HUNGARY's submission

to the Consultation on Creative Content in a European Digital Single Market: Challenges for the Future (Reflection Document of DG INFSO and DG MARKT of 22 October 2009)

I. General remarks

Hungary expresses its gratitude towards the Commission for drawing up reflection document „Creative Content in a European Digital Single Market: Challenges for the Future (hereinafter referred as Reflection Document) and for the launching of the consultation process on a digital single market for creative content on-line. In our opinion, the adequate method to create a legal framework that enhances the accessibility of creative content in the digital single market and at the same time considers the interests of all parties concerned in a balanced way should be based on the permanent involvement of stakeholders and Member States into the preparation.

The future of the creative content is a topic of paramount interest for Hungary that is also clearly shown by its incorporation into the ES-BE-HU trio Presidency program. The present document, in line with the schematic character of the Commission's document, contains some preliminary reflections on the Reflection Document, and Hungary reserves its right to express its opinion later, in a more detailed or a varying manner concerning any topic or any group of topics.

The majority of the issues identified by the Commission, where any claims for modification arise, seem to be accommodated in multiple ways at the copyright system's actual development level. Therefore, we believe that, concerning the identified problems, it is indispensable that the Commission presents the alternative solutions in a more detailed manner and examines them by way of impact assessments. Nevertheless, those proposals that are unrealistic or would seriously endanger European values or would further increase the already alarming level of piracy, should be rejected at this stage. In this way, it can be ensured that Member States, following the adequate procedures, will be in the position to either jointly or individually, considering the principle of subsidiarity and proportionality, could choose from the alternative solutions and can adapt the copyright regime to the new challenges.

Taking into account the fact that the identified problems affect numerous elements of the copyright regime (exclusive rights and the rights of remuneration, the system of exceptions and limitations, contractual and licensing practices, application of technological measures, enforcement and indirectly the fight against piracy) and that these are generally in close correlation with each other (e.g. the difficulties of exercising the exclusive rights regarding remuneration claims, the safeguarding of exceptions and limitations when technological measures are applied), therefore, it is indispensable that when assessing the impact of each solution, the influence they exert on each-other is also taken into consideration, so that inconsistent initiatives can be avoided.

Considering that the alternative solutions of each problem are not necessarily optimal for all stakeholders, Hungary is in favor of the elaboration of those solutions that are all together acceptable by all relevant parties, such as rightholders, consumers and commercial users and

have, as far as the result is concerned, generally positive effects on all parties concerned. Nevertheless, rightholders' legitimate interests that are secured in high level legal instruments shall not be sacrificed in favor of easier licensing and better access to knowledge, in spite of the fact that these goals are also supportable, as this might cause serious negative effects on the creation of creative content. The idea of better accessing creative content can only be interpreted in the context of ensuring better circumstances for the creation of these content.

At this point, it should be emphasized that we do not deem the approach correct which always takes the consumer the weaker party and as such the only stakeholder that merits special protection. In the system of copyright, the „protection of the weaker party" shall be granted for the author, therefore, only a balanced consideration of two weaker parties' interest is possible, by emphasizing the fact that primarily it is not the copyright system that should provide for the protection of consumers' interests. The duly consideration of the information technology sector's interests also require long-term consideration. Making the licensing easier or ad absurdum abolishing it – as a short-term aim – does not match neither the basic long term strategy nor the content creating ambitions of the converging service providers and IT industry. Finally such an approach may eliminate the economical basis of the creation of new content.

We fully agree with the opinion that in the present situation the „one size fits all" approach cannot be upheld. There is no unity neither in the financing methods of certain types of works and performances nor in the traditions of the different cultural sectors, or in the size or the geographical scope of the licensing of single works or performances. This is equally true in respect of traditional or newly developed business models, practices of applying digital rights management and as well as regarding consumers' behavior. For this reason we support further elaboration of flexible solutions, and such legal constructions that give the possibility of choice to the stakeholders.

Hungary supports a complex approach when solving of the identified problems, as in the course of modernizing copyright regulation concerning digital content, it also is imperative that its relation to other fields of law is clearly settled. Especially the questions of data protection should be kept in mind, as an issue that is tightly connected with the liability of service providers (a key issue in enforcement) or consumer protection aspects (balancing the possible negative effects caused by the application of technological measures). The complex approach is reasonable in view of the evaluation of cultural market sector's financing models since they might be different regarding the different type of works.

Finally, among the general remarks we would like to note that the Commission's document, in our view, does not deal in adequate depth with the problem that strikes all branches of copyright (and all fields of intellectual property): namely rendering the fight against piracy and counterfeiting more effective. It shall become a key issue in the impact assessments being made, since no solutions that further deepen this problem shall be supported.

The examination of databases which contain the data of rightholders, works, and licenses and the better accessibility thereof, inclusive the setting up of new ones if necessary can be broadly supported.

II. Special remarks

In relation to the identified problems concerning exceptions and limitations – taking into account the Commission's intentions that were announced in the Communication on copyright in the knowledge economy – it can be agreed that the continuation of harmonization is needed because there are still differences between the Member States' solutions in significant aspects.

Firstly, it would be reasonable to establish a uniform approach regarding exceptions and limitations defined in Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and in other directives.

In addition, further approximation of the conditions concerning exceptions and limitations can also be reasonable especially in cases assessed in the Commission's Communication on Copyright in the Knowledge Economy. Moreover, such an approach seems to be necessary in case of some aspects of private reproduction (especially the determination of the scope of the equipments in cross-border relations).

In the medium term, a more detailed harmonization of the existing exceptions and limitations seems more a reasonable approach rather than the widening of the scope of exceptions and limitations. However, where this latter may occur (administration of orphan works or legal status of consumer/user-created/generated content) we consider as adequate the further examination these phenomena and the assessment of a larger scope of solutions (fees, special licensing systems).

Concerning a possible obligation of mandatory introduction of some exceptions and limitations by Member States, it is necessary to examine whether it is in line with those international treaties of which Member States and the EU are contracting parties. Along this assessment, it shall also be examined which are those exceptions and limitations that fall within this approach and in the case which it is reasonable to take away the Member State's possibility to ensure the legitimate aim behind such exceptions and limitations by a different regulatory method. In case there is no obstacle to use this approach, it seems that it should be only applicable concerning those exceptions and limitations behind which it exists an extremely important social aim (the freedom of information, the freedom of expression, the freedom of education and scientific life or cultural preservation) and which interests are ensured by all or by the majority of Member Sates by limitation of the author's exclusive right.

A further aspect where evaluation is needed is the current European Union legislation concerning the connection between exceptions and limitations and the use of technological measures. On the one hand it should be examined whether there is a need for widening the scope of those exceptions and limitations which, according to the rules in force, can prevail in case of the application of technological measures. On the other hand it seems adequate to review, in case of online contracts, the necessity of upholding the approach that the right holder might exclude the application of any exceptions and limitations. It is especially

justified to elaborate on this possibility in relation to the above-mentioned limitations that assert special social interests.

Detailed assessment of the possibilities is also needed in case of cross-border aspects, bearing in mind especially that the limitation of the author's right in one Member State should not give the possibility of commercial, but license free use in another Member State.

We consider the Commission's opinion expressed in connection with the collecting societies – especially in the light of the European Union level events and changes of the past years – somewhat vague. The Commission's approach still does not bear in mind the basic principle that the functioning of collective societies has a decisive role in smaller countries' copyright system and performs a key task in defining national cultural identity.

Focusing on this aspect, Hungary is committed to an approach which ensures the uniform treatment of all Member States and collecting societies, as this can guarantee the harmonious development of the internal market.

In connection with the harmonization of the operation and the structure of collecting societies Hungary is open for further assessments. These shall precede the creation of a new, more efficient right management system for users and right holders.

As to the aspect of reciprocal representing system and multi-territorial licensing managed by collecting societies, on the one hand, legislative initiatives concerning multi-territorial licensing shall be taken into consideration. On the other hand, prior to the preparation of any European Union level legislation with binding effect it is worth and needed to evaluate the effects of the Commission's decision taken in the CISAC case first. It is based on the fact that the decision does not only affect the contents of the representation agreements but has an impact on the character of the relationship between the collecting societies and even on the number, size and tasks of the collective societies, and – in a broader meaning – it might influence cultural diversity too. The scope of the field subject to legislation might also significantly change in the close future. Furthermore, it is needed to become familiar with those results that are deriving from the Commission's examinations held regarding collective management organizations.

We hereby finally refer to the circumstance that the definitions used by the Commission in this matter either do not follow the exact terminology of international treaties and the acquis communautaire. Therefore, it is difficult to understand properly how the Commission intends to make use of the differences between extended and compulsory collective management in possible new regulatory proposals.

Concerning the licensing of multi-territorial online uses, we support a more detailed analysis of the solutions proposed by the Commission, directed towards the application of already known and efficient models of easier acquisition of rights in the online environment. We agree that it is especially necessary that the licensing of satellite broadcasting inside the EEA and the licensing models concerning EU-wide mechanical reproduction of musical works' are profoundly examined.

Preliminary – stemming from the similarity in the immaterial character of the use – we consider the licensing model of satellite broadcasting the easiest adaptable solution in respect

of the right of making available works to the public by means of download. It shall be mentioned however that in the online environment the right of reproduction is also relevant, so the model of mechanical licensing shall be taken into consideration too.

Nevertheless, the principle of exhaustion is not the adequate means for the efficient handling of the current problems. The reason therefore is the lack of the tangible copy of the work concerning which the relevant right could exhaust. In all those cases where the digital copy of work can be identified – e.g. because of the placement of right management information –a further circumstance shall duly be considered when counting with the application of the principle of exhaustion in digital environment. This concerns the act that the identification of the digital copy of the work is even more difficult than in case of physical copies, so their exposure to piracy is even larger.

The introduction of these solutions by reservation of exclusive rights and in some cases with transferability thereof, combined with an inalienable right to equitable remuneration can provide for imaginable alternatives. It shall in any case be avoided that such regulation is created that no license for use shall be requested within the EU. It should be equally avoided that the interests of users that have significant market positions or Member States that have major economic potential would prevail over the interests of those authors who live in linguistically isolated countries, in parallel indirectly push the cultural diversity into the background too.

The idea of creating a European copyright title can be said to be an interesting suggestion, however, it is most important to handle this idea with great caution. This also derivates from the hardly doubtable negative effects that appear besides the factual positivity of some European forms of protection introduced or to be introduced in the field of industrial property (i.e. European Union trademark, European Union designs, European Union plant variety protection, European Union geographic indication protection, European Union patent). Taking into consideration that according to our opinion there is no legal basis for this idea in the Treaty of the European Union (TEU), we definitely refuse the further examination of this possibility. This perception is also underlined by the fact that this form of protection cannot operate in parallel or simultaneously with the national forms of protection and the reasonable aims of the market can be reached by tools which interfere less with the national forms of protection.

It shall be emphasized that the cause of the territoriality of copyright protection that is acknowledged also by the Commission is the factual circumstance of the linguistic differences of Europe that is not wished to be destroyed by anyone. In addition, this is not the only reason for the territoriality of the protection. It is similarly important that the character of culture is basically also national and the destruction of this nature of the culture cannot be considered as a valid aim.

According to our opinion, Article 118 of the TEU does not serve the harmonization of copyright but intends to establish the separate legal basis for already achieved and current ambitions aiming at the creation EU-wide forms of protection in the field of industrial property. This is also supported by the fact that the paragraph (1) of the referred provision refers to the „setting up of a centralized Union-wide authorization, coordination and supervision arrangements” that cannot be established by the EU in the field of copyright since this would be contrary to the prohibition of formalities regulated in paragraph (2) of Article 5

of the Berne Convention. This provision is an obligatory norm for the EU and its Member States also based on the Article 1 paragraph (4) of the WIPO Copyright Treaty since 14 December 2009. This approach is also strengthened by paragraph (2) of Article 118 of the TEU that contains a rule regarding the „language regime concerning the legal entitlements of European protection" which is obviously an absurd rule in case of copyright protection that protects literary, scientific and artistic works. According to this in this field the EU cannot have any competence.

Should the Commission – even despite all the aforementioned arguments – still consider Article 118 of TEU as an appropriate legal basis, the examination whether the formality prohibition established by the Berne Convention will further on become necessary. It is strongly questionable whether, contrary to industrial property rights, the principle of no formalities allows in practice for the effective operation of a national and a European Union level copyright protection simultaneously. If this is not possible or the European Union level protection would cause the abolition of national protection then the question arises and it should be clarified whether the competence of the EU based on Article 345 of the TEU extends even to the abolition of the national copyright system. The EU law cannot harm and especially cannot destroy national property regimes the part of which is the national copyright regime in accordance with paragraph (2) of Article 17 of the Charter of Fundamental Rights of the European Union which is considered to be compulsory based on the case law of the European Court of Justice and on the TEU.

In our opinion, such a new EU intellectual property title would have a dramatic and undesired impact on the structure of the cultural markets (because not every user would claim EU level licenses and this fact alone could lead to the significant rearrangement of the market). Apart from this it could have a deep influence on cultural diversity and on the chances of law enforcement, not to mention that those parts of the copyright regime that today are in national competence (in particular moral rights) would completely loose their significance.

By considering all the above we emphasize that the idea of the Community copyright title is not supported by Hungary neither from legal, cultural nor from economical points of view.

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