Max Planck Institute for Innovation and Competition

Position Statement of the

Max Planck Institute for Innovation and Competition

on the Proposed Modernisation of European Copyright Rules

PART A

General Remarks

(Version 1.1)

I. Foreword

1. The Max Planck Institute for Innovation and Competition is a research institute within the Max Planck Society that since its founding in 1966 has been committed to the analysis and development of intellectual property and competition law on the basis of established scientific principles. The Institute regularly advises governmental bodies and other organisations. It takes an international approach and places emphasis on the comparative analysis of law as well as economic and technological aspects of legal development.

2. From this perspective, the European Commission's proposals of 14 September 2016 towards copyright reform in the European Union (hereinafter "copyright package") are of particular interest to the Max Planck Institute (MPI). These comments follow the position already taken by the MPI on this and related subject-matters, and particularly the Position Statement on the "Public consultation on the role of publishers in the copyright value chain" from 2016 and the Position Statement concerning the "Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled" from 2015.

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3. The MPI intends to react on all Proposals included in the copyright package of 14 September 2016, examining whether the approach adopted by the European Commission is adequate for reaching its established objectives. In response to certain critical aspects, alternatives will be suggested to the EU legislature.

4. The Statement is structured as follows:

Part A – **General Remarks**

Part B – Copyright Exceptions and Limitations

Chapter 1: Text and Data Mining (Article 3 (COM(2016) 593))

Chapter 2: Digital and Cross-Border Teaching Activities (Article 4 (COM(2016) 593))

Chapter 3: Preservation of Cultural Heritage (Article 5 (COM(2016) 593))

Chapter 4: Implementation of the Marrakesh Treaty (COM(2016) 596 and COM(2016) 595)

Part C – Out-of commerce works (Articles 7-9 (COM(2016) 593)

Part D – Copyright Contract Law (Article 10 and Articles 14-16 (COM(2016) 593))

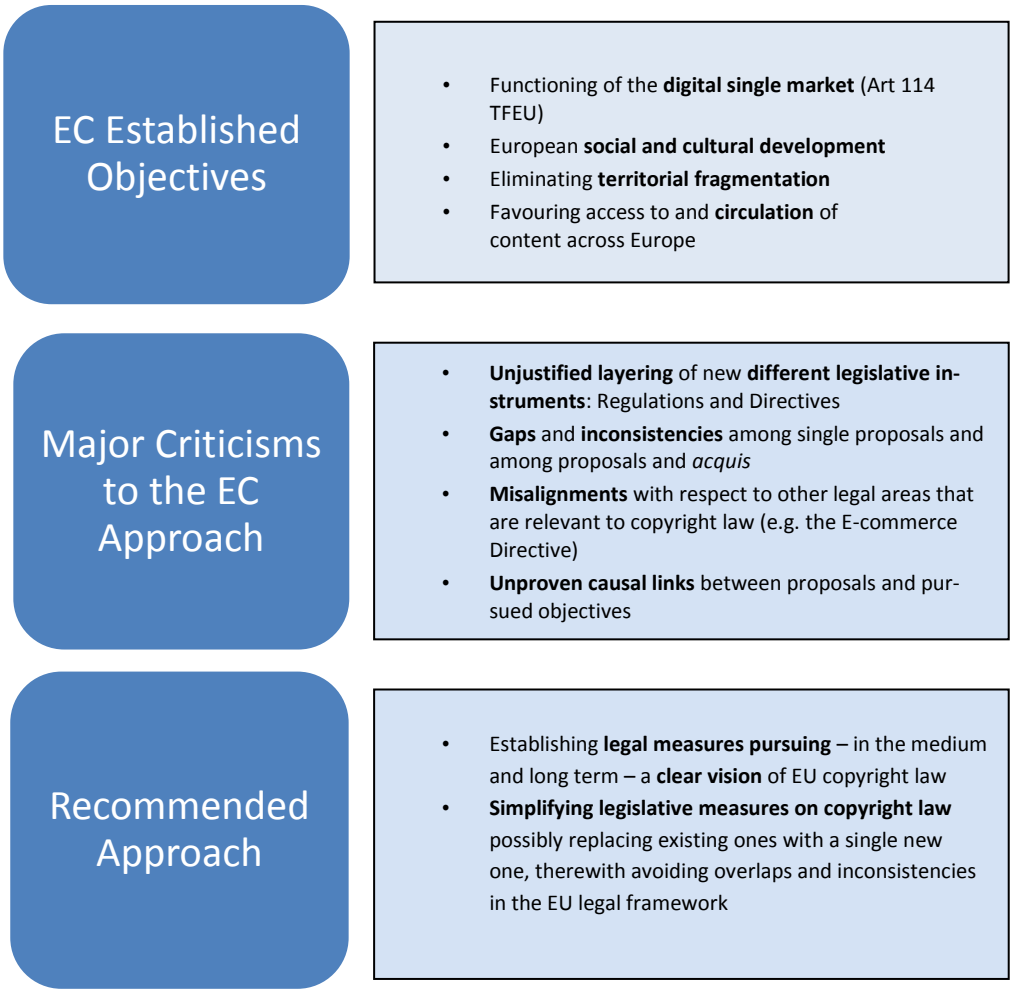
Part E – Protection of Press Publications Concerning Digital Uses (Article 11 COM(2016) 593)

Part F – Claims to Fair Compensation (Article 12 COM(2016) 593)

Part G - Use of Protected Content on Online Platforms (Article 13 COM(2016) 593)

Part H – Content Circulation in Europe (COM(2016) 594)

II. Part A, Executive summary



III. Context and the Commission's objectives

5. The European Union has made considerable efforts to achieve an approximation of the laws of Member States in the field of copyright. Eleven Directives define European copyright law and more than 80 decisions of the Court of Justice of the European Union (CJEU) have been called upon to rule on the interpretation of these Directives. But the creation of a European copyright law has suffered from two main limitations: a) the different national implementations of European Directives; b) the national exercise of copyright

that continues to be based on a territorial restriction linked to the geographical boundaries of sovereign states.

6. Facing the abovementioned problems and addressing them in a fundamental way the European Union has cultivated the idea of a **unitary copyright title**. But more recently the Commission has sought to follow **a more cautious path**. The initial approach of overcoming existing copyright barriers thoroughly was replaced by one that largely leaves intact the national dimension of the EU copyright right system. The European Commission aims in the meantime "to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU".

7. For this purpose **three general objectives** have been identified: a) to allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audio-visual works and cultural heritage; b) to facilitate digital uses of protected content for education, research and preservation in the digital single market; c) to ensure a well-functioning marketplace for copyright where rightholders may set licensing terms and negotiate on a fair basis with those distributing their content.

IV. Summary table of the proposals included in the copyright package

8. First, it seems useful to summarise in a table the legislative proposals included in the copyright package. The table shows in particular 1) subject-matter covered by the proposals; 2) amendments of the existing Directives; 3) Directives on which the proposals under discussion are based, and which are relevant for the implementation of these proposals; 4) non-copyright-related legislative initiatives. Specific overlaps and intersections between the proposed Directives and Regulations on the one hand, and between them and the copyright *acquis* on the other, will be taken into account in the respective parts of the Max Planck Postion Statement on the copyright package.

EU COPYRIGHT PACKAGE: CONTENT AND LINKS				
Proposals	**Covered Subject-Matter**	**Amended Directives**	**Concerned Directives of the *Acquis***	**Non-copyright, Related Leg. Proposals**
Prop. Dir. COM(2016) 593	- Exceptions and Limitations - Copyright Contract Law - Internet Service Providers - Rights in Publications	Dir. 2001/29 (InfoSoc); Dir. 96/9 (Database).	Dir. 2014/26 (Collective management); Dir. 2012/28 (Orphan works); Dir. 2010/31 (E-Commerce); Dir. 2010/13 (Audiovisual); Dir. 2009/24 (Software); Dir. 2006/115 (Rental); Dir. 2004/48 (Enforcement); Dir. 2001/29 (InfoSoc); Dir. 96/9 (Database); Dir. 93/83 (Satellite-Cable)	**Prop. Reg. COM (2016) 289** (Geo-blocking) **Prop. Reg. COM(2015) 627** final (cross-border portability of content)
Prop. Reg. COM(2016) 594	Online transmissions of broadcasting organisations and retransmissions of television and radio programmes			
Prop. Reg. COM(2016) 595	Exceptions and Limitations (Marrakesh Treaty)	Dir. 2001/29 (InfoSoc)		
Prop. Dir. COM(2016) 596	Exceptions and Limitations (Marrakesh Treaty)	Dir. 2001/29/EC (InfoSoc)		

V. Additional legislative layers

9. The Commission has come up with multiple proposals, thereby creating **additional** – but largely **unnecessary** – **legislative layers**. In fact, several proposals regulating the same subject-matter (for example, exceptions and limitations) superimpose an already problematic – at times also incoherent – regulatory framework. This legislative approach – if not corrected during the legislative process – will worsen the current patchwork causing further **significant inconsistencies**. Two significant examples, however, will be mentioned here:

- Internet Service Providers: As it stands Article 13 of the proposed copyright Directive (Prop. Dir. COM(2016) 593) contradicts Article 15 of the E-Commerce Directive (Dir. 2000/31/EC).

- Press Publishers' Neighbouring Right: As it stands Article 11 of the proposed copyright Directive (Prop. Dir. COM(2016) 593) is not aligned with Article 3 InfoSoc Directive (Dir. 2001/29); Article 7 Database Directive (Dir. 1996/9); Article 12-14 E-Commerce Directive (Dir. 2010/31/EC).

10. The legislative approach adopted by the Commission is not based on a systematic re-evaluation of European copyright. Consequently, important aspects of copyright are regulated in a **non-systematic way**. A clear example concerns exceptions and limitations. On the one hand, we welcome the Commission's intention to introduce and make mandatory the proposed exceptions on distance education, text and data mining, and preservation of cultural heritage in the proposed copyright Directive (COM(2016) 593). On the other hand, it is not understandable why many other exceptions contained in the InfoSoc Directive remain optional, such as those on the purposes of quotation and criticism, parody and personal use. Moreover, the proposed Directive is intended to apply in parallel with the existing, partly overlapping exceptions of Article 5 of the InfoSoc Directive. A clear example in this regard is Article 4 COM(2016) 593, "Use of works and other subject-matter in digital and cross-border teaching activities", in relation to Article 5(3) InfoSoc Directive. The proposed provision does not replace the existing one, which – as it stands – remains valid in the analogue environment (on this specific issue, see Part B, Article 4 – Use of works and other subject-matter in digital and cross-border teaching activities). Therewith, the Commission's proposals make the **legal situation increasingly complicated**, and one can hardly imagine that those affected by these different rules would be able to effectively keep an

overview. Instead, the difficulty in identifying which legislation applies to a specific case causes **legal uncertainty.**

VI. Fragmentation of the legal framework

11. The lack of coherence and legal certainty is enhanced by including in the copyright package both **Regulations and Directives**, partly for the same subject-matter, without a visible justification. We will deal with the choice of the legislative instrument in section IX of this document and more in detail in the relevant parts of this Statement.

12. From a methodological point of view, general problems arise when a Regulation (partly) overrules a Directive. In this case, even assuming that

    - national law – possibly implementing a Directive – is automatically abolished by a subsequent Regulation (based on the principles according to which a Regulation imposes upon national courts the disapplication of national law when it is in contrast to the Regulation itself);

    - the subsequent Regulation repeals a prior Directive according to the principle of *lex posterior derogat priori*,

    the regulatory framework remains **fragmented** if a Directive and a Regulation covering the same subject-matter coexist. Therewith, if the recipients of European law provisions have to refer to different legislative levels (Regulations and national law, implementing Directives) governing the same cases or subject-matter, the complexity of legal framework unnecessarily increases.

13. This issue emerges, for example, in the case of the proposed Regulation on "Online transmissions of broadcasting organisations and retransmissions of television and radio programmes" (COM(2016) 594), with respect to copyright *acquis* including the Cable and Satellite Directive.

14. Of course the adoption of a Regulation does not in itself cause fragmentation of the European legal framework. Rather, Regulations, when properly confined in the scope and correctly located from a systematic point of view, can facilitate the creation of the digital single market.

VII. Imprecisions of the legislative technique

15. The proposals under review lack conceptualisation as well as semantic and linguistic consistency. Some examples are listed below, but the proposals will be more comprehensively examined in the different parts of this Statement.

1. The notion of rightholder

16. The European legislator has not harmonised the concepts of **copyright ownership and authorship** and the related notion of rightholder. The consequences of this lack of clarity have emerged again and again, recently, for example, in the *Reprobel* case (C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL, Epson Europe BV intervening*). By interpreting the InfoSoc Directive and the term "rightholder" as synonymous for the original owner of the right, the CJEU excluded publishers – the actual (but derivative) rightholders in the majority of cases – from the right to a share of "fair compensation". This concept is by no means clarified by the proposed Art. 12 of COM(2016) 593. The issue will be examined in detail in part F of the Statement.

2. Exceptions, limitations and fair compensation

17. Another issue of fundamental relevance is the definition of the exceptions and limitations to copyright and related rights (see, e.g. Article 5 of InfoSoc Directive) as well as of fair compensation, compensation, equitable remuneration and remuneration.

18. The distinction between exceptions and limitations is incorporated in the EU copyright *acquis*, but the nature and significance of this distinction has never

been clarified by the European legislator, even though the CJEU draws a clear contrast between exceptions and limitations (see cases C-457/11, *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and Others*; C-458/11, *Canon Deutschland GmbH*, C-459/11, *Fujitsu Technology Solutions GmbH and C-460/11, Hewlett-Packard GmbH v Verwertungsgesellschaft Wort (VG Wort))*.

19. This differentiation does not seem, however, to be transposed in the proposed copyright package. Articles 3 to 5 of COM(2016) 593 introduce new mandatory permitted uses, but their qualification as **exception or limitation** seems **unclear**. Specifically, Articles 3 (Text and Data Mining) and 5 (Preservation of Cultural Heritage) speak of exceptions. Article 4 (Use of works and other subject-matter in digital and cross-border teaching activities), in contrast, seems to allow Member States to introduce permitted uses both in the form of exception and limitation.

20. Further, the text of the Proposal COM(2016) 593 does not appropriately distinguish between the concept of fair compensation (used in the InfoSoc Directive) and equitable remuneration. In this sense, it is important to note that the EU *acquis* attributes to the term **fair compensation a specific meaning, which is different from the one of equitable remuneration**. The term equitable remuneration was used in Directive 1992/100 (Rental and Lending) and, according to the CJEU, an equitable remuneration should be determined based on the value of use of a work in financial transactions (see, cases C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*; C‑271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*). This distinguishes it from fair compensation, which might also be a flat rate, as long as it is associated with the "harm" suffered by rightholders (C-467/08, *Padawan SL v SGAE*). Therefore, the distinction involves a different method of quantification.

21. With regard to the Proposal COM(2016) 593, it is unclear a) whether the Directive Proposal, and in particular Articles 3 to 5, stick with the classification of exception and limitation according to the InfoSoc Directive, as interpreted by the CJEU; b) what the relationship is between this qualification and the obligation (or the freedom) of Member States to allow fair compensation or equitable remuneration; c) in what cases Member States can allow equitable remuneration instead of fair compensation.

22. Answering these questions is particularly important in relation to **Article 12 of the Directive Proposal**, entitled **"Claims to a fair compensation**" as well as with regard to Articles 3 to 6 of the Proposal COM(2016) 593. In disagreement with the mentioned heading, the text of Article 12 as well as Recitals 13 and 36 of the Proposal COM(2016) 593 use only the term compensation and seem to incorrectly overlap the notions of fair compensation and equitable remuneration. The main interpretative issues emerge from Recital 36 (of the Proposal COM(2016) 593). The wording of this Recital is ambiguous, especially considering that the European Commission seems to be biased. On the one hand it reflects a particular notion of fair compensation, which is quantified on the basis of the "harm" suffered by rightholders: "[…] *there are systems in place to* ***compensate for the harm caused by an exception or limitation*** […]" (see also Recital 13 of the Proposal COM(2016) 593). On the other hand, the European Commission seems to accept the systems in place in most of the Member States, applying an equitable remuneration system based on different quantification criteria ([…] ***publishers* […] *may in some instances be deprived of revenues*** *where such works are used under exceptions or limitations […]. In a number of Member States compensation for uses under those exceptions is shared between authors and publishers* […].

3. Communication to the Public and Making Available to the Public

23. Another aspect that is neglected by the Proposal under review is the definition of the scope of the rights to communication to the public and making available

to the public, particularly in relation to hyperlinking. The CJEU has recently offered important guidance on the interpretation of these rights (see most recently Case C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others). But this domain should not be left to the CJEU to be developed without sufficient foundation in EU copyright legislation.

24. A clearer notion of these rights would be essential for defining the scope of the neighbouring right that the Commission proposes in favour of press publishers in Article 11 (Protection of press publications concerning digital uses) of the Proposal COM(2016)593. Although Article 11 needs to be assessed critically anyway (see part E), it would be unavoidable to clarify what acts of **hyperlinking** do constitute communication to the public.

25. Furthermore, proposal COM(2016) 593 refers to the notion of "Communication to the public" in **Recital 38** on the responsibility of "information society service providers", as defined in Article 13 of the Proposal. It is important to note here, however, that the recital appears to suggest that providers storing protected subject-matter and providing access to the public, unless it is eligible for the hosting safe harbour (Article 14 E-Commerce Directive), themselves perform an act of communication to the public. If this is the notion of communication to the public, such providers would be infringing copyright, which explains why this highly relevant issue should be clarified in the proposed Directive.

VIII. Incompliance with the principle of proportionality

26. The Impact Assessment (IA) on the modernisation of EU copyright law that the Commission made publicly available on 14 September 2016 does not provide a sufficient foundation for certain key issues. It makes a **superficial analysis** of the different policy options both in terms of the type of instrument and the desired content, however, on the sole basis of theoretical options and general

data. In addition, the IA does not make efficient use of the Member States' experience to delineate policy options.

27. Thus, in some points the IA seems to serve more as ex-post justification of a predetermined policy choice, rather than as ex-ante substantiation of the need for action. In view of that, it is more than doubtful whether the **principle of proportionality** (laid down in Article 5 of the Treaty on the European Union, hereinafter TEU) has been observed.

28. Furthermore, not even **Article 22** of the proposal ("**Review**") seems to align with the principle of proportionality. This principle primarily governs the mode and intensity of EU intervention in the laws and policies of the Member States requiring that legislative measures are fit for their purposes. In order to assess the effectiveness of the legal provisions, the review needs to be carried out within a reasonable timeframe and manner. However, Article 22 is too generic with regard to both the **timeframe** in which the assessment of the draft Directive needs to be completed and the **methods** to apply during the review. When assessing the appropriate evaluation, it must be taken into account whether at the EU level similar provisions have existed previously and whether some Member States have any prior experience. For instance, Article 4 of the proposed copyright Directive on the teaching exception is partly similar to Article 5(3) InfoSoc Directive. But, particularly for cross-border teaching activities, the introduction of the proposed mandatory exception offers new possibilities. In this case, a comparison needs to be made with the prior situation. Also, a certain amount of time is required to recognize and realize the opportunities arising from the changed legal framework. However, the review should be completed no later than a specified period especially considering how quickly changes in the digital market occur. A period of **five to seven years** seems appropriate for a review of the new rules.

IX. Alternative regulatory approach

29. As early as in 2009 the idea of a **unitary copyright system** including a single European copyright title arose on the policy level (see "Reflection Paper" on Creative content in a European digital single market: Challenges for the Future jointly issued by the DG INFSO and MARKET 22 October 2009, http://studylib.net/doc/18540363/en-en-creative-content-in-a-european-digital-single). At the time, the DG Information Society and the DG Market stated that: "A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyright and related rights". The idea was further strengthened in the Communication of 24 May 2011 COM(2011) 287 final where the Commission stated that "the Commission will also examine the feasibility of creating an optional 'unitary' copyright title on the basis of Article 118 TFEU and its potential impact for the single market, right holders and consumers". Even the recent Draft Report by the European Member of Parliament on the evaluation of the InfoSoc Directive considers "the introduction of a single European Copyright Title that would apply directly and uniformly across the Union, in compliance with the Commission's objective of better regulation as a legal means to remedy the lack of harmonization resulting from Directive 2001/29" (Report of the Committee on Legal Affairs on the evaluation of Directive 2001/29/ of 22 May 2001, item 3,3, rapporteur Julia Reda, February 2015). More recently, the Commission declared that "the full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, would require substantial changes in the way our rules work today (Communication "Towards a modern, more European copyright framework" (COM/2015/626 final).

30. A unitary copyright system can be fostered only by means of Regulations. Adopting Regulations is in theory a realistic prospect which is linked to **TFEU, Article 118**. And there is more: according to current primary European law, it is reasonable to think that the Union is even obliged to adopt Regulations, at

least if adopting a copyright Regulations is necessary for the functioning of the internal market. Indeed, according to Article 118 TFEU "*In the context of the establishment and functioning of the internal market, the European Parliament and the Council […]* ***shall establish measures for the creation of European intellectual property rights*** *[…]*". It is notable that the provision uses the term "shall". And it is obvious that when adopting Directives certain aspects of copyright remain un-harmonised. Directives indeed have disadvantages regarding legal uncertainty related to diverging national interpretations, with the added problems of costly and slow national implementation procedures.

31. The adoption of Regulations would be consistent with the Commission's intention of proposing pragmatic solutions to copyright territoriality, which is a limitation to the functioning of a **digital single market.** When choosing the appropriate legislative instruments, it is important to take into account their characteristics and the context in which they will apply. Whereas in the analogue market, Regulations (as opposed to Directives) are not the *condicio sine qua non*, but merely an element that favours the single market, the functioning of the digital single market largely **presupposes uniform legislation**. If the digital market is based on Internet without barriers within the EU, an inconsistent notion of "communication to the public" or "making content available to the public" is likely to prevent the unhampered circulation of protected subject-matter.

32. Therefore, the adoption of Regulations for regulating copyright for the purposes of the functioning of the digital single market seems to be in **accordance with the principles of subsidiarity and proportionality** as long as it does not address issues of little or no impact on the internal market. A Regulation would be in line with the three main integration clauses in the Treaties that are relevant to copyright in the internal market: culture (Article 167(4) TFEU), consumer protection (Articles 12 and 169/2(a) TFEU) and competitiveness of the Union's Industry (Article 173(3) TFEU).

33. The MPI strongly favours a unitary copyright system in the **mid-term**. Although it hardly seems achievable in the course of this package, it is crucial that the Commission's choice of one or the other of the legislative instruments is sustainable. As described above, this is currently not the case. Instead, the legislative instruments should be chosen in a way that does not counteract the medium and long-term vision of a modern European copyright law. Above all it makes sense to **simplify** European **copyright law** rather than making it even more complex and inconsistent. It seems particularly ill advised to add new provisions to existing ones, which already deal with similar issues. As an alternative, existing legislative measures could be replaced with a new (possibly single) one, therewith avoiding overlaps and inconsistencies in the EU legal framework.

34. However, since this postulation might go beyond the realistically attainable objectives, the copyright package should at least be limited to one new Directive containing all mandatory exceptions, including those concerning uses for the benefit of people with disabilities (Implementation of the Marrakesh Treaty (COM(2016) 596 and COM(2016) 595)).

[Version 1.1]

Munich, February 22, 2017

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