



Brussels, 30.6.2016

C(2016) 3880 final

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a modern, more European copyright framework" {COM(2015) 626 final}.

The Communication's aim is to set out a pragmatic and priority based approach to the modernisation of the European copyright framework in order to be in a position to deliver fast results. It forms part of a broader package of ambitious measures designed to take forward the Digital Single Market Strategy with a step-by-step approach, as announced in the 2016 Commission Work Programme.

The Commission's action plan is built on four complementary pillars: enhancing online access to content across the EU, including in the light of the results of the review of the Satellite and Cable Directive; adapting exceptions to copyright rules to a digital and cross-border environment, focussing in particular on those exceptions and limitations which are key for the functioning of the digital single market and the pursuit of public policy objectives (such as those in the area of education, research – including text and data mining – and access to knowledge); creating a fair marketplace, including as regards the role of online intermediaries when they distribute copyright-protected content and lastly, strengthening the enforcement system.

As a first step, the Commission presented a legislative proposal on cross-border portability, which will ensure that subscribers to online content services can continue using them while temporarily present in another Member State. As set out in the Commission Communication, further copyright measures will follow in 2016.

The Commission welcomes the Bundesrat's support for the aims of the Communication, namely the need for action to achieve a modern, more European copyright framework and to overcome fragmentation in the internal market. The Commission shares the view of the Bundesrat that an appropriate balance must be struck between the interests of rights holders, distributors, consumers and cultural institutions. We have also taken note of the Bundesrat's doubts relating to certain elements, in particular the scope of the envisaged action in the area of exceptions.

*Mr Stanislaw TILLICH
President of the Bundesrat
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The proposal on cross-border portability specifically is currently in the legislative processes with both co-legislators.

The Commission is pleased to have this opportunity to provide further details on the issues raised by the Bundesrat in the attached annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Günther H. Oettinger
Member of the Commission*

ANNEX

The Commission has carefully considered the issues raised by the Bundesrat in its Opinion and would like to offer the following observations grouped by topic and with reference to the respective paragraphs of the Bundesrat's opinion.

1) Concerning the Commission's proposal for a Regulation of the European Parliament and the Council on ensuring the cross-border portability of online content services in the internal market (paragraphs 8, 14 and 15 of the opinion) the Commission welcomes the Bundesrat's support and agrees that the interests of all relevant stakeholders are to be taken into account. Regarding services provided without payment of money (which include some services provided by public service broadcasters), the Commission would like to point out that in order to fall under the scope of the legislative proposal, one of the following two conditions needs to be fulfilled: 1) the service is provided against payment of money or 2) the service is provided without payment of money, provided that the subscriber's Member State of residence is verified by the provider. It is important to note that the Regulation will not oblige all services to have such a verification system. As a consequence, online content services provided without payment of money, such as many online services provided by public broadcasters, are covered by the proposal only if the subscriber's Member State of residence is verified by the service provider. This means that public service broadcasters are not obliged to ensure portability as long as they do not put verification mechanisms in place. If public service broadcasters however have such a mechanism in place, their online services (if falling within the definition provided in the proposed Regulation) will be covered. This way they would not be obliged to make investments in authentication mechanisms if they do not wish so.

The Commission furthermore agrees that the concept of "temporarily present" is key for the proposal. This concept is closely linked to the concept of "the Member State of residence" and the verification of the latter. We trust that the co-legislators reach a result which will be adequate to the needs of European consumers and at the same time will provide necessary safeguards for rightholders and service providers.

2) As regards the issue of cross-border distribution of and access to television and radio programmes (paragraphs 11 and 12) the Commission, as indicated in the Communication, is assessing options and considering further measures. We recently held a public consultation on the Satellite and Cable Directive and launched a study on the application of the Directive. Together with our impact assessment work, this will be the basis to decide the next steps in this area. The Commission is aware of the fact that territoriality plays an important role for the financing of the film industry as well as for cultural diversity.

3) Regarding the Bundesrat's comments on exceptions (paragraphs 4 and 13), the Commission's approach is to address those exceptions that are key to the Digital Single Market, in particular in the areas of access to knowledge, education and research, including text and data mining. We are pleased to see that the Bundesrat agrees that education and science are key areas to be addressed in this context. The Bundesrat considers in its opinion that other exceptions and limitations in addition to those in the areas mentioned in the Communication should also be addressed. As regards private copying, this remains an important area the Commission is working on to achieve a well-functioning internal market,

as indicated in the Communication. As regards other exceptions, the Commission considers that a complete overhaul of the whole list of exceptions and limitations set out in the different copyright directives, and in particular in Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, would not be desirable. Not all exceptions are equally important for the functioning of the Digital Single Market and not all of them need increasing their level of harmonisation.

4) The Commission agrees with the Bundesrat that the right of communication to the public (paragraph 5) is a key issue when it comes to the online distribution of content. As indicated in the Communication, the Commission is looking in particular into the activities of different types of intermediaries in relation to copyright-protected content. It is our objective to clarify the rules applicable to the intermediaries who distribute content with a view of achieving a fairer allocation of value generated by the online distribution of copyright-protected content by online platforms providing access to such content ("value gap"). In this context, we are notably examining whether action is needed on the definition of the right of communication to the public.

5) Regarding the application of the principle of exhaustion in the digital world (paragraph 5), the issue was part of the 2013 public consultation on the review of the EU copyright rules. The conclusion reached after closure of the consultation was that action in this regard at EU level would be premature, in particular because it could not be clarified what the impact on the market would be. At the moment the Commission is not planning to take action on this issue.

6) As regards the call to the Commission to assess the effectiveness of current copyright law from a consumer perspective and to establish clear consumer rights (paragraph 7), the Commission would like to assure the Bundesrat that the consumer dimension is an important driver of our copyright modernisation strategy. The Commission believes that the proposal for a Regulation on cross-border portability of online content services in the internal market will bring substantial benefits by allowing consumers to profit from the opportunities of the digital single market. More generally, the consumer perspective will be a key factor that will be taken into account also in the second package of legislative proposals to be adopted later in 2016.

7) Lastly, as regards the idea of a single EU copyright jurisdiction (paragraph 16) the Commission agrees, as confirmed in its Communication, that such a single jurisdiction is not an issue for immediate action but could rather be considered in the long run as part of the question on how to achieve a fully harmonised EU copyright framework, including possibly an EU copyright code.