Bundesrat **Document 565/16 (Decision)**

16.12.16

Decision
of the Bundesrat

Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market

COM(2016) 593 final; Council document 12254/16

At its 952nd session on 16 December 2016 the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG):

Regarding the overall proposal

1. The Bundesrat welcomes the fact that the Commission is addressing the matter of copyright in the digital single market. It also welcomes the Commission's proposal's basic objectives of reducing the differences between national copyright regimes and of allowing for wider online access to protected works by users across the EU. The Bundesrat emphasises that the proposals must not, however, restrict cultural diversity in the Member States and that a fair balance must be achieved between the interests of authors, users, producers, broadcasting organisations, cultural institutions and consumers. With regard to matters of copyright, the Bundesrat therefore refers to its opinions of 10 July 2015 (BR Document 212/15 (Decision)), 18 March 2016 (BR Document 15/16 (Decision)) and 22 April 2016 (BR Document 167/16 (Decision)), copies of which were previously submitted to the Commission.

2. The Bundesrat notes with regret that the Commission's reform efforts have fallen well short of its expectations for a consistent, consumer-friendly reform of copyright. In this connection it would draw attention to its above-mentioned opinion of 18 March 2016, in particular to points 4 and 5, which are relevant from the point of view of consumer protection and in which it highlighted key aspects of the need for reform.

3. The Bundesrat notes that, according to information provided by the Commission, despite the growing importance of video-on-demand platforms, etc., only one third of all audiovisual works available online originate from the EU.

4. The Bundesrat welcomes the proposed Directive's objective of facilitating cross-border access to copyright-protected content as being in the interests of consumers.

5. In the Second Copyright Package, the Commission addresses important and pressing issues relating to the digital knowledge society. The Bundesrat welcomes the proposed Directive's objective of ensuring, in the light of developments in digital technologies, the legality of certain types of use in the fields of education, scientific research and the preservation of cultural heritage, under clearly defined conditions. In particular, it welcomes in principle the approach taken of harmonising limitation provisions and of

laying such provisions down in an agreement. The Bundesrat considers this to be an important step towards a European science and education area.

6. The Bundesrat pursues the objective of ensuring education, science and cultural institutions the access that they need to digital works under fair and reasonable conditions for all parties and of allowing broad use to be made of digital potential. The Bundesrat considers that broad use of digital potential will provide a sustainable return for society as a whole — in part by making learning and research environments more effective and efficient so as to enhance European innovation.

7. The Bundesrat notes that science and education require the exchange of and access to information and publications to be made as free as possible. A large amount of information, in the form of copyright-protected works, cannot easily be used in the fields of education and science. That is why the Bundesrat welcomes appropriate limitation provisions at European level that fairly balance the interests of authors and users and are clearly worded, easy to apply and based on real uses made in the relevant institutions.

8. The Bundesrat must point out that the limitation provisions of copyright law have been harmonised only in certain areas, while other practical and contentious issues, such as the exceptions made for private copying and other forms of fair, non-commercial use, are still excluded.

9. The Bundesrat asks the German Government to take appropriate steps in the subsequent discussions of the proposed Directive to ensure that European copyright law continues to present no impediment to the establishment and updating of databases with information essential for the sound administration of justice. The Bundesrat therefore assumes that the provision of a database such as 'Asylfact', for example, as a source of information needed in order to promptly and properly implement asylum procedures in Germany, is covered by the limitation provision laid down in Section 45 of the Copyright Act — Administration of justice and public security. As such coverage will have to be safeguarded in the future as well, it would seem expedient to provide a similar exemption in EU secondary law for the field of the administration of justice and public security.

10. In the opinion of the Bundesrat, the proposed arrangements are — as recital 36, for example, shows — still too stuck in the old models of exploitation and value creation and have not yet fully embraced the real uses made of digital media at universities, research institutes and cultural heritage institutions.

11. The Bundesrat is critical of the fact that the proposal in its present form takes no account of the findings of economic studies (such as the Düsseldorf Institute for Competition Economics study 'Ökonomische Auswirkungen einer Bildungs- und Wissenschaftschranke im Urheberrecht', July 2016, 'DICE 2016'), according to which limitation provisions for education and research generally have no impact on the primary market, and that no corresponding conclusions have been drawn regarding the remuneration requirement and the primacy of publishers' works.

12. The Bundesrat notes with regret that the proposal does not yet meet its requirements, as set out in its above-mentioned opinion of 18 March 2016, for harmonisation of

copyright law in the field of education and research in order to reliably establish the conditions under European law for the introduction of the general limitation called for by the Bundesrat in respect of education and science (see BR Document 643/13 (Decision) of 20 September 2013).

13. The Bundesrat considers that provisions should be included that allow heritage institutions to web-harvest freely available online documents. The provision laid down in Article 5 presupposes that such content is already contained in the collections of the heritage institutions. What is needed is an additional basis on which to establish a cultural memory of the born-digital generation. This gap in the provisions is contrary to the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (C(2011) 7579 final).

14. With regard to the full harmonisation of the delivery of copies by libraries, the Bundesrat would refer to the negative experiences gained with the national provisions of Section 53a of the Copyright Act, which have no practical effect. The provisions of EU law should therefore not follow that example, since a clause which allows works to be delivered electronically only where the publisher has no obvious 'appropriate' published works available will inevitably result in a reduction of the range of works provided, curtailment of teaching and research activities, and attempts by those affected to circumvent the rules.

15. The Bundesrat calls for a provision to be incorporated into Article 4 that clarifies the admissibility of the use of annexes in teaching and research and allows users to store and print out intranet content, to publicly reproduce it in the same learning context and to disseminate it in the form of paper copies. These are necessary rights allowing appropriate use to be made of copyright-protected material at educational establishments and research institutions and the great potential of digitisation to be exploited for that purpose.

16. The Bundesrat considers that the proposed legal definition of 'cultural heritage institutions' does not include publicly owned theatres. On account of the extensive records that they hold — of premieres and subsequent performances, some of them in digital form — such theatres, like film and audio heritage institutions, should in principle also be incorporated into the canon of 'cultural heritage institutions'.

17. The Bundesrat calls for a review of the resistance of digital rights management regimes (DRMs) to copyright limitation. DRMs should, where possible, supersede limitation provisions only under certain conditions, and not as a general rule. Technological protection measures must not, in the Bundesrat's opinion, allow circumvention of limitations under copyright law.

18. The Bundesrat continues to call for the introduction of a right to resell legally acquired digital goods. As the law stands, physical works (such as books) are treated differently from digital works (such as eBooks) in that standard terms of business and technological protection measures (digital rights management) often prohibit or prevent consumers who purchase digital goods from reselling them or giving them away. The legal basis for a general right to resell lawfully acquired digital goods, provided that the reseller does not keep any copies of the digital work, must therefore be secured.

Particular points of the proposal

19. The Bundesrat considers recital 16 to be problematical, as it allows the freedom of teaching and research protected by Article 5(3) of the Basic Law to be restricted by way of copyright law. Rather, the recital should make it clear that such content is used for the purposes of teaching and research in order to ensure that the national provisions cannot contain a priority clause.

    In this connection, it should generally be noted that tight limitations result in the privileged institutions using only a small number of licensed works and otherwise using the free resources available online or having recourse to private copies via lists of links and references. This not only contradicts the paradigm of the 'digital knowledge society' but also makes digital use of publishers' content less attractive than that of free resources. As a result, sales of such content will in the medium term be much lower on account of its greatly diminished relevance. The objective of making the publishing industry more sustainable in the face of the digital transformation will accordingly not be met. Lastly, limitation without priority licensing has the advantage of protecting the public from disproportionate prices.

20. The Bundesrat suggests that, in recitals 33 to 35 and Articles 2(4) and 11, it should be clarified that the provision of journalistic/editorial services is the criterion which must be met in order for the protective rights to apply, so as to make it clear that those rights are available not only to publishers of press publications but to all providers of such services.

Title II

21. In Article 3 the Bundesrat welcomes the provisions laid down in paragraphs 1 and 2, which will, in its opinion, eliminate any legal uncertainty. Text and data mining is a key way of making new scientific findings in the digital knowledge society, and suitable conditions must be established to enable research institutes to participate successfully in global competition. The Bundesrat fears that if paragraphs 3 and 4 are maintained, the applicability of paragraphs 1 and 2 might be inverted. Paragraph 4, in particular, entails additional bureaucracy and costs and might allow the text and data limit to be applied only once agreed by a — possibly large — number of stakeholders. It should therefore be made absolutely clear — if paragraphs 3 and 4 are not deleted — that the application of paragraphs 1 and 2 does not depend on the actual conclusion of the agreement provided for in paragraph 4.

22. The Bundesrat is critical of the implications for legal doctrine of the exemption in Article 3, in the form of a provision explicitly allowing science and research institutions to carry out text and data mining. It follows, conversely, that, in order to carry out web analyses, companies and start-ups providing innovative big-data applications or search technologies would have to enter into licences with all authors of online content. Not only is that impracticable, it would also mean the end of a large number of data analysis service providers in Europe. It should be noted that businesses also provide socially important research and innovation services, often in cooperation with scientific institutions. Text and data mining is to be regarded as an application downstream of reading, using data and texts which are already lawfully accessible.

The activity as a whole (including the dissemination of the results of analyses) should therefore be covered by the exemption. For all the forms in which and purposes for which text and data mining is applied, including research, it is very important that the results obtained in analyses can be made clear to clients using samples, for example. The disclosure of *de minimis* sections of the texts or data analysed, in the form of snippets, is in practice very important in this regard.

23. The Bundesrat suggests that in Article 4(1)(b) the words 'at reasonable expense' should be placed after the words 'to be impossible' so as to rule out the risk of avoidable administrative costs associated with the provision becoming excessively high.

24. The Bundesrat considers that the priority clause of Article 4(2) should be deleted, since it would in practice result in the limitation being underused to the detriment of the rightholder. Moreover, lessons learned from the application of Section 52a of the German Copyright Act have shown that the search for appropriate licences results in high administrative costs which make the socially desirable use of such limitation unattractive and can have a prohibitive effect. The assumptions made in recital 17 are, in the Bundesrat's opinion, empirically untenable, as they have been refuted by the results of the DICE and other studies.

25. The provision in Article 4(4) should be deleted, as the DICE study does not show limitation provisions to have any relevant impact on the primary market. Publishers' products can be advertised free of charge at universities, research institutes and cultural heritage institutions. By financing staff and infrastructure, the sponsors of those institutions also create the conditions to generate (publishable) research findings and broaden and preserve cultural heritage. The requirement to provide compensation for the use of copyright-protected scientific works for the common good should, in particular, therefore be reassessed, taking into account the fact that the term 'fair compensation' should also include a ban on double charging.

26. It should, the Bundesrat considers, be made clear that the proposed compensation is to be provided as a lump sum, as it is neither appropriate to the needs of universities nor reasonably practicable to pay compensation on an individual basis. The following second sentence should therefore be added to Article 4(4): 'The fair compensation shall be provided as a lump sum'.

27. The Bundesrat considers that Article 5, by restricting its scope to the making of copies, does not go far enough. The mediation of cultural heritage should, in the Bundesrat's opinion, also be included here. In order for that to be possible, a sustainable arrangement must be made for it to be one of the tasks of heritage institutions to make cultural heritage publicly accessible. To this end the Bundesrat suggests inserting the words 'and accessibility' after the word 'Preservation' in the title. The words 'and to make such works and subject-matter publicly accessible for non-commercial purposes via a secure electronic network used for cultural mediation and scientific evaluation' should also be inserted after the words 'for such preservation'.

The Bundesrat considers this broadening of the scope of Article 5 to be essential, as national portals, such as the German Digital Library and the German Archives Portal,

and European portals, such as Europeana or the Archives Portal Europe, provide content not only for the purpose of cultural mediation but also for the purpose of scientific evaluation and should become a comprehensive and generally accessible source of knowledge of the cultural heritage of Europe.

28. The Bundesrat asks the German Government to press in due course for a suitable addition to be made to Article 5 so as to legally permit museums to make their collections publicly accessible online in order to improve the access of the public at large to copyright-protected cultural goods held in museum collections.

Title III

29. In principle the Bundesrat welcomes the provisions based on German law in Article 7. Nevertheless, the provisions should not be extended to translations, as planned, and it should be made clear that second-hand bookshops are not one of the customary channels of commerce.

Title IV

30. The Bundesrat points out that the measures referred to in Title IV of the proposed Directive, which according to the explanatory memorandum will have 'in the medium term a positive impact on the production and availability of content and on media pluralism', include an extended variant of 'ancillary copyright'. That right was established in national law on 1 August 2013 and served, it was argued at the time, mainly to prevent search engine providers from systematically accessing press publications. It was explicitly not intended to change the possibilities of use by consumers (see BR Document 514/12 of 12 October 2012). That being so, the Bundesrat asks the German Government to examine whether, and if so to what extent, the lessons learned from the application of national ancillary copyright have shown that right to have had a beneficial effect on production and the availability of content since its introduction in 2013. The Government should also consider whether ancillary copyright is in fact a suitable instrument to facilitate consumers' cross-border access to copyright-protected content. It should report its findings to the Commission.

31. In principle the Bundesrat welcomes the introduction in Article 11 of an ancillary copyright at European level. This will allow editorial/journalistic services and the aggregation of such services to be protected from platforms and user rights to be strengthened.

The Bundesrat calls on the Commission to introduce a *de minimis* threshold (for snippets) for the ancillary copyright in Article 11 of the proposed Directive.

It also suggests that the clarification relating to hyperlinks in recital 33 be incorporated into Article 11.

It recommends that the entitlement of authors to a fair share in the proceeds from the exploitation of ancillary copyright be provided for in Article 11, as in Section 87h of the Copyright Act.

The Bundesrat emphasises that in the future it must still be possible for holders of protective rights to waive all or some of their rights in accordance with the principle of freedom of contract.

The protection period of 20 years would seem excessively long. The Bundesrat therefore asks the Commission to consider whether the 20-year period provided for in Article 11(4) is appropriate or should be shortened.

32. With regard to Article 12, the Bundesrat points out that economic studies have shown that limitation provisions under copyright law actually have no relevance to the primary market (see the 'DICE 2016' study). The sharing of publishers in the necessary remuneration of authors of scientific works, on which the rulings of the Federal Court of Justice and other national courts have been unfavourable, should therefore not form part of the relevant limitation provisions. Publishers — unlike authors — influence their revenue through the costing of their products. Suitably broad limitation provisions promote the generation of new knowledge by accelerating its dissemination.

33. The Bundesrat welcomes the fact that, in Article 13 of the proposed Directive, the Commission wishes to make service providers which store or provide public access to large quantities of works and other subject-matter uploaded by their users more accountable for compliance with protective rights and corresponding use agreements. It points out in this connection, however, that the measures adopted for that purpose must safeguard the interests of both rightholders and service providers and must not obstruct innovation on the part of service providers. That is why the Bundesrat asks the Commission to consider whether, in addition to the criterion of the 'large quantities' of uploaded works and other subject-matter in the wording of Article 13, a *de minimis* threshold should also be set in order to prevent barriers to innovation and start-ups.

34. The Bundesrat also asks the Commission to eliminate the discrepancies between the different language versions of Article 13, in particular between the German and the English version of the proposed Directive.

35. The Bundesrat welcomes the introduction of transparency obligations in Article 14 of the proposed Directive for the benefit of authors and performers, who will in the future be entitled to receive information on the exploitation of their works and the revenues thereby generated.

The Bundesrat asks the Commission to ensure that in Article 14(1) authors and performers are entitled to receive only information of the type that is normally available in the ordinary course of business, in order to avoid unnecessary bureaucracy.

It also asks the Commission to reconsider the restriction of the scope of Article 14(1) of the proposed Directive to 'those to whom they have licensed or transferred their rights'. By limiting the entitlement to those contractual partners, persons working on commissioned productions, for example, will be unable to exploit this right to information. All the more so, given that there is no requirement either for the contractual partner to obtain information concerning the further use made of the work

by the third party or for the third party to provide such information if their contractual counterparty has no entitlement to receive it.

36. The Bundesrat also asks the Commission to expand on the words ‘not significant’ in Article 14(3) in order to provide legal clarity and to prevent the risk of circumvention.

37. Moreover, the Commission welcomes the fact that the need for dispute resolution mechanisms has been recognised in Article 16 of the proposed Directive in order to implement the measures proposed to strengthen the position of authors. It should be evaluated in due course whether the voluntary procedure proposed is enough to enforce the legislation effectively.

Direct transmission to the Commission

38. The Bundesrat is sending this opinion directly to the Commission.