available to the public" of their fixed performances and phonograms, respectively, the way it is described there ("making available to the public" which, in contrast with Article 8 of the WCT in respect of copyright, is not included in the broader concept of communication to the public) – there is no reason to state that non-interactive streaming is not covered by the right to single equitable remuneration provided in Article 15 of the WPPT and Article 8(2) of the Rental, Lending and Related Rights Directive.

It is another matter that, as stated in the footnote, the right of reproduction may also be involved. The second problem with the footnote, however, is exactly in respect of the way right of reproduction of performers and producers of phonograms is qualified; namely as "their reproduction rights for remuneration." In contrast with what the footnote suggests, the right of reproduction of producers of phonograms is provided by Article 10 of the Rome Convention, Article 14.2 of the TRIPS Agreement and Article 11 of the WPPT as an exclusive right of authorization or prohibition. Furthermore, while Article 7.1(c)(and of course, Article 19) of the Rome Convention and Article 14.1 of the TRIPS Agreement regulate the right of reproduction of performers in a more complex way, Article 7 of the WPPT contains, *mutatis mutandis*, the same provision on this right of performers concerning their performances fixed on phonograms as Article 11 on the right of producers of phonograms.

*Page 8*

In respect of the exploitation models of films the following statements are made: "Statutory and contractual provisions relating to **release windows** for VOD can act as a barrier to the availability of content on digital platforms across borders, because of the time lapse between VOD and other releases. Release windows that are too long can hinder the emergence of attractive legal offers and stifle innovation."

We submit that the basic problem is not the application of release windows. The basic problem is the rampant, and in certain aspects completely uncontrolled, on-line piracy of films. Release windows might be brought closer to each other or merged, and film producers could introduce new attractive legal offers based on their exclusive rights if this problem were solved. This is one of the indications we can see that the scope of issues of the RD

should be extended to the means of enforcement of rights (DRM protection, filtering, blocking technologies, obligations to cooperate and new aspects of liability of service providers and other intermediaries, etc.). In the absence of this, it is not clear what kind of innovation by whom and in whose interests is stifled just because film producers intend to maintain their contractual practice that, under the given conditions, is the only guarantee for them to be able to recoup their investments.

*Page 9*

It is stated that "[r]ightholders want to ensure that they are remunerated fairly and adequately when their works are used on digital platforms." This statement is certainly correct in the sense that rightholders truly want to get adequate remuneration. It would not be correct, however, to suggest that what rightholders – or at least the majority of them – simply want to enjoy is a right to remuneration. Therefore, the statement would be more precise if it read as follows: "Rightholders want to ensure that their rights provided by the international treaties and the *acquis communautaire* may be adequately protected, exercised and enforced when their works and objects of related rights are used on digital platforms."

The last two paragraphs in page 9 seem to be an example of – in our views – too far reaching readiness to fulfill any kinds of demands of consumers no matter whether or not they are duly justified and realistic under the given conditions. Audiovisual works may, of course, be made available without taking into account the current conditions indispensable for preserving the chance for recouping investments with reasonable profit. There is a danger, however, that without settling the problem of financing (since the RD also recognizes that online platforms do not contribute to the indispensable pre-financing of film production) and without offering effective means against on-line piracy, there will be free, or "feeling to be free," access to such works but – as a hardly evitable collateral damage – to less and less and to lower and lower quality.

Otherwise, in view of having seen how certain letter-campaigns are organized by some ultrapopulist and neo-anarchist websites, allow us not to be truly impressed by the fact that such "citizen letters" are sent to the EC. We submit that, although some of them might be legitimate, many others contain – the way it transpires from the description in the RD – exaggerating demands. In contrast, we believe that the complaints of owners of rights about uncontrolled on-line piracy are truly genuine and fully justified and they should be addressed with at least as much attention as to "consumer frustration" because not everything is available immediately anywhere freely no matter with what consequences for creators and producers. It seems to us that a fully balanced approach is needed to consider the conflicting interests of the various stakeholders.

*Pages 10 to 13 and 17*

The RD deals, in these pages, with the territorial aspects of copyright which it presents as a problem. We submit that it is not a problem but a reality which should be taken into account and which we should live with. Appropriate licensing practice and private-international-law solutions may be suitable to settle the possible issues related to territoriality.

It should also be taken into account as a legal and practical fact that the nature of different rights is different from this viewpoint. The analysis of the situation regarding the exhaustion of the right of reproduction is correct, of course, but it is not a concept that could be extended to non-copy-related rights as the rights of broadcasting, communication to the public and public performance. Also the model to determine the place of use in respect of satellite broadcasting could hardly be copied to the more complex interactive transmissions covered by the right of making available to the public combined with acts of reproduction in the stage of uploading and downloading, but in a certain way also during transmissions. Also it should be taken into account that sometimes (see, on-demand streaming) the communication side is dominant in acts of making available, while in other cases (see, no-real-time condensed transmissions for downloading), the reproduction and distribution aspects are more apparent. And it should be added that the same system may behave in this or that way depending on which service is used by the end-user. (It follows from this that we agree with the RD that it would be desirable to clarify the applicability of the right of communication and the reproduction/distribution aspects of interactive making available of musical works in the above-mentioned different situations. It should be added that this is mainly or exclusively a problem for musical rights which may be, and sometimes are, represented by different bodies. As regards other categories of works, in particular audiovisual works in the case of which there are owners of consolidated rights, what is involved is just the application of the overall right of interactive making available in different contexts depending on the way the owners of rights intend to exploit that right.)

It appears that the RD would consider it as an appropriate solution to apply source licensing for online transmissions in a way similar to what exists in respect of satellite broadcasting as provided in the Satellite and Cable Directive. We submit that there used to be such licensing systems; namely those based on the Santiago and Barcelona agreements worked out by collective management organizations. It guaranteed all-European – and even worldwide – licenses in respect of authors rights by the society of the country to which the online user had the closest relationship and in the case of which the control of uses and enforcement of rights could be fulfilled in the most effective way. It is a pity that, due for EC's intervention for competition and internal-market-related reasons those systems had to be abandoned. We submit that what has emerged in the meantime as a result of various EC interventions is not necessarily more appropriate from competition and internal-market viewpoints, but it is certainly much more complex and, in certain aspects, even seems to lack the characteristics and advantages of a genuine collective management. It is also a pity that there is hardly a realistic chance to reconsider all this. If not other things, the so-called "institutional pride" and the trend of broadening scope of regulation rather than leaving issues to owners of rights might emerge as obstacles.

Although who knows. In page 17, the following statements may be found which seem to reflect the position of the authors of the RD: "Transposing the rationale of [the Satellite and Cable] Directive to the Internet could imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this license would cover all Community territories. The principal rationale for domiciling licensor and licensee in one territory is to identify the relevant territory in which the multi-territorial license can be obtained." This seems to be a description of certain advantages of the Santiago and Barcelona agreements. (Two things should, however, be added. First, that, since exclusive rights are involved, no extended territorial effect of a license should be

prescribed by community or national legislation. Secondly, that such a system may be applied in the case of music, but it could hardly emerge as a realistic and desirable option in the case of works which, due to their nature, are not normally exploited through collective management systems; and certainly it is not suitable for the management of rights in audiovisual works which, under the present conditions, should be flexibly adapted to the different release windows and pre-financing arrangements to be applied in the various countries.)

*Page 19*

It is in this page that the ideas concerning alternative forms of remuneration are summed up.

First, it is stated as follows: “An altogether different approach, which would either exist alongside traditional copyright licensing (national or EU wide) or replace such licensing between right-owners and commercial users altogether, would be the introduction of **alternative forms of remuneration**.”

Then, certain possible alternative models are mentioned, first of all the above-mentioned idea according to which „ISPs would owe rightholders a form of compensation for mass reproductions and dissemination of copyright protected works undertaken by their customers.”

The RD should be commended that, although apparently it considers such alternative forms of remuneration as suitable to replace licenses based on exclusive rights and as a reasonable option, it refers to certain doubts as follows:

> “It is an open question whether implementation of alternative forms of remuneration at EU level could lead to a situation which is acceptable to rightholders, ISPs and consumers, and this is why it is raised in this reflection paper…The application or introduction of alternative remuneration models would also have to be preceded by a careful examination of whether such models are compatible with the "rights based" approach taken in several international copyright conventions, the different aspects of downloading and uploading and the long term sustainability of a creative content market using this model. Finally, reflection on alternative forms of remuneration raises delicate issues of how proceeds would be shared out, given that these new forms necessarily aggregate different rights belonging to different rightholders.”

The doubts seem to be fully justified. The international copyright treaties consistently follow the “rights-based” approach and, as pointed out above, fundamentally the exclusive-rights-based approach. The exclusive rights may be subject to certain limitations and exceptions but only where this is in accordance with the “three-step test” as provided in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT, Article 16 of the WPPT and Article 5(5) of the Information Society (Copyright) Directive. The limitation of exclusive rights to mere rights to remuneration means the introduction of compulsory licenses. This is allowed under the Berne Convention in certain cases – namely in respect of the right of broadcasting and cable retransmission of works and mechanical reproduction of musical works as provided exceptionally in Article 11bis(2) and 13(1), respectively – but it

follows from the *a contrario* principle that it is not allowed in respect of other exclusive rights. Furthermore, in the context of the TRIPS Agreement and the WCT, the application of these limitations is also subject to the "three-step test" by virtue of Article 13 of the Agreement and Article 10(2) of the Treaty.

Therefore, in our view, the application of "alternative forms of remuneration" replacing exclusive rights in cases going beyond the above-mentioned exceptionally and exclusively determined cases, would be in conflict with the Berne Convention, the TRIPS Agreement and the WCT.

*Page 20*

The following statement is made in this page of the RD:

> "The introduction of **an extended or mandatory collective management system** for the administration of the "making available" rights of authors and performers and the provision of an additional unwaivable right to equitable remuneration… has been also suggested by rightholders. Although these suggestions would seem to add an additional layer of complexity to collective management, they could have the potential to create more effective protection and a stronger position for creators in their negotiations with their production companies."

First, it should be pointed out that the status of extended collective management and mandatory collective management are different from viewpoint of the international treaties and the *acquis communataire.*

*Mandatory collective management* may only be prescribed for the exercise of rights to remuneration (either originally provided as such or as a result of the limitation of certain exclusive rights – in particular the right of reproduction – to such a right where it is allowed in accordance with the "three-step test"); furthermore, in respect of those exclusive rights in the case of which the Berne Convention exceptionally allows the imposition of conditions for the exercise of those rights (the prescription that an exclusive right may only be exercised through collective management being obviously such a condition). These exhaustively determined cases are covered by the same provisions (Article 11*bis*(2) and 13(1) of the Berne Convention) as those mentioned in connection with compulsory licenses (since the provisions on compulsory licenses are also regarded as conditions of exercising the rights involved). The *acquis communaitare* is, in general, in accordance with the international norms (see Article 9(1) of the Satellite and Cable Directive and Article 6 of the Resale Right Directive) In respect of Article 4(4) of the Rental, Lending and Related Rights Directive concerning the collective administration of the unwaivable "residual rights" of rental of authors and performers , see the comments below.

The above-quoted paragraph of the RD also refers to the possible mandatory collective management of an unwaivable ("residual") right to remuneration derived from the exclusive right of (interactive) making available to the public on the basis of the model applied in the Rental, Lending and Related Rights Directive. In this respect, the members of the Board of the Copyright Experts Council do not necessarily represent the same opinion.

Reference should be made to the comments made by a member of the Board representing Artisjus, the Hungarian society of authors. As it is indicated below, the comments, due to a communication problem, only reached the President of the Council on January 5, just before the expiry of the deadline for submitting comments on the RD. Therefore, there was no time to build it in the corresponding parts of the comments made on behalf of the Council and, thus, the comments are included in an annex below.

The said member of the Board supports the idea of broadening the "rental model" to the right of interactive making available to the public and he indicates his reason for this. In contrast, the position of the President of the Council, is as follows:

In the case of the right of rental, one might argue that the provisions on unwaivable "residual rights" to be maintained after the transfer of exclusive rights and on the possibility of prescribing mandatory collective management for the exercise of such "residual rights" may be regarded to be in accordance with the international copyright norms since the TRIPS Agreement also provides for an exclusive rental right in the case of phonograms and cinematoghraphic works as the Rental Directive does (and in addition also in the case of computer programs) and still no Member of the WTO has raised any objection to such a system.

This kind of argument referring to the situation under the TRIPS Agreement would not be equally valid concerning phonograms, on the one hand, and films (=cinematographic works), on the other hand. Furthermore, the status of authors and performers of cinematographic works also differs. It is true that Article 11 of the Agreement provides for an exclusive right of rental for the authors of cinematographic works, but it – or Article 14 on related rights – does not contain a similar provision regarding the performers of such works.

As regards phonograms, it seems that Article 14.4 – which provides for an exclusive rental right to producers of phonograms – is not supposed to be interpreted as also including an obligation to grant such a right to the authors whose works and to performances whose performances are fixed on phonograms.

The first sentence of paragraph 4 of Article 14 of the TRIPS Agreement reads as follows: "The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms, as determined in a Member's law."

The 1996 WIPO study about the "Implications of the TRIPS Agreement on Treaties Administered by WIPO" interpreted this provision in the following way:

> "As discussed above, under Article 11, in respect of computer programs, Members are obliged to provide for authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. That obligation is applicable *mutatis mutandis* for phonograms in favor of producers of phonograms. As regards other possible right holders in phonograms – such as performers whose performances, and authors the performances of whose works, are fixed in phonograms, the expression 'any other right holders in phonograms as determined in a Member's law' indicates that Members are free to extend or not to

> extend that right to those other right holders."( WIPO publication 464(E), 1996; page 28.)

According to this interpretation, *in the case of phonograms, the rental right for authors and performers is only optional*. One may say, of course, that such an opinion in a WIPO publication is not binding for WTO bodies. However, it does have certainly more relevance that the following agreed statement has been adopted by the 1996 WIPO Diplomatic Conference concerning Article 7(1) of the WCT which contained the same kind of provision from the viewpoint of a possible rental right of authors in respect of their works embodied in phonograms as Article 14.4 of the TRIPS Agreement:

> "It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement."

As it can be seen, the WIPO Diplomatic Conference, in a way, "interpreted" the TRIPS Agreement in the same manner as the above-quoted WIPO study. (Article 9(1) of the WPPT contains exactly the same kind of provision on a possible rental right of performers in respect of phonograms. No agreed statement is added to it. However, it seems quite evident that the same interpretation is supposed to apply to it.) It can be said that an agreed statement adopted by a WIPO Diplomatic Conference is not binding either for WTO bodies. This is certainly true. It seems to be equally true, however, that WTO bodies cannot fully neglect it either since the majority of WTO Members attended the Diplomatic Conference and participated in the unanimous adoption of the agreed statement.

In view of this, under the relevant international norms, there does not seem to be a clear obligation to grant an exclusive right of rental to authors and performers in respect of phonograms, and to performers of films (=cinematographic works). Thus, it might be said that, since the Rental Directive provides for a right of rental in cases where there is no clear international obligation to do so, it does not violate any international norms by providing for the possibility of mandatory collective management of that right.

Nevertheless, *the same cannot be said about the exclusive right of authors of cinematograhic works* since Article 11 of the TRIPS Agreement provides for such a right beyond any doubts whatsoever. Nevertheless, Article 4.4 of the Rental, Lending and Related Rights Directive allows for a "residual" right to remuneration and for the possibility of imposing collective management as a condition of its exercise also in the case of such authors.

As mentioned above, this has led to the idea in to introduce a similar "residual right" in respect of authors' and performers' interactive making available right and impose collective management thereof.

One may argue that the mandatory collective management of such a "residual right" must be acceptable since it does not concern the exclusive right itself. The owners of the exclusive right may exercise it on an individual basis; it is only the "residual right" after the exercise of that right in the form of its transfer to producers which is subject to mandatory collective management.

Nevertheless, such an argument may not stand a more thorough scrutiny. It could be pointed out that it is an unacceptable limitation of the given exclusive right, from the viewpoint of the relevant international norms, if the right owner is not allowed to exercise it as a real exclusive right by determining the amount, and the time and conditions of the payment, of remuneration for the authorization of the uses covered by the exclusive right – since all these are matters for mandatory collective management.

Therefore, it seems that, if a country still provides for mandatory collective management of a "residual right" of an exclusive right the way it is described above, it may only be sure that it is in accordance with the relevant international norms if it restricts its application to domestic owners of rights (with the obvious possibility of also applying this in the EU to the rights of community owners in general) and does not extend it to those who are supposed to enjoy protection under an international treaty (establishing in this way a "two-tier" system).

It goes without saying that, as discussed above, the prescription of mandatory collective management not only for the exercise of such a "residual right," applicable *after* the transfer of the exclusive right concerned, but also for the exercise of the exclusive right itself would be in conflict with the international treaties in all those cases where the international treaties do not allow the imposition of such a condition (and they apparently do not do so, e.g., in the case of either the right of rental or the right of making available to the public).

This does not mean that collective management may not be a reasonable form of exercising the right of making available to the public in certain cases. However, since it is an exclusive right, this may only take the form of voluntary collective management or – if all the conditions outlined below are met – at maximum, the form of "extended collective management."

The other option mentioned in the RD is *extended collective management*. Its nature and conditions of application are different from those discussed above in respect of mandatory collective management. It is, in general, accepted that it is also applicable for the exercise of exclusive rights subject to certain strict conditions. Namely, first, it should only be applied for rights in the case of which collective management is a normal and necessary way of exercising rights. Secondly, only those voluntarily established collective management organizations may receive the status of an extended collective management system that are sufficiently representatives both domestically and internationally (and, thus, in general, only certain specific categories of rights are concerned by the extended effect, such as the rights in "orphan works"). Thirdly, the owners of exclusive rights must have a realistic and practical way of "opting out" from the collective system, as provided in Article 3(2) of the Satellite and cable Directive which foresees such extended collective management.

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*Annex: Comments of the member of the Board of the Copyright Experts Council representing Artisjus, the Hungarian authors' society, received before the expiry of the deadline for the submission of comments to the Commission, which therefore, in general, have not been included in the corresponding parts of the comments above, but which is to be regarded as integral part of the Council's comments:*

"The Reflection Document cites the idea as well that "*ISPs would owe rightholders a form of compensation for mass reproductions* and dissemination of copyright protected works undertaken by consumers." We as well could imagine a system where one would – supported by "HADOPI-type" strengthened enforcement rules - convince the service providers (this would be again an attempt in the voluntary direction) to undertake to pay royalties on behalf of the consumers using internet instead of being exposed to repeated "notice and take down" and data supply claims. The service providers could shift this financial burden to the subscriber who, in order to mitigate this system, could opt out if they whished if they would commit themselves to strict control and sanctions in case of copyright infringement. The service provider might be remunerated for this cooperation by the right owners. This type of "global licensing agreements" would legalize the file sharing practices using the given service. Namely, it is not realistic to require compensation and, at the same time, maintain the legal risks for the user and the consumers. However, such a "global license" presupposes a complete representation right of the world repertoire.

Finally, the Reflection Document enumerates the possibility of the introduction of an *unwaivable right to equitable remuneration* for the making available right of authors and performers.

Artisjus, unlike the majority position of GESAC, is supportive of this solution. This seems to be the only way of valorization of the presently empty and unenforceable economic rights regarding internet use. The compatibility of the introduction of this legal instrument with the present international copyright treaties needs a careful consideration (this limitation would be not an exception but a compensated type of restriction that makes easier to find the compliance of such a solution with the international framework). It is clear for us, that such a right would have to be EU-wide in territorial scope but its objective scope has to be restricted to rights in certain work categories. The allocation of the remuneration between the work categories and different groups of rightholders seems to require a legislative intervention as well.

For all the above reasons, it is clear that legislative changes on the content of substantial right, on the notion and place of use as well as the territorial scope of copyright will do little to improve the situation as regards multi-territory clearance of rights. The introduction of an *unwaivable right to equitable remuneration* seems to be the only – narrow – way out of the present impasse, created to a great extent by the Commission itself. "

Budapest, January 5, 2010

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