

Warsaw, 21th of February

Internal Market and Services DG
Unit D1 – Copyright
European Commission
SPA 2 04/085
1049 Brussels
Belgium

By email: markt-copyright-consultation@ec.europa.eu

Dear Sirs,

The non-profit Association of Television Programming Distributors *Sygnal* is pleased to respond to your request for contribution to Public Consultation on the review of the EU copyrights rules. Our Association is listed in the EU Transparency Register, ID number 084497913019-90.

Yours sincerely



Jarosław Mojsiejuk

President of the Association of Television Programming Distributors *Sygnal*

The non-profit Association of Television Programming Distributors Sygnal was established in January 2002 with its mission to prevent from television piracy.

At present the Association consists of many members like for example representatives of Cyfrowy Polsat, HBO Polska, INEA, VIMN Polska, Orange Polska, Digital Platform nc+, Walt Disney Polska Fox International Channels Polska, Sony Pictures Television and BBC Worldwide Channels. During recent General Assembly Meeting of the Members of Sygnal Association in May 2013 there were admitted successive supporting members: Telewizja Polsat SA, Irdeto, Nagravision and Redefine.

Main goal of Sygnal is prevention from thief of television signal from CAT TV systems and DTH platforms, bequilement and forgery of original equipment as well as admitting to trade counterfeit key words and set-top-boxes. In order to execute this task, every year, in different part of Poland, Sygnal organizes many seminars and training courses dedicated for specific groups from police officers of economic crime departments at constabulary to economic crime departments of municipal and county police headquarters. Besides, in order to increase the effectiveness of Polish judiciary concerning TV piracy the Association offers and conducts conferences for both districts and provincials' prosecutor's offices. Apart from the above mentioned activities, appointed representatives of our Members together with the police, make findings, carry out investigations and take actions against television piracy mainly by monitoring Internet, but also visiting software fairs and warehouses of distributors of set-top-boxes. Such an activity reduces illegal production and manufacture of chip cards and decoders/set-top-boxes as well as the amount of illegal software available for downloading through different web pages. Hence, daily active collaboration of our members with the police across Poland, only last year contributed to bringing over 180 lawsuits against perpetrators that circumvented the conditional system access of DTH TV in Poland. In some cases of so called "sharing" there were over 100 criminals involved in one lawsuit.

Taking into consideration all the above, the members of the Association not only inform and bring the social awareness to the public about the damages produced by so called piracy, but also about punishing acts of legal regulations that come after.

Public Consultation on the review of the EU copyright rules.

- 1. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?***

One of the most important challenges both for the European Union and the European countries are protection of local companies, domestic economies and consumers associated with equal opportunities as well as harmonized conditions to run businesses in the EU territory by entrepreneurs having their registered seats in different continents. Course of action connected with introduction of the Single EU copyright title applicable in the entire EU territory which would replace existing national copyright systems is desirable and justified as long as this solution applies not only to European registered business entities but to all entrepreneurs which run their businesses connected with the works exploitation in the EU territory. In case of e-commerce services we talk about services directed to individuals within EU territory and commercial activity connected with the EU market (collection fees directly or indirectly from users, dissemination of advertisements addressed to the citizens of the EU). The Internet allows users to offer its services from any place in the world irrespectively of the server location, registered seat of the subject (e.g. operator) who provides above mentioned services or the domain register location and its technical support. A significant proportion of entrepreneurs are trying to avoid the legal liability provide its services to inhabitants of other countries in which providing such services constitutes an infringement of applicable laws therein. It is therefore necessary to take steps to create a uniform legal system, which will provide a consistent way to protect consumers and the entrepreneurs detached from the principle of territoriality. This action is absolutely necessary not only on account of the more effective legal copyright protection, but also on account of the protection of local economies. The important issue on the market of online content distribution is also a fact that over the 50% of income from advertisements which are a main source of financing the Internet's projects, goes to "large" enterprises registered in the United States of North America (e.g. in Mountain View, that is in one of the principal cities that make up Silicon Valley) which do not support the development of the local (European) entrepreneurship, and do not also provide the appropriate protection both for European consumers and entrepreneurs as well as for authors and other right holders.. The scale of this phenomenon is growing from year to year, and already at this point is significant for the European economy. According to the IAB Europe data concerning 26 countries, the value of the online advertisements in 2012 amounted to 24.3 billion Euro. Further consent for entrepreneurs from outside the European Union to reap profits from provided by them services on the EU market without imposing on them the same responsibilities as the ones that lies with European entrepreneurs would lead for further weakening of the European (including the Polish one) innovation and economic growth. What is more, it would be a clear signal of priority attitude towards enterprises with global reach in relation to local entrepreneurs.

Key issue at pursuit of the civil damages actions in relation to infringement of the intellectual property rights in the digital environment is an international factor (e.g. in case when service provider's registered seat is in one country, and dissemination (infringement) takes place in other country) and consequently the process of establishing appropriate law is being translated into real opportunity to pursuit claims by entitled right holder. As an example it is worth to note that the Article 3 of the

Directive on electronic commerce provides that the applicable law in the EU Members State should be determined in conformity with the registered seat of the service provider.

The above mentioned rule, i.e. the principle of country of origin, is also reflected in Article 3a of the Act on Providing Services by Electronic Means which implements this Directive into the Polish law order. However, the principle of country of origin does not apply to protection of copyright and related rights, databases and an industrial property (Article 3a (2) (1) of the Act on Providing Services by Electronic Means). This exclusion results from the principle of territoriality in intellectual property law (*lex loci protectionis* principle).

Eventually the principle of the country of origin has been rejected for two reasons. Firstly, some problems appeared in determining the source of transmission due to the technical complexity of activity undertaken in the digital environment. Secondly, adoption as relevant the law of the country from which territory specific transmission was introduced into digital environment, could result in the low level of protection of intellectual property what could be regarded as favoring infringements. So, consistently, pursuant to Article 33 of the Private International Law Act the law applicable to the obligation arising from the occurrence which is not a juridical act shall be regulated by Rome II - Regulation (EC) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199/40, 31/07/2007, p. 40). Whereas pursuant to Article 8 (1) of this regulation the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

Unfortunately it is not clear how to understand the extract "the law of the country for which protection is claimed". There are two possible interpretations that arise. According to the first one, it depends on the entitled which law shall be applicable, because the entitled finally decides whether to seek the protection in general. As a consequence, the person sustaining damage could also decide to seek the protection in law of a country of its registered seat. However, this interpretation is unacceptable. Article 8(3) of the regulation forbids concluding freedom of choice contracts in similar cases therefore an assumption that such an act could come into force by unilateral operation of entitled party *a maiori ad minus* cannot be accepted. And so the law of the country, based on which one may seek the protection, should be indicated according to objective criteria. Moreover, undoubtedly it should be the country somehow related to the event being a subject of evaluation. Therefore it seems that the only option which remains is to address the issue to the country in which granting protection in a particular case is justified (necessary) that is in consequence the country which legislation was infringed. Consequently, the extract "the law of the country for which protection is claimed" should be understand as the law of the country where a breach of intellectual property rights took place. Therefore, as the domestic law protects the copyright only within the limits of its territorial validity an occurrence of this type of illegal activity on the territory of one country (Poland) cannot be treated as an infringement that breaches the domestic law of the other country. This way the adoption as appropriate law of the country in which there had been no violation of law, could lead to refusal of protection (dismissal of action) on the basis of the argument, according to which that law was not infringed (and therefore action is not from this point of view illegal).

It must be concluded therefore that the *lex loci protectionis* principle (Article 8 (1) of the regulation), which should cover all cases of infringement of intellectual property, is the rule clear enough only when the given right is protected exclusively in one country. Otherwise, that is in a situation where entity who infringe the owner's rights has its registered seat in other country than the country in which the service is provided to by the entity, the applicable law for the protection of intellectual property rights will be domestic law according to the location where the infringement has taken place, because only on the basis of this law, seeking the protection would be possible.

Currently the companies that operate video industry most often have to face the second scenario. That is because, in case of rendering illegal services in language of users of the country to which such service (e.g. running website or distribution of audiovisual works) in fact is being provided (addressed) and other than the country in which the entity who infringe the owner's right has its registered seat, it should be obvious that the entity who infringe the owner's right is operating in reality in the country, to which this service was directly provided. However, the problem is in the fact that the place of infringement is established according to the location of servers or the registered seat of the entity who infringes the owner's right. In such case the local substantive law is also applicable, and the possibility of taking legal action is usually also possible only in this country, and not e.g. in Poland. It is therefore necessary to postulate that the infringement shall not be identified according to the place where entity who infringe the owner's right real acted. As the place of infringement should be treated also the place where some effects of the action occurred.

The basis for establishing relevant jurisdiction for infringement the rights should be the country in which the service is being provided or reaches its "target" and not the country of domain registration, the registered seat of the entity who infringes the owner's right or the country where the source of "transmission" is located. The European Union should aim for organization of the rules of cooperation between Europe and the United States in scope of providing Internet services. Lack of action of local European governments, as well as the entire European Union resulted in the fact that half of the budgets allocated for the Internet industry financed in the website advertising model are being derived across the ocean. As a result there is a lack of support for local markets through submission to the tax system, the local labor market is not developing and customers are not being protected in accordance with principles consistent with locally applicable laws. In the situation of silent agreement of local governments, preferential conditions for conducting for entrepreneurs with the international scope of operations while the competitiveness of local companies is getting smaller

It is a common practice that servers/domains of websites which are using to infringe of intellectual property rights are registered in different country than the country in which the owner has its registered seat. Besides, also the Internet itself is being used to infringe the rights, because of its strictly cross-border nature. Moreover, the profits gained from activity based on infringements of the law are being transferred through agents in different countries to conceal their source of origin. Such as situation demands for cooperation between authorities of different countries. Therefore, it is increasingly postulated to grant to "the cyberspace" the status of different location (other reality) than the real world and to create a separate, appropriate to its characteristics system of law. Such a system of law would regulate any legal situations that may be encountered on the Internet by its users. The law of the cyberspace would include the following fields of the law: the copyright law, the industrial property law, the protection of personal rights, as well as elements of the press law and the civil law. The aim of such a system would be to make liable all users of the Internet global network so that nobody could ignore regulations due to lack of knowledge on the foreign law.

In principle, the harmonization of copyright law in the EU is the right direction of action. The main advantage of such a regulation would be the exclusion of conflicts of various legal systems, elimination of the problem of choice of the legal framework applicable to the given facts, and what is the most important such a regulation would allow to develop new legal structures specific only for international computer networks. As a consequence, the number of infringements on the Internet would be reduced to a considerable degree. However, it would be necessary for this purpose to implement mechanisms facilitating identification of entities who infringe the owner's right, taken into account the fact that the cyberspace is devoid of any physical attributes of someone's presence, such as fingerprints, voice or image.

11. Should the provision of hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

Yes, all models of distribution or content cataloguing (including hyperlinks and cataloguing services of the content published by the users) should be the subject to the same copyright regulations. Any exemption from these regulations for entities which offer access to content based on the specific business model (e.g. links' catalogue) leads to the competitive inequality as well as constitutes incentive for creation of non-licensed systems of content distribution outside the law.

There should be two conditions, which should be met simultaneously to use the work of the rightholder. The first condition is the commercial nature of the activity while the second one is connected with addressing services to citizens of the EU, irrespectively of either the country of registered seat of the entity that offer the access to content nor the server location. Providing or facilitating the access to content (e.g. by cataloguing links or content published by users) for citizens of the EU in order to gain financial benefits (by collecting fees from users or presenting commercials) should constitute activity regulated both under the copyright law and the media law as well as the other relevant provisions regulating services provided by electronic means.

15. What would be the possible disadvantages of such a system?

Provisions of the Berne Convention for the Protection of Literary and Artistic Works that introduce a general rule that works are protected regardless of the fulfillment of any formal requirements are an obstacle to enforce such type of regulation. Introduction of a system of registration of works would cause problems with their licensing. Main disadvantage of such solution would be the transfer of authority on making decisions whether the given piece of work meets the condition to be a work in the meaning of copyrights law to the body responsible for registration (instead of the court during court proceeding). Such approach may result in the fact that many pieces of art would not be considered works (under copyrights law) or on the contrary too many of them would be recognized as such. Besides, as the works' registration would probably require relevant fees also the cost of license would have been increased accordingly. Moreover, currently a work is under the copyright protection since its creation, so the question should be raised whether in case of introduction of the work registration system, such a protection would not have been dependent on its registration and since when then it would have been valid. This in turn is significant taking into account perspective of the length of registration of trademarks in the Polish Patent Office.

20. Are the current terms of copyright protection still appropriate in the digital environment?

Proprietary copyrights by their nature are subject to a temporary protection. Duration of such protection is very long. It should be emphasized that the majority of the 20th century artistic work is still under the copyrights' protection. Such a long time of protection is not adequate to the current reality. Assuming that an author dies 30 years after creating a work (which is nothing exceptional), the work is subject to a hundred years' protection. However currently, a cycle of commercial "living" of works is in majority being counted in years, and even months. Such a situation causes numerous practical problems - among others problem of orphan works. Protection period that lasts 70 year since the death of an author usually embraces two generations, and reaching rightholders after a dozen or so

years is practically impossible. For the above mentioned reason many former works are not being exploited (e.g. by hotheads or those ones who would like to "refresh" them).

The number of scientific researches confirms that the optimal period of the copyright protection should last between 15 and 38 years that is significantly shorter than the currently valid one which lasts 70 years after death of an author. It is worthwhile to stress that too long protection is not good for the authors too (see the Declaration of the European Academics of 2009 – available at website <http://www.cippm.org.uk/downloads/Press%20Release%20Copyright%20Extension.pdf> (2009).

Besides, the fact that the costs of too long period of protection have to bear recipients of works (consumers, users) is a disadvantage. Professor Paul Heald demonstrated that in case of the majority of publishers an average price of copyrighted book was USD 8.90 while in case of books that were not copyright protected - only 6.30 USD (see Heald Paul, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955954 available on the website). Moreover, in the age of technologies like ebooks and ebooks' readers, a lot of unprotected publications are available for free.

The long overdue copyright protection holds down/limits availability of very works (see e.g. New York the Times 11th December 2013 – European Laws Lead Copyright is Rare Music Releases and Heald 'How Paul Makes Books Copyright and Music Disappear' (2013)). Out of 10.027 of books published in 1930, in year 2001 only 174 were still being printed. (yes: Landes and Posner, The Economic Structure of Intellectual Property Law, 2003, p. 212). Besides, in regards to orphan works the long overdue copyright protection also leads to the escalation of these issues.

21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?

No, the EU copyright directives should not oblige Member States to adopt all exceptions in the domestic law. This process should be regulated in the form of letting the possibility of putting into force those exceptions into the legal system of an individual Member State, but in the form of a closed catalogue of strictly defined acceptable exceptions.

23. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

The current scope of fair use seems to be correct. However, the term "social relationship" should be clarified. Discussions like whether e.g. the friend from the social networking website really stays in such a relationship has already appeared. Due to the rapid growth of Internet activities the issue that refers to the interpretation fair use of will be emerging much more often.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

Regulations of fair use should be possibly precise and universal so that they would not become outdated in environment of the incessant development of new technologies (including the Internet). In a frame of fair use in the area of digital distribution and with the pressure on the Internet, the terms and conditions of use of the work require clarification. Firstly, the term "a copy" should be clarified

with reference to works in digital form -. The term "social relationship" should also be clarified in respect of the Internet relationship.

There is kind of uncertainty concerning the scope of fair use that exists in the valid law order. Consequently, above mentioned uncertainty translates into substantial doubts concerning the scope and level of fees for devices and data storage media (technical measures), which in case of adoption the exception to the reproduction right by a given Member State should constitute fair amounts of compensation for right holders.

Ad. 21 Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

Firstly, we should focus on the problem of terminology applied in the legislation which is coming from notions developed in times, when duplication occurred only in the analogue form. Provisions of the Polish Act on the copyright and related rights - use in the way not always consistent notions of: "dissemination", "reproduction" and "copy". For example Article (20) (1) (2) of Act on the copyright and related rights has introduced a fee from "(...) reprographic devices which allow to make copies of all or a part of a published work ." On the other hand, Subparagraph 3 of the Article adopts fee obligation on " (...) blank carriers used for fixing, within the scope of fair use, works or objects of related rights,". These concepts are starting point in specifying the scope of the fair use. There are some other doubts that arise in reference to the scope of identification of the notions i.e. fair use (broader meaning) and one's own fair use (notion being included in the scope fair use).

Apart from changing terminology resulting from technological development, the modification of means of distribution and content consumption (including works) should be also indicated. We are also witnessing progressive divergence from the model based on copy of the work towards the model resting on access (e.g. to cloud computing services) what ultimately should reduce universality of creating (downloading) traditional private copies. Therefore, there is a requirement for diversification of work reproduction cases and the distinct decision whether in particular case reproduction occurs as part of a fair use as well as whether it causes damages on the part of a right holder.

The current lack of the harmonization causes the legal insecurity and substantial impediments for content providers and operators on the uniform (unified) European market. However, adoption of new business models to all Member States withholds this process too much. Moreover the current absence of the harmonization also strikes consumers as they are being deprived of clear and cohesive criteria which would enable them to exercise their entitlements of a fair use for example.

As an example we could cite here Report of A. Vittorino containing recommendations concerning the fees for private copying of reprography, in which the significance of licensing of digital services was emphasized. The process of carrying private copy out based on provisions of licence agreements should not – according to the opinion of the author of the report - result in calculating fees, because acting so does not cause any damages for right holders. On the other hand end users should not repeatedly pays for the same activity/authorization e.g. in the licence agreement and then in the price of every device which meets criteria established by the law of a Member State.

In the analysed scope, pursuant to applicable regulations work reproduction may occur :

- 1. with copyright holder consent (principle) or*
- 2. one of the following exemptions:*

a. reproductions on paper or any similar carrier – Article 5 (2) (a) of a Directive 2001/29/EC (reprography)

b. reproductions by a natural person for fair use - Article of 5(2) (b) of a Directive 2001/29/EC (fair use).

One should note differences between above mentioned cases and at the same time emphasize that the basic form of a remuneration artistic creators should result from the licence agreement (based on the right of reproduction exclusivity), rather than fair compensation resulting from the adoption one of exemptions provisioned by a Directive 2001/29/EC. In our opinion, in case when the issue of reproduction is regulated in the licence agreement there is no justification for mediums' and devices' fees. Thus, due to lack of the damages on copyright holder's side requiring a fair compensation cannot be applied. Therefore, it is crucial to create distinct definition of the cases when reproduction occurs within the fair use.

Apart from the above remarks, it should be indicated that the present definition of fair use in the Polish legislation causes many interpretational problems. Above all, a character of the original work used for reproduction as part of own fair use still remains unsolved. The above matter is also decisive for determining character of mediums' and devices' fees. Depending on interpretation these charges can assume the form "fee from piracy" - e.g. when the person as part of one's own fair use performs reproduction of work obtained illegally or fee from work obtained and reproduced in legal way. Companies associated in the Polish Chamber are explicitly in favor of the latter interpretation.

26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

This is the issue that could be solved (addressed) through the unification of exceptions on the level of the EU in the catalogue of optional solutions. This solution should marginalize the problem of application territorial exceptions and limitations.

30. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?

The exploitation of works and related rights should be based on the institution of fair use. The statutory licence should allow research and educational institutions to use disseminated works in original and in translation and to make copies of fragments of the disseminated work free of charge. Obviously such regulation should be applied exclusively on condition that exploitation of works is permitted for teaching purposes or in order to conduct their own research. This regulation should not be based on meeting requirements of not obtaining material benefits.

Disabilities

(b) [In particular if you are an organisation providing services for persons with disabilities:] Have you experienced problems when distributing/communicating works published in special formats across the EU?

(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?

Article 5 (3) (b) of Directive 2001/29/EC allows non-commercial using of protected works by people with a disability. However, such usage must be related to the specific disability.

It is worth to mention that on 28th June 2013, in Marrakech WIPO organized the Diplomatic Conference, which was concluded with the adoption of the Marrakesh Treaty to Facilitate Access to

Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. This Treaty will enable distribution and public access to copies of works adjusted for blind or visually impaired persons both in the country and abroad. In near future this Treaty will be signed by the EU and its Member States and ratified. Implementation of this Treaty may require an amendment of the EU law in particular with the aspect of cross-border use of works of the recalled exception.

50. What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?

It is noteworthy that Article 331 of the Polish Copyright and Related Rights Act (as a part of fair use) allows in institutionalised way adjusting works to fulfill accessibility need of disabled persons. This regulation enables largenumber of people to participate in the current information society. Consequently they can improve their qualification.

55. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?

We should promote the effective use of texts and data for the purposes of researches. Currently, usage of texts and data requires conclusion of agreements between users (usually research centers) and rightholders. (e.g. publishers of scientific journals) to establish technical aspects of the terms of access to relevant database.

It is necessary to determine on the EU level the scale of demand for access to texts and data usage in relation to academic publications. There is also a need to asses adequate means that could meet this demand. Moreover it's necessary to examine possible limitations of the standard drafts of licence agreement and to evaluate the ability of technological platforms to facilitate the access to texts and data exploration.

60. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

The publication of content by its owners (e.g. blogs, podcasts, video streaming, photographs/pictures) in online network like Facebook, Instagram or Wordpress is currently very popular. Therefore, the European Union should commence and to regulate these issues. It should be noted that the owners of online services based on creative activity of its users gain significant profits from such activity. That's whythe EU should concentrate on two crucial aspects of this phenomenon.

The first one refers to an infringement of the intellectual property by an unauthorized usage of works. Illegitimated users in such cases refer to the freedom of speech. Due to the fact that the owners of online services base their business model on the activity of users such explanation is for them convenient, because they gain high profits. Currently, such owners avoid liability despite receiving infringement notice, in accordance with Article 14 Directive 2000/31/EC, arguing that they are not responsible for their users' actions. However, such owners should participate in protection of copyrights.

The second one concerns providing adequate protection for users disseminating their works in online services. Currently, the majority of online services put in their terms and conditions the provision to assume all rights to the content published in their services including its commercial usage at a later date. The EU should notice such issue, because it is connected with depriving authors of works of future profits from its usage.

63. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?¹

Yes, the system of payments for the private digital copying should take into account situations in which reproduction of a legally purchased copy of work is made in accordance with rightholders authorization. This is a typical situation e.g. in case of the Ultraviolet or multi-platform content distribution business models. Due to the fact that legitimate distribution of works already involves relevant fees there damage for rightholders in such models.

Failure to obey the above mentioned model despite of rightholders consent could lead to duplication of obligatory fee received by competent collective management organization, and as a consequence would hamper development of innovative business models.

Payments for carriers and devices should be applied exclusively in case where harm to the rightholders is possible to prove. The system of payments should also take into account the situation when reproduction of the legitimate copy is made with the consent of a rightholder e.g. when obtaining access to works via streaming or cloud – since in this case it is difficult to find any damages to the rightholders.

In case of works reproduction there are several more examples where no damages occurs to rightholders. These are as follows:

1. Conversions of contents/works to other format (format shifting)
2. Creating of backup copy
3. Using time-shifting technology in set-top-boxes and TV-sets which do not enable to create copies of which has economic value

Above mentioned cases should be included in regulations as exceptions from the system of payment.

64. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?

As far as it comes to the new models of distribution, as of the ones based on the cloud technology there is no reproduction by copying from one device/carrier to the other.. Additionally, legal models of work distribution in the cloud technology are defined under licence agreements between service providers and rightholders therefore cannot cause any harm (damages) to the latter. Compensation due to the private copying should still refer only to the case when a work is copied from one carrier/device to the other.. Therefore, the system of compensation should unequivocally exclude cloud-based services from the carriers and devices payment system.

New technologies change ways of distribution and consumption of content, including of works. The following characteristic of such services should be noted:

1. Access of works is based on copyrightholders consent (licence agreements)
2. Cloud-based services are carried out in closed ecosystems enabling precise control over the access to content (e.g. Spotify, iTunes, Ipla)

¹ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

In the offline (analogue) environment the manner that could provide remuneration for creator (author) has not existed. On the other hand an online 'sphere' allows for very precise copyright protection of works, as well as for the convenient way of making payments (including micropayments). Current solutions allow to regulate all aspects of works usage within of civil law licence agreement.

When it comes to the above mentioned services there is no classical reproduction of content. One should remember that compensation for authors may concern exclusively a damage suffered in relation to the private use. Users activity that violates applicable regulations e.g. illegal access of work to public - stay outside the scope of the system of payments.

We think, that implementing fees for services based on new business models, would lead to increase of prices and decrease competitiveness of service providers operating in the European Union, what in consequence may also cause problems in combating piracy.

65. *Would you see an added value in making levies visible on the invoices for products subject to levies?*²

Placing information on levies may contribute to increasing awareness of this issue among users and rightholders as well as to raising transparency of the entire model of payments.

Such information would allow end users to efficiently seek the repayment of unjustified payments (e.g. in case when devices are not being used in the framework of exceptions indicated in the provisions of Directive 2001/ 29/EC), ensuring full conformity with the Padawan vs. SGAE ruling. Besides it would enable to monitor allotting payments at the points of sale - in accordance with A. Vittorino recommendation.

69. *If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?*

In terms of provisions on works, reproduction Directive 2001/29/EC contains general guidelines, however it takes into consideration technological diversity associated with rights to the access of works (Article 5) including devices for temporary storage of data (Act of 18th July, 2002 on Providing Services by Electronic Means defines it as 'caching') in order to provide basic service or services when the data storage is temporary and incidental.

Thus, according to intention of the European Parliament only devices which in their assumption are used for reproduction of works are subject to a regulation and not the ones that possess such a functionality (of an auxiliary/secondary character) or temporarily store the data in order to provide basic service. Unfortunately national regulations in Poland seem to diverge from the guidelines of the European Parliament and Council of Europe and try to include all devices which have data carriers that hypothetically could serve for reproduction of works although it is not the main function of the device. Therefore, first things first it would be essential to consider guidelines of Directive 2001/29/EC in establishing domestic (national) regulations.

On the Directive level one should clarify the crucial issues, as at the stage of definition different interpretations are already visible on local markets. Of the same importance are the following questions: how to determine when harm occurs in order to form the grounds for compensation, how to interpret the storage of data for reproduction with reference to the temporary data

² This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

storage, how do the provisions apply to the data processing in cloud technologies or to streaming services when there is no file transmission/copying between data carriers or devices. It is necessary to harmonise Member States provisions on the compensation on account of the private copying. The current legal status is giving rise to doubts on many aspects. Firstly it should be indicated that the scope of a private use directly affects the damage suffered by rightholder. Besides, the definition of damage is recognized differently by the individual Member States. The present system leads to the number of disorders with reference to the principles of operation of the single market. Producers and importers of devices are exposed to a great risk associated with the uncertainty as for the law (e.g. in Poland it concerns the issue of B2B exclusion) and dissimilarities between systems of the debt collection in the individual Member States. In the extreme cases, situations described above refrain entrepreneurs from selling some devices in individual countries.

Another issue in Poland is a problem of multiple value added tax calculation for carriers and devices. In case of calculating VAT based on the gross sale price of device or carrier, VAT is being calculated once again upon a fee payment for the Collective Management Organizations. This is a paradoxical situation and has no justification.

There are serious doubts as to the definitional layer in relation to subjects obliged to make payment. Situation mentioned above can be reflected in the decision of the Supreme Court - of Civil Division – case no: III CZP 61 / 11:

However if one wants to interpret the Article 20 (1) (2) of the Polish Copyright and Related Rights Act bearing in mind all motives expressed in Directive 2001/29/EC and in the judgment in the "Padawan" case, then the wording of this provision should have been different. Determining wording of the provision belongs to the legislator that cannot be replaced by the court, as fairly stated Appeal Court justifying its decision. Regarding an Article 20 (1) (2) of the Polish Copyright and Related Rights Act one should go beyond the current wording and stipulate the sellers' obligations in the chain of distribution rather than only a manufacturer and importer, moreover should describe buyers that use reprographic devices for the private purposes through indicating their features.

Adequate remarks of the defendant in this respect consist however in postulates *de lege ferenda*. , it is necessary to interpret Polish law according to the system of provisions of the European Union, and verdict of the Court of Justice of the European Union, however, the directive in the system of the EU law does not have direct effects in the legal system of a Member State. In addition, the current wording of Article 20 (1) (2) of the Polish Copyright and Related Rights Act is not in conflict with the provisions of Directive 2001/29/EC, but does not correspond exactly to its all provisions. The same can be referred to a comparison between the content and purpose of Article 20 (1) (2) of the Polish Copyright and Related Rights Act with the EU Court of Justice position in the "Padawan" case.

Existing copyright system should carry out the purpose of this law, which is to protect the rights of authors and performers, The interpretation of the Copyright and Related Rights should follow the above mentioned rule. By the predictions of reprographics' fees collection imposed only to manufacturers and importers, as it states *de lege lata* Article 20 (1) (2) in connection with Article 5 of the Polish Copyright and Related Rights Act fulfills the purpose of the law in this regard."

The Supreme Court has clearly pointed out the lack of coherence between the provisions of Directive 2001/29/EC and the Polish regulations in this respect, and as a result decided to make

the teleological interpretation of provisions in place for the EU interpretation which takes into account the case-law of the Court of Justice of the European Union.

Polish law does not contain the distinct connection between the institution of own private use and fees from devices and carriers - which raises essential doubts about the nature of these fees. In particular it is not clear how the fees from devices and carriers should be established.

Legislator laid down the following criterion: capacity of a device and carrier to reproduce works, and the designed use thereof for functions other than reproduction of works.

Therefore there is no reference to criteria arising from Directive 2001/29/EC, and case-law of the Court of Justice of the European Union - such as the need to ensure fair compensation for rightholders which have sustained damages as a result of applying the exception in respect of reproduction for private use.

In our opinion directions of changes of the current model should include the following assumptions:

1. Charges from carriers and devices should apply only in a situation when there is possible to demonstrate sustained damages on the side of rightholder,
 2. Devices and carriers that were not used in a private use (B2B and B2A sales models) should be excluded,
 3. Charges from carriers and devices cannot interfere with the principles of the common market and lead to a situation in which the fee for the same activity/authorisation is paid repeatedly,
 4. In case of content/works made available with the authorization of rightholder and within the framework of granted licence no damages appear on the side of the subject of the copyright,
 5. The model of payments should guarantee an "appropriate balance" among businesses of rightholders and users of the protected objects,
 6. Unification of applied wording that influence the scope of compensation for private use is required,
 7. Fees shall be charged at the point of sale - because only in this way it is possible to specify the target destination of the device or carrier,
 8. Model of the fees' payment should result in the smallest possible burden for manufacturers and importers,
 9. Provisions at the EU level should implement a common pricing methodology taking into account purchasing power of consumers in the given Member State.
- There is no justification or the effective enforcement capacity to execute charges in case of secondary transfer of ownership of carrier or device.

73. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?

There is a need for a strong development of works on implementation of the Pan-European procedures for reporting illegal content on the Internet. We fully endorse the recommendations presented by the European Commission in the "Digital Agenda for Europe" especially the implementation of "European emergency number" for notification of offensive or harmful Internet content. In addition around this peculiar alarm procedure we would like to express the opinion that it should also report gross infringements of copyrights. Works on the amendment of current provisions should also include facilitating the settlement of disputes in cases on infringement of intellectual property rights, for example by introduction of the Online Dispute Resolution (ODR) and, above all, an effective system of legal assistance in regards to copyright

infringements and combating pathological phenomena accompanying them like e.g. money laundering, both on a European and over European scale.

In the aspiration to ensure consumer protection in frames of the digital single market one should take into account also the interests of intellectual property rights. In accordance with EU Court of Justice case law (joined cases C-236/08, C-238/08 and C-278/08) an average consumer on the Internet should be seen as "properly informed, sufficiently careful and sensible Internet user" therefore we should not restrict the consumer's liability for violating intellectual property rights on the Internet. Besides, we disagree with demands of the prohibition on the use of technical measures to protect a work from copying it or illegal, online distribution.

One should remember of the need to provide rightholders with necessary instruments (measures) of protection without which their market activity is exposed to losses and in the long perspective may shake the profitability of business. As a result, the State loses revenue from taxes paid by legally operating companies, employees of these companies lose their jobs or the new ones are not created and the Internet pirates gain profits as a result of committed criminal-tax offences. The scale of the impunity of organised crime based on income gained from the illicit practices is staggering. The problem illustrates for instance a fact, that in the "Transparency Report" prepared by Google, Polish entrepreneurs are constantly on the leading positions in terms of number of reported copyright infringement claims in the world. It illustrates how huge is the scale of piracy in Poland.

In 2011 the number of offences in cases of Articles 6-7 of the Act of 5 July 2002 on the protection of some services provided by electronic means based on or consisting of conditional access increased up to 425. According to the 2011 Poland Safety Report prepared by the Ministry of Internal Affairs it is a 76 per cent increase comparing to a year 2010 (242) http://www.msw.gov.pl/portal/pl/2/10205/Raport_o_stanie_bezpieczenstwa_w_Polsce_w_2011_roku.html

It should be emphasized that the piracy is very often connected with traditional crime, especially with money laundering. For the effective combat against this phenomenon a cooperation of all the Member States is essential, but it is not enough. With this in mind, we hope that establishing the European Cybercrime Centre (EC3) at Europol would bring measurable benefits recalling as well that in harmony with the Council of Europe Convention on Cybercrime of 23rd November, 2001 the notion of cybercrime also applies to offences associated with infringement of copyright and related rights.

In order to ensure transparency of principles of the protection of intellectual property rights for rightholders as well as for consumers, it is necessary to clarify the concept of a digital copy and provide a clear definition of boundaries between fair personal use and public use both at the national and the European level. Dilluting this division to an unspecified number of copies and covering them up with the notion of "dissemination" brings substantial losses for rightholders including the TV operators which broadcasts are illegally transmitted on the Internet. We disagree to the practice of offloading onto the society costs of the piracy by raising and widening on more and more new fields and objects and economic phenomena of so-called reprographic charges.

74. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright

infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

The role of intermediaries was so far unjustly marginalised. An analysis of the most popular pirate sites shows that entities handling payments or service providers are often connected in terms of capital with the subject who infringes the intellectual property rights and they play a key role in gaining financial benefit from running "pirates" services. Profiting from intermediation they participate in creation of a chain of services that forms the illegal circulation of content. It is therefore necessary to enforce regulations that would hinder the practice of provisioning services by intermediaries for entities that illegally make content available to the public.

When it comes to the business models of the pirate services, firstly we should mention the paid model when a user pays for services. These types of payment take the form of subscription for site or service or the content of a higher quality, transfer fees for collected data, "voluntary" tributes to service providers, etc. From the analysis made by Anti-Piracy Protection it turns out that 30 per cent of the most popular pirate services apply paid business model. This practice is enabled by payment intermediaries like operators, brokers etc. The second model business enabling to gain financial benefits from the 'pirate's activity is an advertising model. These type of services are being supplied by advertisements supported by advertising networks, affiliation programs etc. Some of them allow for the direct publication of a banner on the service website without the participation of intermediaries but it is very uncommon situation. The model based on transmission of commercials dominates as around 70% of the most popular pirate services apply it. Some entities use both business model simultaneously.

In order to break up the funding scheme of "pirate's" practices the implementation of some mechanisms that would force intermediaries to stop cooperation with services that illegally distribute content are required. e.g. upon obtaining relevant information from rightholder.

It should be emphasized that as far as it comes to the national (domestic) subjects that register the Internet domains' names there is no rational grounds for the extension of a liability of the intermediary as defined in Directive 2001/29/EC and Directive 2004/48/EC. Role of the national operator of the register of domains' names comes down to support of delegations names on to the servers which are servicing the registered name of the Internet domain, and which can also indicate the WWW web service, used for publications of materials infringing the intellectual property rights.

Simultaneously it should be noted that in the event where the specific name of the Internet domain infringes intellectual property rights, the person recognizing oneself as injured party can initiate a legal action against third party, which registered the given name of the Internet domain, to the court or to the one of permanent arbitration courts, dealing with issues of Internet domains.


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