CLEARY GOTTLIEB

ALERT MEMORANDUM

January 7, 2014 clearygottlieb.com

European Commission Public Consultation on the Review of the EU Copyright Rules

I. INTRODUCTION

The European Commission (the "Commission") announced on 5 December 2013 the launching of a "Public Consultation on the review of the EU copyright rules" (the "Consultation") as part of its on-going efforts to review and modernise EU copyright law. The Consultation seeks to address the effect of digitalisation on the manner in which content is created, distributed and accessed and ensure that the EU copyright regulatory framework stays "fit for purpose" in the digital age.

Consumers, service providers and right-holders are invited to provide opinions on the problems they perceive with the current law and suggestions for legislative or other solutions. The Consultation will close on 5 February 2014.

II. EXECUTIVE SUMMARY

The Consultation addresses the following areas:

- cross-border availability of digital content;
- the need for more clarity regarding the authorisations required for various types of digital transmission;
- registration of works and other subject matter;
- how to improve the use and interoperability of identifiers;
- the term of protection;
- limitations and exceptions to copyright;
- private copying and reprography;
- fair remuneration of authors and performers;
- respect for rights; and
- the idea of establishing a unified EU Copyright Title.

III. BACKGROUND AND LEGAL FRAMEWORK

The Consultation takes place in the context of a wider drive by the Commission to develop a Digital Single Market and open up access to content throughout the EU. An appropriate and modernised system of copyright law is essential for this process.

Since May 2005, when the Commission announced the creation of an open and competitive single market for the production and distribution of online content in its "i2010 Communication", the Commission and its representatives have issued various papers, communications and statements on the modernisation of the EU copyright framework in the context of increasing digitalisation.[1] Building upon these materials and initiatives, in December 2012, the Commission announced a two-pronged approach for modernising copyright:

- First, "Licences for Europe", a stakeholder dialogue led jointly by the Directorate Generals for Internal Market and Services, and Education, Culture, Multilingualism, Sport, Media and Youth, and DG Connect. Licences for Europe was intended to facilitate a structured dialogue between the Commission and industry stakeholders, focusing on six areas of copyright reform: cross-border portability of content, user-generated content, data and text mining, private copy levies, access to audio-visual works, and cultural heritage. Stakeholders included

[1] In mid-2006, the Commission consulted on ways of enhancing competition in online content markets, leading to the publication of a detailed study describing obstacles to the exploitation of digital content on new technology platforms. In January 2008 the Commission issued a communication on creative online content in the single market, focusing on multi-territory licensing, digital rights management systems and piracy. A further consultation was held in late 2009. In May 2010, the Commission launched its "Digital Agenda for Europe", intended to deliver sustainable economic and social benefits from a digital single market. The Digital Agenda, inter alia, criticised the "*patchwork of national online markets*" and announced the Commission's intention to simplify copyright clearance, management and cross-border licensing. In January 2011, the Commission published its first evaluation report of the implementation of the Directive on the enforcement of intellectual property rights. In April 2011, following the "re-launch" of the Single Market, Commissioner Barnier made a keynote speech at Cannes that set out measures to improve the legislative framework for creating and exploiting creative content. In May 2011, the Commission published a Communication outlining its strategic objectives for delivering a "true Single Market" for intellectual property rights. (http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf). In July 2011, the Commission published its Green Paper on the online distribution of audio-visual works in the EU, summarising challenges and opportunities in the online distribution of audio-visual works, such as rights clearance for transmission and retransmission of audio-visual media services and transactional VOD services, and remuneration of rights-holders for online exploitation. With the publication of the Green Paper, the Commission launched a public consultation on whether the regulatory and legal framework posed barriers to the cross-border availability of online services in the EU. In July 2012, the Commission adopted a proposal for a Directive on collective management of copyright and multi-territorial licensing of rights in musical works for online exploitation. In December 2012, the Commission published a further communication on the Digital Agenda, which announced the Commission's intention to consult on fragmentation of the EU copyright market and territoriality in the internal market.

representatives from consumer and digital rights organisations, IT and technology companies, internet service providers, film heritage institutions, broadcasters, public libraries, authors, producers, performers, and other copyright-holders in the audio-visuals, music, publishing and video game industries.[2] The final plenary session of the consultation closed on November 13, 2013, with stakeholders making various commitments to reform aspects of the existing copyright regime.[3]

- The second limb of this initiative envisages the completion of various market studies, impact assessments and legal texts, which will enable the Commission to take a final decision (during the course of 2014) as to whether legislative reforms are required. The Consultation forms part of this second phase of work.

The Consultation recognises that the introduction of digital technology and the internet has changed the environment in which the law of copyright operates by providing new ways for content to be created, distributed and accessed. It is therefore necessary to ensure that the EU copyright regulatory framework operates effectively in the new digital environment. The question of legislative reform is intended to run in parallel with the "Licences for Europe" pledges which emerged from stakeholder dialogue focussing on specific industry-led solutions to issues on which rapid progress was deemed necessary and possible.[4] The "Licences for Europe" pledges and discussions will also inform the Commission's review process.

IV. TOPICS OF CONSULTATION

A. CROSS-BORDER AVAILABILITY OF DIGITAL CONTENT

Copyright is currently granted national, as opposed to EU-wide, protection; the geographical scope of copyright protection is limited to the territory of each Member State in which such protection is granted. As a result, authorisation to disseminate protected content online must be sought in each Member State where the content will be communicated. Despite EU initiatives to facilitate multi-territorial licences[5] and a "Licences for Europe" pledge from representatives of the audio-visual industry to further

---

2 For a full list of participants, see http://ec.europa.eu/licences-for-europe-dialogue/en/content/working-groups.

3 Stakeholder commitments and pledges are summarised in the materials published at the close of the final plenary session. See http://ec.europa.eu/licences-for-europe-dialogue/en/content/final-plenary-meeting.

4 Licences for Europe – Ten pledges to bring more content online, available at http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

5 See, e.g., Proposal for a Directive of the European Parliament and of the Council of 11 July 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM (2012) 372 final.

develop cross-border portability of content, many online services are not accessible in all Member States.

The Consultation seeks opinions regarding difficulties in accessing and providing cross-border online services, demand for cross-border licences, the rationale for imposing territorial restrictions on service providers and recipients and suggestions for reform.

B. **CLARITY REGARDING THE AUTHORISATIONS REQUIRED FOR DIGITAL TRANSMISSIONS**

The Consultation identifies several areas of potential confusion in respect of the authorisations that must be sought in order to transmit protected content digitally:

- Digital transmissions of copyright-protected content require clearance regarding both the "reproduction" right to make copies and the "communication to the public" right to disseminate content digitally. Where content is made available in several territories, it is not always clear in which of the territories licences must be granted. Licensing is further complicated where the "reproduction" right and "communication to the public" right are held by different persons.

- It is unclear whether the provision of a hyperlink constitutes an act of communication to the public, which requires authorisation from the right-holder. Several cases are currently pending before the Court of Justice of the European Union ("CJEU") on this issue.[6]

- Browsing the internet involves temporary copies being made of protected works. It is unclear whether such copies will always be exempt from the need to seek authorisation by virtue of being a temporary act of reproduction.[7]

- It is unclear whether the principle of EU exhaustion of the "distribution" right that applies in the case of distribution of physical copies can also be applied when a digital transmission with an equivalent effect to distribution occurs, i.e. whether, once a buyer acquires the property of a digital copy, the right holder will be unable to prevent further distribution.[8]

---

6 Cases C-466/12 (*Svensson*), C-348/13 (*Bestwater International*) and C-279/13 (*C More entertainment*).

7 Article 5(1), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

8 The Consultation acknowledges that this question was addressed by the CJEU in Case C-128/11 (*UsedSoft GmbH v. Oracle International Corp*), in which the CJEU held that the distribution right is exhausted upon first sale in the context of computer programs. However, the Consultation notes that this decision was based on the Computer Programs Directive and may not extend to other types of digital content.

The Consultation seeks views on whether the law is sufficiently clear in these areas, whether participants have faced difficulties when trying to undertake certain activities and whether authorisations should be required in certain situations.

C. **REGISTRATION OF WORKS AND OTHER SUBJECT MATTER**

There is currently no EU system of copyright registration. The Consultation asks whether the creation of an EU registration system would be helpful in identifying and licensing works, given the increased scope that digitalisation provides for disseminating content.

Although Article 5 of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention") provides that the protection and exercise of rights shall not be subject to any formality, the Consultation notes that the prohibition is not absolute and that any system of registration that may be introduced need not be compulsory or constitute a precondition for the protection or exercise of rights, and thus would not fall foul of the Berne Convention prohibition.

D. **HOW TO IMPROVE THE USE AND INTEROPERABILITY OF IDENTIFIERS**

Private databases of works often rely on the use of interoperable, internationally agreed "identifiers", which identify the work and the owner. The Consultation asks whether the EU should promote the adoption of identifiers and interoperable databases.

The use of identifiers to facilitate interoperable databases is also a current issue from a competition law perspective. The Commission recently found in *Reuters Instrument Codes* that a prohibition by Thompson Reuters on the use of its real-time datafeed identifiers (i) to retrieve data from real-time datafeeds of other providers and (ii) to create mapping tables that would allow interoperability with datafeeds from other providers gave rise to insurmountable difficulties for customers wishing to switch provider and thus constituted an abuse of a dominant position.[9] Further clarification on the EU position regarding the use of identifiers and interoperable databases is to be welcomed.

E. **TERM OF PROTECTION**

Currently, performers and producers in the audio-visual sector, other than for sound recordings, benefit from a shorter term of copyright protection than creators of other types of works (including sound recordings), i.e. 50 years after the death of the creator rather than 70 years. The Consultation asks whether current terms of copyright protection are still appropriate and, if not, whether they should be longer or shorter.

[9] Case AT.39654. The Commission accepted commitments from Thompson Reuters to offer customers the possibility of licensing additional usage rights in respect of the identifiers for the purpose of switching datafeed providers.

F. **LIMITATIONS AND EXCEPTIONS TO COPYRIGHT**

Limitations and exceptions to copyright, which enable protected works to be used for certain purposes without authorisation from the right-holder, are, like copyright itself, territorial. At the EU level, many limitations and exceptions are optional and Member States are granted flexibility as to whether, and to what extent, to adopt them. In many instances, Member States may also decide whether to provide compensation to right-holders where these exceptions and limitations apply.

The Consultation seeks opinions at a general level as to whether greater harmonisation is desirable, whether any limitations and exceptions should be introduced or removed and whether the territoriality of limitations and exceptions creates problems. It also seeks to establish whether there is a sufficient degree of flexibility in the current EU regulatory framework and how greater flexibility can best be provided, if required.

Specific questions are also asked regarding the exceptions relating to libraries and archives, teaching, research, disabilities, text and data mining and user-generated content. The Consultation acknowledges that the ability to view and share content digitally may have particular implications in these areas and seeks views as to whether there are problems with the current law and whether a legislative, or other, solution is required at EU level.

This aspect of the Consultation is particularly relevant given the background of recent academic debate advocating greater flexibility in the law and assessing the benefits of introducing a more malleable system, such as that implemented in the U.S., whereby the "fair use" of a work would not infringe copyright, compared to the existing closed list of limitations and exceptions.[10] Member state governments have also expressed a desire for increased flexibility in the law of copyright limitations and exceptions in order to accommodate rapid developments in technology.[11]

G. **PRIVATE COPYING AND REPROGRAPHY**

Currently, there is an exception to the "reproduction" right for copies made for private use. Right-holders are compensated by levies charged on goods used for the purpose of

[10] See, e.g., Hugenholtz and Senftleben, *Fair Use in Europe. In Search of Flexibilities*, available at http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf.

[11] E.g., the UK Government has stated that there is a need for a wider set of EU copyright exceptions and flexibilities allowing greater adaptability to new technologies (HM Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth*, available at http://www.ipo.gov.uk/ipresponse-full.pdf); the Dutch Government has promised to initiate EU-level discussions on the introduction of a "fair use" defence for user-created content (Kamerstuk 21501-33, available at https://zoek.officielebekendmakingen.nl/kst-21501-33-294.html).

making copies, such as recording equipment and photocopiers. The Consultation seeks to establish whether there is a need for clarification on the application of the private copying and reprography exceptions to the digital environment and whether digital private copies should also be subject to levies. The Consultation also asks whether the divergence of national systems for such levies obstructs the free movement of goods and services.

Relevant to this topic is the case *Hewlett-Packard Belgium*[12], currently pending before the CJEU, in which questions are asked as to how "fair compensation" to right-holders for permitted copying under Article 5(2) of the Copyright Directive[13] should be interpreted and calculated. The questions referred to the CJEU[14] raise the following issues: (i) whether "fair compensation" must be interpreted differently depending on whether copying is for private or commercial purposes; (ii) whether and how any harm caused by copying is relevant to the calculation of compensation, or whether it can be fixed simply on the basis of objective factors like the speed of the copier and the number of copies made; (iii) whether Member States may opt for compensation systems other than copyright levies; (iv) relevant criteria for ensuring that compensation is fair and that a fair balance is maintained between various stakeholders; (v) whether Member States may allocate part of the "fair compensation" due to right-holders to publishers rather than authors; and (vi) whether levies can be calculated to cover counterfeit copying and the copying of sheet music (the latter of which is excluded from Article 5(2)(a)).

H. FAIR REMUNERATION OF AUTHORS AND PERFORMERS

The Consultation recognises that concerns have been raised that the remuneration of authors and performers is insufficient, particularly that the benefits of online and digital exploitation of content is not being adequately shared with the content creators. Participants are asked what is the best mechanism to ensure adequate remuneration and whether there is a need for regulation at the EU level.

As noted above, in the context of works subject to permitted copying, the CJEU will consider in *Hewlett-Packard Belgium*[15] whether Member States may allocate part of the "fair compensation" due to right-holders to publishers rather than authors.

---

12 Case C-572/13.

13 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

14 Available at http://www.ipo.gov.uk/pro-policy/policy-information/ecj/ecj-2013/ecj-2013-c57213.htm

15 Case C-572/13.

I. **RESPECT FOR RIGHTS**

The Consultation seeks opinions as to whether there should be stricter enforcement of copyright in the context of infringement for a commercial purpose and whether there should be clarification on the role of intermediaries, such as Internet service providers, advertising brokers and domain name registrars. It also questions whether the correct balance is struck between respect for copyright and the protection of privacy and personal data.

J. **ESTABLISHING A UNIFIED EU COPYRIGHT TITLE**

Finally, the Consultation queries whether total EU harmonisation of copyright law would be desirable. This would establish a unified and consistent framework for rights, exceptions and enforcement, replacing the current bundle of national rights and exceptions. Although harmonisation has been attempted in some areas, including in respect of computer programs, databases, satellite broadcasting and orphan works, such attempts have been piecemeal and restricted to specific fields.[16]

V. **IMPLICATIONS**

Responses to the Consultation are intended to be considered by the Commission in deciding whether to propose legislative reform of EU copyright laws in 2014. As demonstrated by the "Licences for Europe" dialogue, in which two of the four working groups assembled did not reach agreement on the problems to be addressed, it is not guaranteed that any consensus of views will emerge. Even if the Commission is able to establish prevailing problems and appropriate solutions on the basis of responses to the Consultation, it will be a further challenge to create workable legislative provisions to address the issues identified.

The Commission should meet this challenge head-on. It would be undesirable if the Commission, encountering difficulties in achieving consensus on legislative reforms, were to attempt to force reforms through via other channels. This risk is not purely theoretical. By way of illustration, the CJEU's interpretation of the limits of copyright exclusivity in satellite broadcasts in *Murphy*[17] appear contrary to how the scope of

[16] See, e.g., Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; and Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

[17] Joined Cases C-403/08 (*Football Association Premier League Ltd and Others v QC Leisure and Others*) and C-429/08 (*Karen Murphy v Media Protection Services Ltd*).

copyright protection had been generally understood in the industry. Prior to the *Murphy* judgment, the general consensus view had been that copies created by decrypting and accessing a satellite broadcast outside a licensed territory represented independent acts of exploitation that required distinct authorization.[18] By following a different legal interpretation, it has been argued, the CJEU thereby created a novel copyright framework for satellite broadcasts that did not correspond to the general understandings and expectations in the broadcasting industry. If the Commission believes that the current legislative framework is not fit for purpose given advances in digital technology, these perceived deficiencies are best addressed through legislative reform. The Consultation, like the Commission's other efforts to achieve legislative reform, is therefore of considerable importance.

The Consultation provides a further opportunity for stakeholders to contribute to the debate on the adequacy of EU copyright law in the digital environment. Stakeholders can, through their responses, help to focus the discussion and the Commission's efforts in this area.

The Consultation document can be accessed here.

* * *

Please feel free to call any of your regular contacts at the Firm or any of our partners and counsel listed under "Intellectual Property" in the Practices section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

[18] Indeed, the Advocate General in *Murphy* shared the view that the creation, during the downlink process, of transient copies of content on a TV screen linked to a device for decrypting and accessing protected broadcast content represented a self-standing act of exploitation, noting that: "*[T]he copy which is produced on the screen would indeed appear to have independent economic significance. It is the subject-matter of the exploitation of a broadcast. In terms of copyright law, the exploitation of the rights to a broadcast is connected with the broadcasting right, since the authors are given a right to object to the broadcast. [...] Consequently, transient copies of a work created on a television screen linked to the decoder box have independent economic significance*".

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099