August 2017

AK Position Paper

Vote of the European Parliament on the proposal for a directive of the European Commission on copyright in the Digital Single Market COM (2016)593

www.akeuropa.eu

About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transperency Register under the number 23869471911-54.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, communityand military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske
President

Christoph Klein
Director

Executive Summary

The proposal for a directive of the European Commission COM (2016)593 to adapt European copyright law to the digital age is currently under discussion in the pertinent committees of the European Parliament.

The provisions on copyright date back to 2001 and must be modified as a matter of urgency to reflect conditions in today's digital environment. Apart from copyright protection, the proposed reform must also focus on the new needs of users in a digital world and find the necessary means to reconcile such interests. The European Parliament demanded such reforms in its resolution dated 09.07.2015. However, the proposal submitted by the Commission falls far short of a user-friendly reform and of the stipulations of the European Parliament. Furthermore, Arts. 11 and 13 contain extremely problematic provisions.

Dear Sir, Dear Madam - In order to create an up-to-date framework for copyright protection in a digital environment we ask you to:

1. **Refuse your support for the introduction of ancillary rights (Art. 11 – "press publishers` right")**: The system in Spain and Germany has shown that this instrument is completely unsuited to generate income and results in negative side effects, such as massive legal uncertainty, restrictions on accessing information, or the criminalisation of individuals when inserting links on social media.

2. **Reject the provisions of Article 13 on the obligation of service providers to provide Internet monitoring, including Recital 38** (last sentence), which undermines the provisions of the Electronic Commerce Directive. The wording of Article 13 is too broad and vague. The prohibition of general monitoring obligations for host providers, which derives from the Electronic Commerce Directive, must be retained in the future in order to maintain the fundamental right to privacy.

3. Support proposed amendments that aim **to allow utilisation in a digital environment through special rules for education, science, libraries and other cultural institutions**. This will improve learning and research environments and facilitate access to knowledge and innovations. Furthermore, it is essential to **find solutions for forms of daily communication by private individuals, such as "posting" and "sharing" content on social networks, video and photo portals, blogs, etc.**, which give users the necessary legal certainty that their internet actions are legal, while offering authors fair compensation in the event of economic loss.

4. Improve the position of authors and performers through copyright contract law (see Chapter 3 of the Commission's proposal).

The AK's position in detail

Article 11 - "Protection of press publications" (according to this provision press publication publishers are to be given an extra online-right when third parties use subject matter from press publications)

We would like you to consider that the system of ancillary rights, the objective of which is to ensure income for press publication publishers, has failed in Germany and Spain: In Germany and Spain, a new source of income was to be created for newspaper publishers when search engines or "news aggregators" insert links with small excerpts from the newspaper article, which then jump to the media page of the newspaper (e.g. Google News). However, it has transpired that this legal instrument is, firstly, completely unsuited to generating income for newspaper publishers. Secondly, the following negative ancillary effects are created:

- The aim of improving the income of newspaper publishers has not been achieved because the company Google has responded predictably: It delists newspapers, offers an opt-in in return for waiving licence fees, or even shuts down search engine services in the corresponding country.

- Ancillary rights create legal uncertainty that can only be clarified in expensive law suits.

- Other, smaller, search engines are faced with high transaction costs (legal clarification of vague legal terms, licence agreements). They have to delist texts or have to forgo showing previews in search results, and so can no longer offer users an effective search tool. This further strengthens the position of Google in an oligopoly.

- The flow of information in the Internet is restricted at the expense of the general public, the search for information is made more difficult, or many results are no longer displayed. Newspaper publishers get less internet traffic and hence fewer readers and less income.

However, the ancillary rights contained in this proposal by the Commission go even further in their scope of application and consequences than national legislation to date. Not only are traditional newspapers protected, but also lifestyle magazines and car magazines, for example. The new ancillary rights apply retroactively for 20 years (term of duration in Germany: one year!). The clause does not contain any exceptions for short texts (limited to characters or words), i.e. snippets, which are commonly used in posts or links, are also included. The relevant target group which must apply for licences for links is no longer - as in national regulations - limited to aggregators or news services. It also includes public institutions and private individuals. So it is to be feared that private individuals who, for example, set links in social networks, will always run the risk of infringing copyright when posting hyperlinks on platforms (together with snippets). Nor is the sen-

tence in Recital 33 "This protection does not extend to acts of hyperlinking which do not constitute communication to the public" sufficient in legal terms in order to exempt links from these ancillary rights.

The ancillary rights in this version creates legal uncertainty and imperils freedom of information and setting links; this will have negative consequences for private users, as well as for science and education.

Article 13 and Recital 38 - the obligation of information society service providers to conclude licence contracts and to monitor users' uploads:

Article 13 defines the obligation of information society service providers who store or give access to large amounts of copyright-protected works to obtain licences from right holders and to monitor user uploads or infringements of copyright (the application of "appropriate and proportionate" measures, e.g. content recognition technologies). The clause is seen by some right holders as an appropriate compromise that will motivate Google to compensate right holders appropriately ("value gap" compensation). However, the solution proposed by the Commission will not only lead to massive legal uncertainty, but will also undermine the prohibition on general monitoring obligations for host providers, and hence constitutes massive interference in the fundamental rights to privacy and freedom of expression (Recital 38, last sentence). In any case, the wording of the clause is too vague and is disproportionately broad in its application.
There is legal uncertainty, for example, in relation to the open definition of "large amounts of works" and the question of which providers are covered by that. A general reference to all service providers who store content and provide access to the public will result in institutions such as Wikipedia, which generally use CC-licensed content and have a negligibly small number of copyright infringements, being required to use technical content recognition technologies. This means that primarily free platforms will be faced with financial and organisational challenges and this will call their continued existence into question. Article 13 will result in negative effects on the Internet, on the fundamental right to freedom of expression, and on access to information.

Essential addenda that should be included in the proposed directive:

In order to ensure a reform that is appropriate to the digital age and corresponding actions, in the opinion of the BAK the following points should be included in the proposed directive:

1. Solutions for transformative utilisation of works (e.g. uploading videos created by the uploader using third party music, films, texts on platforms), in order to decriminalise the daily actions of consumers and to create legal certainty.

2. It must be ensured that legally guaranteed licences cannot be circumvented by using copy protection or excluded by contractual provisions.

3. The possibility of linking one site to another is an important cornerstone of the Internet. The unlimited freedom to set links must be maintained in the future.

4. In order to create legal certainty, the provisions for exemptions within Member States must be harmonised at the highest level, whereby the exceptions must also apply to Member States with regard to their scope of application.

5. In the digital age, fair compensation for right holders must be based on the actual economic loss suffered. It should not be possible to derive an additional claim for compensation from user actions where no or minimal loss is suffered (changes in format, backups).

6. The introduction of a clause on the freedom of panorama which must be applicable in all Member States and does not only target private actions: It must be ensured that the public space remains usable for the general public. For example, in Austria and some other Member States it is the law of the land that photos of copyrighted works in the public space can be used and disseminated without having to clarify rights. A limitation of this right to merely "out-of-commerce" actions must be rejected since the term "commercial use" can be interpreted very broadly and can also apply to private individuals (e.g. parts of private holiday snaps on social networks that stipulate further commercial utilisation in their licensing terms). Open projects such as Wikipedia, whose licences also allow for commercial use, but also photographers, documentary filmmakers and journalists, could be affected by restricted freedom of panorama.

Should you have any further questions
please do not hesitate to contact

Sonja Auer-Parzer
T: +43 (0) 1 501 651 2311
sonja.auer@akwien.at

and

Amir Ghoreishi
(in our Brussels Office)
T +32 (0) 2 230 62 54
amir.ghoreishi@akeuropa.eu

Bundesarbeitskammer Österreich
Prinz-Eugen-Straße 20-22
1040 Vienna, Austria
T +43 (0) 1 501 65-0

AK EUROPA
Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73