

EU Copyright Law, Lobbying and Transparency of Policy-making

The cases of sound recordings term extension and orphan works provisions

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Abstract: The objective of this paper is to discuss EU lobbying in the area of copyright. Legislation needs to regulate the legal position of various different stakeholders in a balanced manner. However, a number of EU copyright provisions brought into effect over recent years were highly controversial and have led to suggestions that powerful lobbying forces may have had some influence. This article investigates the effects of lobbying on copyright law-making in Europe. A specific comparative and multi-faceted analysis is provided of the legislative process for two recently adopted directives: 2011/77/EU which extends the term of protection of sound recordings and 2012/28/EU which introduces certain

permitted uses of orphan works (some references are also made to the ACTA case). Firstly, a short presentation is given of the legal bases for the EU consultation process and lobbying. Next, an analysis is provided of the two cases, taking into consideration the policy-making procedures (with special focus on how the consultation process was handled), the legal solutions proposed and adopted and the various stakeholders' claims. Lastly, it asks why some interest groups were successful and some others failed (the analysis identifies two types of factor for the effectiveness of lobbying: those resulting from stakeholders' actions and those connected with the consultation process).

Keywords: Copyright; Law-Making; Policy-Making; Interest Group; Lobbying; Stakeholder; Consultation; Transparency; Orphan Work; Sound Recording; Phonogram; EU; Library; Music

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A. Introduction^{1 2}

1 In recent years, the European Commission has been very active in the area of copyright legislation. Its activities, undertaken within the wide framework of the digital single market, concern issues that are important as regards the protection and use of copyrights and related rights. They also relate to areas connected with media policy and digital culture. Within the past decade alone, the

Commission's initiatives have resulted in the following EU directives: 2010/13/EU on audiovisual media services³, 2011/77/EU extending the term of protection for sound recordings⁴, 2012/28/EU on orphan works⁵ and 2014/26/EU on collective management of copyright and related rights⁶. It has also carried out work in relation to other issues, such as private copying levies or out-of-commerce works. Moreover, in 2013–2014 the Commission ran public consultations on the review of the EU copyright rules⁷ and conducted the 'Licences for Europe'

stakeholder dialogue⁸. The latter sought to ‘deliver rapid progress in bringing content online through practical industry-led solutions’⁹ and covered the following issues: 1) cross-border access and the portability of services, 2) user-generated content and licensing for small-scale users of protected material, 3) audiovisual sector and cultural heritage institutions, 4) text and data mining. Currently, in connection with the above-mentioned preparatory works, the Commission is carrying out work in order to deliver ‘a copyright modernisation initiative’.¹⁰

- 2 As copyright provisions regulate different areas connected with the creation, dissemination and exploitation of protected content, stakeholders of various types are affected by them. The main stakeholders include rights owners (such as authors, artists, publishers, various entertainment industries, broadcasters, etc.), users (using protected content for private or public purposes) and other parties (e.g. collecting societies, internet service providers). These parties (or the organisations officially representing them) undertake lobbying activities of various types in order to influence the law, sometimes with great success. The rapid development of new technologies and the challenges of exploiting immaterial goods, mean it is the voice of the various creative industries (especially entertainment industries in the music and film sectors) that is particularly audible. Also, these rights holders are exerting strong global pressures to make copyright rules stricter; as but one example among many, let us consider the Anti-Counterfeiting Trade Agreement (ACTA)¹¹. Nowadays parallels are being made with the ongoing negotiation process for the Transatlantic Trade and Investment Partnership (TTIP)¹². The scope of the EU directives and that of ACTA draw attention to the copyright law-making process, especially with respect to the transparency of policy-making, the consultation process, the representation of the various different interests and the user protection (in terms of the copyright regime and fundamental rights and freedoms).¹³
- 3 Lobbying, in general, forms part of the democratic political process and permits society to participate actively in law-making procedures. It plays an important role in European Union law-making and is shaped by the specificity of the EU institutional system. Its large scale and well-developed mechanisms result especially from the openness and positive perception by the European Commission. The Commission sets the EU’s policies and is therefore the most significant target of lobbying¹⁴. The Commission is willing to cooperate with interested parties and often seeks external expertise¹⁵ (this approach is tied in with the ‘democratic deficit’ and ‘resource deficits’ of this institution¹⁶). It has repeatedly underlined the benefits coming from stakeholders’ input to the creation and performance of EU sectoral policies.¹⁷ The open attitude of the Commission towards interest groups has entailed

their inclusion in its policy-making process and in work on legal mechanisms. In practice, lobbying by stakeholders is provided for, *inter alia*, within the process of consultation with interested parties (also referred to as the ‘dialogue with the civil society’¹⁸)¹⁹ which constitutes a kind of institutional framework for lobbying actions. Apart from contacting the Commission officials in Directorates General, stakeholders strive to address their interests at the level of the Commissioners’ cabinets. Also the European Parliament – due to its increasing role in the EU law-making process²⁰ and its ‘democratic credentials’ – has become the ‘natural venue’ for lobbyists, especially those striving for protection of citizens’ interests.²¹ Another lobbying target is the Council of the EU, although this is where it becomes difficult to exert influence. This is because, first, at this stage most provisions are already shaped and secondly, it requires taking the ‘national route’ (contrary to the ‘Brussels route’) which means the necessity of conducting lobbying at the national level²². Although the European Parliament and the Council amend the text, “it is not easy to radically change the text of the Commission. (...) This means that it is important for any particular interest to be taken into account as early on as possible, ideally in the Commission’s initial proposal”²³. Having this in mind, the article will, to a large extent, focus on lobbying at the stage of the Commission work.

- 4 Lobbying by interest groups and the consultations on EU policies held by the European Commission are two cross-cutting processes. The European Commission creates many opportunities for stakeholders to participate in the debate on the possible development of EU policies. In particular, it runs different types of consultation, such as white and green papers, public hearings, conferences, seminars, advisory groups or bilateral consultations. These initiatives facilitate access to the Commission’s officials and stakeholders use these means to articulate their interests and strive for better protection of their interests. It is also a way for them (likewise for other entities, independent experts, citizens etc.) to affect EU policy direction and shape future legal mechanisms.
- 5 In general, at the EU level lobbying has a lawful and professional character. It is provided for in a structured way by a variety of entities representing interests of third parties or a given interest group²⁴. Among such entities are international or European branch federations (which constitute ‘umbrella’ organisations for national bodies, businesses, NGOs etc.), national business or industry or citizen associations, national or European NGOs, corporations, consultancy and law firms, think-tanks, representations of regions etc. Lobbying consists mainly of presenting to the legislator demands for establishing a certain level of legal protection by either changing the law or keeping the legal status quo. It may be performed in the form

of direct lobbying, either in an informal or formal way (i.e. by submitting position papers, legal and/or economic reports etc.), within the consultations initiated by the European Commission or beyond. It may also take the form of indirect lobbying. The latter consists of building social support by appealing to the general public (e.g. by conducting campaigns in the media) and/or by calling citizens to undertake action targeted at the legislator (e.g. by initiating and coordinating grassroots actions, such as: petitions, street demonstrations, activities in cyberspace of various types).²⁵ The indirect lobbying is becoming an increasingly effective method, especially in view of the development of new media tools and Internet-based communication technologies (like social media). Citizen participation in large-scale street demonstrations and cyber-protests, as was the case during the campaign against ACTA in 2012²⁶, constitutes an important development in the EU policy-making processes in the area of copyright²⁷.

- 6 Another kind of activity is that of academics who actively participate in the public debate on possible changes of law. Besides the research activity, sometimes they also run actions targeted at the legislator (e.g. by participating in consultations, submitting studies or issuing open letters to EU politicians). In most cases they look at the public interest and the fair balance of interests between various different stakeholders. Therefore, their activity falls within a broader term of 'advocacy', rather than of 'lobbying', as there is no direct link between entities providing actions (e.g. research centres, academics) and the third party or the interest group²⁸.
- 7 The objective of this paper is to discuss EU lobbying in the area of copyright. It concerns lobbying activities undertaken during the European Commission's work on the proposal for a directive extending the term of protection of sound recordings and the proposal for a directive introducing uses of orphan works (references are also made to the ACTA case). Work on these two EU initiatives was conducted by different Commission units in parallel, which has made it possible to provide a comparative multi-faceted analysis of these two cases. Both proposals (like the directives themselves) were highly controversial and have been widely criticised for their limited scope and the need for such narrowly focused legal mechanisms. Also, the law-making process adopted has been questioned. As legislation needs to regulate the legal position of various different stakeholders in a balanced manner, there have been suggestions that powerful lobbying forces may have had some influence. Therefore this article investigates the effects of lobbying on copyright law-making in Europe. It focuses, on the one hand, on the Commission's policy-making and, on the other, on the participation of stakeholders (including lobbies) in the creation of EU policies. Firstly, a

short presentation is given of the legal basis of the EU consultation process and lobbying (the issue of lobbying poses challenges to law-makers). Next, an analysis is provided of the two cases, taking into consideration the policy-making procedures (with special focus on how the consultation process was handled), the legal solutions proposed and adopted and the various stakeholders' claims. Lastly, the article examines why some interest groups are successful and some others fail (the analysis concerns factors stemming from the groups' activities and from the nature of the consultation process).

B. Legal bases for the EU consultation process and lobbying

- 8 As things stand, there are no binding provisions concerning either the consultation process or lobbying to the European Commission. However, a debate on the transparency of the policy-making process, that was triggered by the issuing of the *White Paper on European Governance*²⁹ in 2001, led to various actions being taken, resulting in the establishment of a set of principles and rules relating to the consultation process and lobbying.
- 9 Yet in 2001, as part of the European initiative *Interactive Policy Making*, the Commission created a website called *Your voice in Europe*³⁰. The objective was to establish an EU 'single access point' to a variety of consultations and other tools that would enable citizens and organisations to play an active role in the European policy-making process (i.e. to get information about consultations and to submit contributions).
- 10 Following an announcement in the *White Paper on European Governance*, in 2002 the Commission established the *General principles and minimum standards for consultation of interested parties*³¹. The general principles were defined as: a) wide participation throughout the policy chain, from conception to implementation, b) openness and accountability of the institutions (by ensuring the visibility and transparency of consultation processes run by the Commission), c) effectiveness of the consultations (by running consultations at an early stage of policy development and by respecting the principle of proportionality) and d) coherence of the actions taken by the Commission departments. In turn, the minimum standards for consultation related to the following issues: a) clear content of the consultation process, b) consultation target groups (relevant parties should have an opportunity to express their opinions), c) publication (adequate awareness-raising publicity, e.g. open public consultations should be published on the Internet and announced at the 'single access point'), d) time limits for participation (at least 8 weeks for reception

of responses to written public consultations and 20 working days for meetings), e) acknowledgement of contributions and feedback (results of public consultations should be displayed on websites linked to the single access point on the Internet). It should be noted, however, that the general principles and minimum standards for consultations apply to public consultations only (especially those that are run in connection with Green Papers³² or other Commission initiatives that are subject to the Impact Assessment of the economic, social and environmental consequences³³).³⁴

- 11 Simultaneously, in 2002 the Commission issued another document (also announced in the White Paper on European Governance) on the *Collection and Use of Expertise: Principles and Guidelines*³⁵. The core principles to be applied by the Commission departments were as follows: a) to seek advice of an appropriately high quality, b) to be open in seeking and acting on advice from experts, c) to ensure that methods for collecting and using expert advice are effective and proportionate. In turn, the guidelines related to: a) planning ahead, b) preparing for the collection of expertise, c) identifying and selecting experts, d) managing the involvement of experts, e) ensuring openness. As a result of subsequent work, in 2010 a register of expert groups was set up together with new horizontal rules for Commission expert groups³⁶. In particular, the following types of members were envisaged (Rule 8): 1) individuals appointed in their personal capacity; 2) individuals appointed to represent a common interest shared by stakeholders in a particular policy area (not to represent an individual stakeholder); 3) organisations, including companies, associations, non-governmental organisations, trade unions, universities, research institutes, union agencies, union bodies and international organisations; 4) Member States' authorities at national, regional or local level. Also, the selection process and appointment of members was defined (Rule 9). Although rules for expert groups are established, they do not solve many practical problems related to their functioning, e.g. absence of independent experts or unbalanced representation of interest groups³⁷ (see the lobbying effectiveness factors identified in terms of the consultation process, point 4.2 of this paper).
- 12 Another measure, this time concerning lobbying, was the European Transparency Initiative of 2005³⁸. Its objective was to establish a voluntary register for interest groups and a code of conduct and to increase transparency by applying (in a more effective way) standards for consultations. These works resulted in the creation in 2011 of a Transparency Register, which is common to the European Parliament and the Commission. This Register ultimately concerns 'organisations and self-employed individuals' acting with the objective of directly or indirectly influencing

the formulation or implementation of policy and the decision-making processes of the EU institutions³⁹. By registering, entities are obliged to follow the code of conduct. It should be underlined, however, that the obligation to register applies only to entities that want to obtain accreditation from the European Parliament and a pass. For consultations run by the Commission, registration is not compulsory (contributions from registered and nonregistered parties are published in separate documents). It is clear, therefore, that the way in which the register works (and in particular the mere fact of being registered) does not influence lobbying practices towards the European Commission (both carried within the consultation process or independently) and stakeholders' input. In consequence, the register does not solve the problems associated with the differing effectiveness of certain lobbying groups (see point 4 of this paper).⁴⁰

- 13 The Commission has recently (19.05.2015) issued the Better Regulation Guidelines⁴¹. The Better Regulation initiative aims at making the EU action more effective by ensuring that "policy is prepared, implemented and reviewed in an open, transparent manner, informed by the best available evidence and backed up by involving stakeholders"⁴². The Guidelines cover the whole policy cycle: policy design and preparation, adoption, implementation (transposition, complementary non-regulatory actions), application (including enforcement), evaluation and revision. The document includes *inter alia* Guidelines on Stakeholder Consultation. These Guidelines' objective is to complement and further define the scope of the General principles and minimum standards for consultation of 2002. It is worth mentioning that a lot of attention is paid to the mapping of stakeholders. The following categories of stakeholder are foreseen: citizen / individual; industry / business / workers' organisations; EU platform, network or association; organisation / association; public authority; consultancy; research / academia; other. In particular, an accent is put on the need to distinguish between stakeholder categories, as well as to differentiate within a specific stakeholder category. It is stressed, moreover, that for a successful stakeholder mapping, the following aspects should be considered: to identify target groups that run the risk of being excluded; to seek balance and comprehensive coverage of interests; to identify the need for specific experience, expertise, technical knowledge and/or involvement of non-organised interests; to avoid 'regulatory capture' (i.e. the same businesses/representative organisations should not always be exclusively consulted, as this increases the risk of listening to a narrow range of interests); to use clear and transparent criteria for selection of participants (e.g. for targeted consultations like meetings, conferences or other types of stakeholder event with limited capacity, pre-selection of participants may be necessary).

As concerns stakeholders' input, the Guidelines omit the issue of the need to identify duplicative contributions, which was pointed out in the Public Consultation Document on Stakeholder Consultation Guidelines⁴³. In turn, a positive aspect of the Stakeholder Consultation Guidelines is that they refer to all kinds of consultation, i.e. the open public consultations and the targeted ones. If we consider the lobbying effectiveness factors identified in terms of the consultation process (see point 4.2 of this paper), it seems that stressing the need to identify categories of stakeholders / interests would constitute a step in the right direction towards balancing the interests of the various stakeholders and preventing the negative effects of offensive lobbying by certain interest groups (only).

C. Impact of lobbying on the making of copyright law

14 Both in the case of extension of the term of protection for sound recordings and in that of the exploitation of orphan works, the law-making process initiated by the European Commission ultimately led to adoption of a new directive (respectively Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, and Directive 2012/28/EU on certain permitted uses of orphan works). Although the legislative process in these two cases concerned the same area (copyright rules), it was conducted in parallel by two different Commission Directorates-General, namely DG Internal Market and Services (DG MARKT) and DG Information Society and Media (DG INFOS)⁴⁴. The former, responsible for EU policy in the field of copyright, dealt with the term of protection of sound recordings, while the latter coordinated the orphan works issue within the EU's Digital Libraries Initiative⁴⁵. Work on both issues was conducted within the same time frame (the first decade of the 21st century and the early 2010s), which makes it possible to provide a comparative multi-faceted analysis and draw conclusions on the Commission's policy-making in the area of copyright.

I. Interest representation

15 Lobbying in the area of copyright is mainly carried out by international or European branch federations acting on behalf of their members, primarily national organisations or corporations representing particular interest groups or various different creative sector industries. This does not mean, however, that other entities (such as national branch organisations, international and/or national institutions, think-tanks, NGOs, corporations, etc.) may not undertake lobbying activities independently; indeed, this could to some extent be observed in the cases

being examined. Usually European or international federations (unlike national organisations) are more effective than national entities, as lobbying constitutes their only activity and also due to the fact that national bodies often do not have enough resources to conduct lobbying activities at European level on a regular basis.

- 16 International organisations bring together various different groups concerned by copyright rules: copyright holders (such as authors, co-authors), rights holders of related rights (such as performing artists, phonogram producers, broadcasters), users of protected content (such as consumers of protected immaterial goods, libraries, archives) and other parties (such as collecting societies, cable operators, internet service providers etc.).
- 17 Interest representation in the copyright field is characterised by there being a large number of actors. Certain interest groups are represented by more than one branch organisation (good examples are representatives of artists⁴⁶, creators⁴⁷ or publishers⁴⁸). Such organisations usually have highly qualified personnel who are experts in the specific problems of the sector concerned, including copyright provisions. Usually, international organisations that represent the interests of rights holders are sector-specific, unlike those representing users which tend to have a more horizontal character⁴⁹.

II. Case 1: Sound recordings

- 18 In 2008 the European Commission announced⁵⁰ the launch of legislative work aimed at extending the term of protection of sound recordings and improving the economic situation of performing artists (previous discussions on this issue had been ongoing in the UK until the British government adopted the Gowers' recommendation⁵¹ not to prolong the term of protection for sound recordings; also, many parties commented on the duration of related rights during public consultations on the review of the EC legal framework in the field of copyright and related rights, run by the European Commission in 2004⁵²). The Commission proposal envisaged extending the term of protection from 50 to 95 years and introducing two new additional clauses in favour of music performers⁵³, namely provisions concerning the establishment by record companies of special funds for performers and a 'use it or lose it' clause. The work ultimately led to a new directive⁵⁴ being issued in 2011 extending the term of protection of sound recordings from 50 to 70 years and introducing the two above-mentioned measures together with a 'clean slate' clause⁵⁵.
- 19 The Commission's legislative work on the proposal for a new directive took only a few months (February–July 2008). The Impact Assessment⁵⁶ concerning

this initiative, issued in April 2008, mentioned the following consultations run by the Commission: 1. public consultations on the review of the EC legal framework in the field of copyright and related rights (2004), 2. bilateral consultations with performers' associations and the recording industry (2006–2007), and 3. independent studies (2006–2007). In turn, the proposal for a directive⁵⁷ mentioned only the public consultations of 2004 and the bilateral consultations in the period 2006–2007 and underlined 'no need for external expertise'. The latter was obviously untrue, as in 2005, the Commission contracted out a study entitled "The Recasting of Copyright & Related Rights for the Knowledge Economy"⁵⁸. The fact that the Commission ignored this study met with major disagreement from academics.⁵⁹ Also, it should be noted that some of the studies were not independent⁶⁰ as they were prepared for the benefit of groups representing rights holders⁶¹. It should be noted, too, that the consultations of 2004 were not dedicated to the issue of the term of protection of copyright and related rights (their scope was much broader). In addition, the Commission declared there that "the term of protection for phonogram producers does not cause particular concern since the term has been harmonised in the Community"⁶². Also, attention should be drawn to the narrow scope of other consultations (taking into consideration the types of consulted parties).

20 Lobbying activities were carried out by various different parties. Among the advocates of the planned changes were representatives of the phonographic industry and performing artists from the music sector (with partial support from the audiovisual sector)⁶³. These groups were pressing for an extension of the term of protection of their rights and the establishment of additional clauses that would protect their interests (for instance, a 'use it or lose it' measure). Among the various arguments were those focusing on the bad legal and economic situation of performers – especially session musicians – at the end of their lives (a flagship motto), online piracy of music, increasing marketing costs, the need to make investments in 'new talent' and the need to adapt the level of protection of performances in the EU to the protection available in the USA. These parties were supported by some other groups representing music publishers and the entertainment retail sector⁶⁴, who were also aiming to strengthen their rights. These groups' lobbying activities were carried out within the (albeit narrow) consultation process, as well as beyond it. Besides the informal lobbying, the parties' activities consisted of issuing formal letters, position papers (both independently and in coalitions) and expert reports, as well as coordinating grassroots actions (petitions). At the stage of discussion in the European Parliament, groups (mainly performers) were actively working on the amendments to the formal proposal, especially on the meaning of the additional clauses, achieving a great deal of success.

Also, once the proposal was in the Council, British musical artists' representatives strongly lobbied the UK government. This resulted in a change to the British position (on March 27, 2009, the UK voted against the Commission proposal; however, it eventually supported an extension up to 70 years and a change of the 'transitional' additional measures for performers to 'permanent' ones)⁶⁵.

- 21 The opponents of the Commission proposal included groups representing the interests of users, namely consumers of immaterial goods⁶⁶ and institutions representing the cultural sector (notably libraries)⁶⁷. These parties were against extending the terms of related rights (but not against the notion of the need to improve the legal situation of performers). The lobbying by these groups consisted of issuing formal letters and position papers⁶⁸ in which, moreover, references were made to the critical opinions of academics (the latter criticised the scope of the Commission proposal as well as its arguments and indicated alternative ways of improving the difficult situation faced by performing artists). Unlike the activities of the proponents, the opponents' lobbying had a defensive character. This resulted, among other things, from the fact that the launch of the Commission's legislative work was announced unexpectedly and that the planned timescale for issuing the proposal for a new directive was short. The low level of lobbying carried out by these groups before this announcement was due to the fact that, in the earlier documents, the Commission had not declared the intention to prolong either copyright or related rights. These parties' lobbying was strongly supported by the activities of academics⁶⁹ urging the Commission and the European Parliament to consider independent evidence on the issue of copyright term extension and to reject the Directive in its proposed form.⁷⁰
- 22 The scope of both the proposal and the directive reflects the claims of the phonogram industries and music performers, as the legal instrument provides for a term extension as well as additional measures for musicians. The Commission proposal (just like the Directive) gave rise to many objections.⁷¹ The opponents, including academia, criticised the idea and arguments, the scope of the provisions and the way in which the legislative work was conducted. It was pointed out, in particular, that extending the term of protection would solve neither the bad economic situation of performers (the additional clauses for performers would not actually improve their economic situation) nor the industry problems related to online piracy and necessary investments (not to mention that this is not the purpose of copyright provisions). The main defect of the proposal (and the Directive) was that the legal instrument applied (unjustly) only to performances fixed in phonograms and totally omitted the interests of the audiovisual sector (it did not apply to

performances recorded on videograms though this issue was discussed in the European Parliament while works on amendments were underway). Moreover, it did not take into account either its impact on end users or the issue of creative exploitation of works being in the public domain.

- 23 Bearing in mind the scope and type of the consultations mentioned above, and especially the fact that the Commission did not launch any public consultations specifically concerning the issue of extending the term of protection of sound recordings, it can be stated that groups representing phonogram producers and performers were favoured, as they had greater access to the Commission officials in the consultation process. The narrow scope of the consultations that took place and the controversies over the proposed legal instrument lead to the conclusion that the whole Commission initiative to extend the term of protection of sound recordings resulted from effective lobbying by the phonographic industry and musicians (artists and performers), as these groups were taking offensive action and were the most interested in changing the legislation. The power of the music sector as a lobby is demonstrated by the high degree to which the interests of phonogram producers and musicians (only) converge with the content of the directive (only their arguments were taken into account).

III. Case 2: Orphan works

- 24 The issue of orphan works was raised by public cultural institutions (mainly libraries and archives) participating in the EU Digital Libraries Initiative⁷², having arisen while they were digitising their collections. It turned out that, in many cases, it was not possible to establish whether works were still protected by copyrights and/or who the rights owner was and/or how to find him in order to get his consent for exploitation of such a work.
- 25 In the period 2006-2011 the European Commission undertook a number of consultations on the orphan works issue (see below). In 2010 the European Parliament called on the Commission to submit a legislative proposal for an orphan works directive⁷³. Following the Commission proposal of 2011⁷⁴, in 2012 the European Parliament and the Council issued a new Directive on certain permitted uses of orphan works⁷⁵. This legal mechanism (both the proposal and the Directive) applies to cultural institutions (only), to works in print in the form of books, journals, newspapers, magazines or other writings (the Directive also covers works and other protected subject-matter that are embedded or incorporated in the works in print; for instance, visual works), audiovisual works and phonograms (stand-alone visual works are excluded). While the proposal stated
- that the choice of legal mechanism would be left up to the Member States (a 'mutual recognition of national solutions' concept), the Directive introduced a new exception or limitation to the rights of reproduction and making available to the public (in accordance with Articles 2 and 3 of Directive 2001/29/EC⁷⁶). The permitted uses (making available and reproduction) are possible after carrying out a diligent search for rights holders in respect of each work (there are no provisions for mass digitisation) within the public interest missions of these institutions only⁷⁷. The Directive provides for mutual recognition of orphan work status and fair compensation for rights holders that put an end to the orphan status of their works (in the proposal the provision also concerned uses other than those within the public interest missions of institutions).⁷⁸
- 26 The European Commission ran various different types of consultation concerning the orphan works issue. Most of the consultations took place within three advisory groups, namely the High Level Expert Group on Digital Libraries (HLEG), Copyright Subgroup (2006–2009), the Working Groups on Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works (2007–2008), and the Reflection Group (or "Comité des Sages") on Bringing Europe's Cultural Heritage Online (2010–2011). Apart from this, stakeholders could also participate in the debate within the following initiatives: the Stakeholders' Seminar (2007), the Green Paper on Copyright in the Knowledge Economy (2008), the Public Hearing on Orphan Works (2009) and on a bilateral basis (2009–2010).⁷⁹ This finally led to the inclusion of this issue in the Digital Agenda for Europe, where the Commission announced the creation of 'a legal framework to facilitate the digitisation and dissemination of cultural works in Europe by proposing a Directive on orphan works'⁸⁰. Among the parties consulted were groups representing cultural institutions (notably libraries and archives) and right holders. However, the absence of representation of other kinds of users (such as consumers of immaterial goods interested in further creative exploitation of orphan works) should be noted. Another weak point of the consultation process was the restricted nature of the consultations at the early stage of the work (only advisory groups, no public issue-tailored consultations).
- 27 The parties most interested in introducing a legal mechanism facilitating the exploitation of orphan works were public cultural institutions⁸¹. They called for the establishment of a legal mechanism at the EU level that would enable 'safe' exploitation of orphan works, i.e. which would make it possible to avoid the risk of paying damages for the unlawful exploitation of such a work in the event of reappearance of the right holder. At the beginning, parties pointed out the significance of the problem, its scale and potential legal solutions (they also indicated

certain mechanisms that were already in place)⁸². In-depth discussions were subsequently conducted within advisory groups and further consultations. In particular, cultural institutions called for the establishment of another exception or limitation to rights in relation to the practice of mass digitisation of works. Also, they called for the legal solution chosen to cover all kinds of works (published and unpublished) from all creative sectors and all types of exploitation (both for statutory and commercial purposes). These parties lobbied independently and via various consultation fora. Among the opponents of this initiative were representatives of rights holders of copyright and related rights from all creative sectors (text, sound, visual, audiovisual)⁸³. These groups became involved in the discussions at the advisory group stage. Their demands concerned, in particular, the following issues: compulsory licences for cultural institutions for exploitation of orphan works (instead of a new exception or limitation to the rights); licence fees to be paid to the respective collecting society (both for commercial and non-commercial exploitation); exclusion of the possibility of exploiting unpublished works; the need to search with due diligence for rights holders in relation to each work⁸⁴ (as opposed to the mass digitisation of works).⁸⁵

- 28 The Commission proposal mainly reflected the recommendations of the High Level Expert Group on Digital Libraries, particularly by adopting the concept of mutual recognition of national solutions and of the need for a diligent search for rights holders prior to the use of a work⁸⁶. The final legal solution reflects the main claim of cultural institutions, namely introduction of a new statutory exception or limitation to the rights. However, adversaries of the initiative blocked certain other demands of the cultural institutions. Examples include the exclusion from the Directive of other kinds of user, commercial uses of orphan works, as well as provision for the mass digitisation of libraries' and archives' collections⁸⁷.
- 29 Both the Commission proposal and the Directive itself raised a number of controversial issues⁸⁸. First, the scope of the legal solution was criticised (there is provision for 'safe' exploitation of orphan works in respect of cultural institutions only, while the interests of other kinds of user are omitted). Next, it concerns only selected categories of works (for instance, stand-alone visual works are excluded) and does not allow the commercial exploitation of orphan works (even by the cultural institutions). Moreover, it does not provide a solution for the mass digitisation process, as a diligent search for rights holders must be carried out with reference to each work. Also, the type of legal instrument chosen raised many objections.⁸⁹ These factors show that the Directive does not provide a wide-ranging solution for the problem of orphan works.
- 30 The above-mentioned observations allow us to draw the following conclusions about the influence of lobbying groups on the law-making process in this case. Firstly, groups representing cultural institutions had an impact on initiating the debate and work at the EU level. Secondly, the Commission ran some consultations at the request of certain lobbying groups. Thirdly, the legal instrument illustrates the demands of parties participating in the advisory groups: public cultural institutions, most interested in a safe mechanism for using orphan works, had an impact on the general scope of the legal mechanism, while some important aspects of the legal solution reflected their opponents' claims.

D. Reasons why certain lobbying groups are effective

- 31 A comparative analysis of the EU policies relating to the extension of the term for sound recordings and to orphan works allows us to identify two groups of effectiveness factors of certain lobbying groups. Some factors are connected with interest groups' actions, while others concern the way the process of consulting stakeholders is handled.

I. Effectiveness factors regarding lobbying groups

- 32 Obviously, groups interested in having regulations introduced in a given field take steps to strongly lobby the European Commission. In both cases, strong pressures could be observed from both opposing sides of the conflicts (rights holders and users) on the policy making processes and the shape of the legal mechanisms. Surprisingly, different kinds of stakeholders were beneficiaries of the provisions on each occasion: rights holders calling for an extension of the term for sound recordings (primarily, the record industry, and artists to a lesser degree) and users (public cultural institutions) for provisions on orphan works (although they are not entirely the winners of the battle). An overview of these cases allows us to identify the following determinants of effective lobbying: 1. the relationship between interest groups and the target of lobbying, 2. the arguments put forward by interest groups, 3. the type of organisations and the configuration of interests, 4. the way of conducting actions.
- 33 1. Relationship between interest groups and the target of lobbying. In both of the consultation processes discussed, the parties lobbying effectively had a stronger position in relation to the target of lobbying (the relevant Unit in the European Commission) than their lobbying opponents (for the term extension the stronger group was performing

artists and phonogram producers and, for orphan works, it was public cultural institutions as users). Their strong position resulted from the fact that they were (in practice) beneficiaries of actions by the Commission: DG INFSO policy was by definition in favour of public sector users (cultural institutions), as its policy concerned the European Digital Libraries Initiative. Meanwhile the policy of DG MARKT was for rights holders benefitting from their copyright and related rights. It has become clear that there is a convergence between the interests of parties carrying out offensive lobbying and the policy conducted by the Commission Units concerned.

- 34 This fact also explains the absolute lack of effectiveness of parties who were not beneficiaries of these Commission Units, namely end users (consumers of immaterial goods) and users interested in exploitation of works in the public domain. It should be noted that, as a rule, policy in favour of consumers came, at that time, from DG Health and Consumers (DG SANCO), not DG MARKT or DG INFSO. In turn, the case of ACTA shows that end-users (as parties not being holders of copyright and related rights) are not effective unless they manage to mobilise the public (irrespective of whether it is done by a 'single tweet' or as a result of a big lobbying campaign). The case of lobbying against ACTA in Poland is a good example of the effectiveness of indirect (grassroots) lobbying. The campaign⁹⁰, conducted in new media (especially via Facebook or other related websites, like <http://stopacta.com.pl>), caused a large response from the public, starting from activities in cyberspace (e-petitions or cyber protests, like Internet blackout and taking down websites) to street demonstrations.
- 35 2. Arguments put forward by interest groups. In both cases, the arguments of the parties lobbying effectively involved, paradoxically, stressing their weak position under the copyright regime. In the case of the term of protection, the parties pointed to the bad legal and financial situation of performing artists at the end of their lives, while in the case of orphan works, cultural institutions emphasised the high risk of lawsuits for damages by reappearing rights owners, which was the main factor stopping them from exploiting orphan works. Highlighting weak copyright protection and/or unfair provisions was ultimately a key argument in favour of changing copyright provisions in order to reinforce the level of protection and the legal situation of the interested parties. In the sound recordings case, the EU legislator recognised this rationale, which is proved in the directive's preamble⁹¹. Also in the case of orphan works, it was considered to be one of the main problems, which the legal instrument sought to solve.⁹²
- 36 3. Type of organisations and configuration of interests. The example of lobbying for extension

of term of protection shows that the sectoral organisations of rights owners were more effective than the horizontal organisations of their opponents (representing users). This was because of the highly specialised profile of their activities and their good knowledge of the sector's problems. Conversely, in the case of lobbying for orphan works, there were a high number of organisations with overly narrow profiles, meaning that they could not reach consensus on the detailed issues (they only managed to achieve a compromise on the general issues).

- 37 4. Way of conducting actions. The cases examined draw our attention to several lobbying strategies that made the actions effective. In general, an overview of the lobbying actions allows us to make a general statement that the more the parties were active and aggressive, the more the lobbying was effective. Moreover, groups who initiated the debate and work on a given issue ended up being particularly effective. This was, at least at the beginning, due to a hidden aspect of their actions. Activities in this form are, by definition, more effective, as they take place before or outside the formal consultation process. They give the parties the time advantage necessary to convince the Commission of their arguments as well as of the need to launch consultations and/or legislative work, without pressure from their opponents.
- 38 The parties used the argumentation cleverly, choosing the most suitable rationale. One example, among many, is the argumentation used during the term extension debate. The music industry seemed to change their focus: while at first the lower protection vis-à-vis the EU was emphasised, later on – especially at the stage of work in the European Parliament – the emphasis was put on the 'weak' position of the poor artists and session musicians.
- 39 Another example of effective lobbying is the stakeholders' activity within the advisory groups in the orphan works case. For instance, representatives of rights holders (especially publishers) were pushing for the 'diligent search' measure from the very beginning, i.e. at the stage of discussions by the HLEG – Copyright Subgroup. In effect, the Subgroup recommended the involvement of a larger group of stakeholders into debate on (*inter alia*) this issue. In consequence, the Stakeholders' Seminar (IX 2007) was held. As groups stressed their willingness to engage in further consultations, the Commission established the Working Groups on due diligent criteria for search of rights holders (2007-2008).
- 40 Also, actions carried out by larger coalitions proved effective. Common actions (regardless of partly divergent interests of the groups acting in concert) provided evidence, in the eyes of the Commission, about the consolidation of the entire sector. They also proved the widespread support among society for

the initiative concerned. Parties that did not manage to build a coalition in order to carry out actions in common did not offer a sufficient counterweight to the well consolidated groups.

II. Effectiveness factors regarding the consultation process

- 41 The way in which the consultation process was handled by the European Commission's DGs (namely DG MARKT and DG INFSO) differed in the two cases. Nevertheless, in both cases the circumstances for lobbying were favourable for the interested parties, although for different parties in the two cases under discussion. When analysing the effectiveness of lobbying, the following aspects of the consultation process should be taken into account: 1. the coherence of EU policies, 2. the type of consultations, 3. the policy framework, 4. the transparency of the consultation process, 5. the participation of national groups in consultations, 6. the Commission's openness to interest groups.
- 42 1. Coherence of EU policies. The policies pursued by DG MARKT and DG INFSO reveal an internal inconsistency in the European Commission's policy in the field of copyright. Analysis shows that, at the same time, work was being carried out both to strengthen the copyright regime by extending the term of protection of (some) rights and to facilitate the exploitation of protected works. This means that each DG was taking action in favour of groups with opposing interests. This situation was convenient and profitable for lobbyists, as different parties (i.e. representing rights holders on the one hand and users on the other) were directing their demands to the respective Units in the Commission that were favourable to them.⁹³
- 43 2. Type of consultation. The consultation is a useful tool for both the Commission and the stakeholders. On the one hand, it serves to achieve the EU policy goals, but on the other hand, it constitutes a platform to conduct effective lobbying actions by stakeholders (it gives access to the Commission officials and to the policy making process), especially in the case of advisory groups.
- 44 It is within the power of the Commission to choose the type of consultation with stakeholders. It may organise public consultations which are addressed to all potentially interested parties (which enable the widespread participation of parties with different interests) or hold consultations in which only certain groups are involved. As this analysis shows, in both cases the consultation processes had the following weaknesses: consultations with selected stakeholders (on bilateral bases) or in closed fora (within advisory groups), the lack of public issue-
- tailored consultations, reliance on expert reports drawn up by stakeholders, not considering the independent experts' analysis. The above-mentioned factors strengthened the hidden lobbying of the parties carrying out strong offensive action (for both the extension of related rights and new provisions on orphan works), while hampering the lobbying opportunities of the opponents.
- 45 The practice of conducting consultations in closed fora, such as the advisory groups appointed by the Commission, raises a number of questions. An analysis of the consultations held in relation to orphan works shows that the Commission may somehow indirectly influence the course of consultations and, in consequence, their results (as it conducts its own policy). First, it often has the power to appoint the members of such groups. Usually, members of advisory groups represent different stakeholders' organisations (i.e. lobbies) and are not independent experts (e.g. researchers). In this way the Commission determines the representation of interests and therefore the lobbying opportunities of the various parties. Also, it is sometimes difficult to obtain information about the selection criteria for groups' members. The practice shows, moreover, that there are often limited opportunities for stakeholders not involved in the work of an advisory group from the beginning to join an established group at a later stage. Next, the Commission may influence who is chosen as chairman⁹⁴, a figure who plays a key role as he/she coordinates a group's works with the aim of leading the parties towards a common position. This was the case for the Working Groups on due diligence criteria for search of rights holders. The chairman was from the International Federation of Reproduction Rights Organisations (IFRRO), an organisation which represented the collective management organisations and the creators' and publishers' associations and which was greatly in favour of the diligent search measure.⁹⁵ Work within the Working Groups ended up with the signing of a Memorandum of Understanding on Diligent Search Guidelines for Orphan Works embracing the Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works (Joint Report and Sector Reports). In view of the many contradictory interests of parties, and also having in mind the Digital Libraries' context, achieving a common position by stakeholders was considered by the Commission as a great success.⁹⁶ Achieving a consensus is highly positive as it gives evidence of wide-ranging support from various different stakeholders (who usually have different or opposing interests) for the Commission's policy (as the orphan works case shows, sometimes the advisory group's recommendations constitute the basis for future legislative proposals / provisions).
- 46 3. Policy framework. The policy framework is of great significance for the consultation process and lobbying by stakeholders. A good example is the

legislative process on orphan works, which was very much stimulated by the earlier Commission policy actions, i.e. the Digital Libraries Initiative⁹⁷ and the Europeana project. More precisely, the Commission was in favour of introducing a legal mechanism concerning orphan works as, if no legislation on facilitating rights clearance was adopted, the whole project of the European Digital Libraries Initiative (and Europeana) could fail.

47 4. Transparency of the consultation process. An analysis of the consultation process held by DG MARKT and DG INFSO allows us to state that European Commission policy was not followed in a transparent way. In particular, in both cases there was no clear information about the consultations that had been held at that time. To give one example, the case of orphan works showed that some individual parties were not aware of the wider context of EU policy or of other parallel consultations relating to this issue. Namely, during the early stage of the Working Groups work, some parties (for instance some publishers) pointed out that they were not aware of the consultations within the HLEG and indicated an unclear link between the framework of Working Groups and the HLEG⁹⁸. Certainly, this lack of transparency resulted from the narrow nature of these consultations (DG MARKT: bilateral consultations; DG INFSO: consultations within advisory groups): the appropriate information reached only those parties whose involvement in the consultations was envisaged. As other parties did not have analogous opportunities to act, they did not have the same chance to lobby effectively.

48 5. Participation of national groups in consultations. In the case of lobbying for both the term of protection for sound recordings to be extended and for permitted uses of orphan works to be introduced, it was possible to observe a kind of 'over-representation' of the interests of certain national branches in the EU consultation process. In the case of extending related rights, strong pressures, especially from the British phonographic industry and artists were seen from the very beginning (notably during Gowers' work on the copyright review) and then during the course of the entire legislative process. This culminated in their exerting pressure on the UK position while work on the proposal was under way in the Council⁹⁹.

49 In turn, in the case of orphan works, an 'over-representation' of national interests at the EU level could be seen during the consultation process. More precisely, there was a situation where the interests of a given branch were represented twice, i.e. by a national organisation and, in parallel, by its European federation. For instance, British Library (BL), Bibliothèque nationale de France (BNF), Joint Information Systems Committee (JISC), Society of College, National and University Librarians (SCONUL) were acting in parallel

with the European Bureau of Library, Information and Documentation Associations (EBLIDA). Moreover, in the Working Groups, 8 of the 33 members represented national entities, of which 4 were from the UK and 3 from France. In turn, 8 of the 19 participants in the public hearing on orphan works represented national groups (4 representing French entities, and 3 representing British ones). It is worth mentioning that the entire consultation process did not feature any national groups from the former 'new' Member States. In consequence, the strong influence of particular parties on European policy results in the application – throughout Europe – of mechanisms resulting from the needs of certain branches (only) from certain member states (only).

50 6. Commission openness to interest groups. The cases of increasing the protection of related rights and of introducing permitted uses of orphan works show that the European Commission is more willing to take into consideration the viewpoint of interest groups that are beneficiaries of its actions than those of other parties. For instance, DG MARKT, by being responsible for regular policy in the field of copyright, by definition was working towards protection of the interests of rights holders (performing artists and phonogram producers). Conversely, DG INFSO, acting in the context of the Digital Libraries Initiative, shaped, in practice, its policy in favour of cultural institutions. The Commission's general statements of openness to stakeholders and willingness to engage in dialogue with interested parties translate, in practice, into openness to claims and arguments from those parties that are the natural targets (beneficiaries) of the policy of its Units (and not necessarily to the claims of other parties or the arguments of independent experts).

E. Conclusions

51 The cases of extending the term of protection of sound recordings and of introducing new provisions for orphan works raise the question of the effects of lobby-making on copyright law-making in Europe. An analysis of the cases allows us to state that lobbying has a noticeable impact on copyright law-making in Europe and that the way in which the EU institutions create policy and law is conducive to lobbying by interested parties. In both cases, strong lobbying by certain interest groups resulted in, first, the Commission undertaking general work on specific issues and, then, in initiating particular consultations with stakeholders. Moreover, lobbying also influenced the content of the directives adopted later. In light of this, an indicator of the effectiveness of the action of particular interest groups could be, firstly, whether consultations and/or legislative work has been initiated under the influence of certain stakeholders and, secondly, whether the content of the EU directives is consistent with the demands of

certain parties, especially when set against critical opinions raised by independent experts (like in both EU legislative processes analysed here) and/or large-scale social movements against the proposed provisions (as in the ACTA case).

- 52 The effective lobbying by certain parties only, had negative consequences on the copyright provisions. Namely, the legal acts issued did not balance the interests of the various different parties in an appropriate way. In particular, they did not take into account (to a sufficient degree) the interests of parties against a given initiative (or campaign) or of the parties that were not engaged in any lobbying actions. In view of the narrowly focused nature of the copyright directives (they regulate only selected issues) and the lack of coherence in EU copyright policy and rules, it is appropriate to ask whether the EU institutions have a broader vision of the development of copyright policy in the long term.
- 53 The best model is where interested parties lobby within the framework of public consultations (dialogue with civil society), which is beneficial for a few reasons: they contribute to enlarging the debate to opponents of a given initiative; to providing more openness in lobbying and to increasing the transparency of the legislative process, thereby making it possible for more balanced legal mechanisms to be issued. This case study shows, however, that even in a situation where public consultations take place, some groups are still more effective than others and can to some extent influence the Commission policy. This leads to the conclusion that effective lobbying by certain interested groups affects policy direction (and eventually legislative initiatives) taken by the EU institutions.
- 54 A case study has shown that, in these two cases, different categories of lobbying groups were effective (this concerns the distinction between rights holders and users). For Directive 2011/77/EU, the effective groups were those representing right holders (phonogram producers and performing artists), as their actions led to the term of protection of their rights being extended (on the other side of the conflict were groups representing users of copyrighted content). Conversely, for Directive 2012/28/EU, more effective (although not entirely winners) were groups representing users in the cultural sector (mainly public libraries and archives) as they managed to convince the Commission of the significance of the problem (in the context of the Digital Library initiative) and, therefore, of the need to establish provisions for 'safe' uses of orphan works (groups representing rights holders were against). In both cases, the interests of end-users (consumers of immaterial goods) and of parties exploiting creative content and/or content being in the public domain were ignored by the EU legislator.
- The ACTA case shows, in turn, that these groups are not effective unless they manage to mobilise the public to undertake (mass) actions in the form of online protests and street demonstrations.
- 55 The above-mentioned observations lead to certain conclusions about the different effectiveness of particular stakeholders. The most effective parties are those especially interested by a given provision, who initiate the debate and lobby offensively at the stage of the early legislative process (within the consultations or independently) and who, at the same time, are the main targets (and beneficiaries) of the Commission Units responsible for EU policy in the area concerned. The effectiveness of lobbying groups also stems from the type and quality of the consultation process. The following weak points of the consultations could be identified: 1. lack of coherence of European Commission policy in the field concerned, 2. consultations of limited character (like on bilateral bases or in advisory groups) being conducted at an early stage of work on the issue concerned, 3. the composition of advisory groups and the procedure for appointing members (especially the lack of balance in the representation of interests and the lack of independent experts), 4. the lack of transparency in the consultation process, 5. an over-representation of national branches in EU-level consultation, 6. the susceptibility of the Commission to the arguments of parties that are the beneficiaries of its policy. It should be noted that the weaknesses of consultations appeared despite the fact that *General Principles and Minimum Standards for Consultation of Interested Parties* and *Principles and Guidelines on the Collection and Use of Expertise* had already been issued. Despite recent changes in the Commission structure, conclusions relating to the lobbying effectiveness of some interest groups seem to be of a general nature.
- 56 The vague character of lobbying poses a challenge to the interest of good regulations governing it. However, as it forms part of the democratic process through being a form of citizens' activity in the public sphere, it should not be restricted. This raises the question of how to regulate lobbying in order to prevent its negative consequences owing to the disproportionate lobbying of some groups. Regulating the lobbyists' access to EU politicians and/or officials (as the Transparency Register does), does not actually solve the practical problems that occur during the consultation process (what is more, for consultations of stakeholders run by the Commission, the registration of lobbyists is not obligatory). Owing to their general character, this is not achieved by the *General Principles and Minimum Standards for Consultation of Interested Parties* or the *Principles and Guidelines on the Collection and Use of Expertise* either. Equally, the further measures of 2010 concerning expert groups do not affect problematic issues (for instance, they guarantee neither a balanced representation of interest nor

the participation of independent experts). An improvement in the quality of the consultation process could come about, to some extent at least, with the *Stakeholder Consultation Guidelines*. In particular, they indicate a possible approach to the analysis of stakeholders' contributions on the basis of the different stakeholder categories (in cases of participation by many different stakeholder groups with differing and potentially conflicting views). It is, moreover, worth stressing that the guidelines concern both the public consultations and the targeted ones.

57 One of the problems with making the process of policy creation and lobbying more transparent is that the EU regulatory initiatives concern particular types of consultation separately and not the consultation process as a whole. In consequence, certain aspects of and problems with the consultation processes are not raised at all. This particularly concerns the following: the criteria by which the Commission chooses a given type of consultation, the coherence of Commission policy in a given area and the transparency of the whole consultation process.

- 1 Research for this paper was financed by a grant from the National Science Centre in Poland for the postdoctoral post (decision No DEC-2014/12/S/HS5/00006).
- 2 Authors' publications until 2011 had been issued under the name of Vetulani, Agnieszka.
- 3 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1.
- 4 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1.
- 5 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5.
- 6 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.03.2014, p. 72.
- 7 See: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.
- 8 See: <http://ec.europa.eu/licences-for-europe-dialogue/en>.
- 9 On content in the Digital Single Market, Communication from the Commission, Brussels, 18.12.2012, COM(2012) 789 final.
- 10 See the Commission Digital Agenda website: <https://ec.europa.eu/digital-agenda/en/copyright>.
- 11 Horten, M. (2013), *A copyright masquerade: How corporate lobbying threatens online freedoms*, London [etc.], Zed Books pp. 50-60; Farrand, B. (2014), *Networks of power in digital copyright law and policy: Political salience, expertise and the legislative process*, Routledge; Vetulani-Cęgiel, A. (2014), *Lobbying w procesie kształtowania prawa autorskiego w Unii Europejskiej: Studium przypadków czas trwania praw pokrewnych, dzieła osierocone, ACTA (in Polish only, English title: Lobbying in Formation of Copyright Law in the European Union. Case Studies: Term of Protection of Related Rights, Orphan Works, ACTA)*, Warszawa, Wolters Kluwer Polska pp. 300-313.
- 12 Matthews, D. (2013), 'Negotiating the IP Chapter of an EU-US Transatlantic Trade and Investment Partnership: Let's Not Repeat Past Mistakes', *IIC International Review of Intellectual Property and Competition Law*, Vol. 44, No. 5, pp. 491-493, DOI 10.1007/s40319-013-0073-y, p. 2.
- 13 Matthews, D., Žikovská, P. (2013), 'The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union', *IIC International Review of Intellectual Property and Competition Law*, Vol. 44, No. 6, pp. 626-655, DOI 10.1007/s40319-013-0081-y, Yu, P. K. (2011), 'Six Secret (and Now Open) Fears of ACTA', *SMU Law Review*, No. 64, pp. 975-1094, Horten, M. (2013), *A copyright masquerade: How corporate lobbying threatens online freedoms*, London [etc.], Zed Books pp. 66-89, Vetulani-Cęgiel, A. (2014), *Lobbying w procesie kształtowania prawa autorskiego w Unii Europejskiej: Studium przypadków czas trwania praw pokrewnych, dzieła osierocone, ACTA (in Polish only, English title: Lobbying in Formation of Copyright Law in the European Union. Case Studies: Term of Protection of Related Rights, Orphan Works, ACTA)*, Warszawa, Wolters Kluwer Polska p. 286 et seq.
- 14 Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan p. 24, Tanasescu, I. (2009), *The European Commission and interest groups: Towards a deliberative interpretation of stakeholder involvement in EU policy-making*, Institute for European Studies - publication series p. 55.
- 15 Bouwen, P. (2002), 'A Comparative Study of Business Lobbying in the European Parliament, the European Commission and the Council of Ministers', *Max-Planck-Institut für Gesellschaftsforschung Discussion Paper*, 02/7 pp. 14-15.
- 16 Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan p. 208, 7.
- 17 An open and structured dialogue between the Commission and special interest groups, 5.03.1993, OJ No C 63 p. 2; The Commission and Non-Governmental Organisations: Building a Stronger Partnership, Commission Discussion Paper, Brussels, 18.1.2000, COM(2000) 11 final p. 5, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, Communication from the Commission, Brussels, 11.12.2002, COM(2002) 704 final pp. 4-6, Collection and use of expertise by the Commission: Principles and Guidelines, "Improving the knowledge base for better policies", Communication from the Commission, Brussels, 11.12.2002, COM(2002) 713 final, Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan pp. 6-7.
- 18 Although EU documents use terms such as 'civil society', 'stakeholders' or 'interested parties' rather than 'lobbyists', the practical actions of the parties in the majority of cases fall within the broad definition of 'lobbying'.
- 19 The European Commission places 'lobbying' in the context of the dialogue with the civil society, see Clamen, M. (2005), *Lobbying i jego sekrety: [original title: Le lobbying et ses secrets. Guide des techniques d'influence, 3eme editions, Dunod, 2000, Paris]*, FELBERG SJA, Warszawa p. XIV.
- 20 The Treaty of Lisbon gave more legislative power to the European Parliament, especially by increasing the application of the ordinary legislative procedure (former co-decision) and the consent procedure, see: <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00008/The-Lisbon-Treaty>.
- 21 Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan p. 24.

- 22 Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan, pp. 24-29.
- 23 Tanasescu, I. (2009), *The European Commission and interest groups: Towards a deliberative interpretation of stakeholder involvement in EU policy-making*, Institute for European Studies - publication series p. 56.
- 24 The key element that differentiates lobbying from other kinds of advocacy is the direct relationship between the entity running action toward the legislator and the interest group or third party.
- 25 For the definition of lobbying and its techniques see: Mulcahy, S. (2015), *Lobbying in Europe: Hidden influence, privileged access*, Transparency International, http://www.transparency.org/whatwedo/publication/lobbying_in_europe, accessed 17.07.2015 pp. 6, 16; Clamen, M. (2005), *Lobbying i jego sekrety: [original title: Le lobbying et ses secrets. Guide des techniques d'influence, 3eme editions, Dunod, 2000, Paris]*, FELBERG SJA, Warszawa; Vetulani-Cegiel, A. (2014), *Lobbying w procesie kształtowania prawa autorskiego w Unii Europejskiej: Studium przypadków czas trwania praw pokrewnych, dzieła osierocone, ACTA (in Polish only, English title: Lobbying in Formation of Copyright Law in the European Union. Case Studies: Term of Protection of Related Rights, Orphan Works, ACTA)*, Warszawa, Wolters Kluwer Polska pp. 39, 48.
- 26 Horten, M. (2013), *A copyright masquerade: How corporate lobbying threatens online freedoms*, London [etc.], Zed Books pp. 107-114, Farrand, B. (2014), *Networks of power in digital copyright law and policy: Political salience, expertise and the legislative process*, Routledge pp. 183-188.
- 27 Vetulani-Cegiel, A. (2014), *Lobbying w procesie kształtowania prawa autorskiego w Unii Europejskiej: Studium przypadków czas trwania praw pokrewnych, dzieła osierocone, ACTA (in Polish only, English title: Lobbying in Formation of Copyright Law in the European Union. Case Studies: Term of Protection of Related Rights, Orphan Works, ACTA)*, Warszawa, Wolters Kluwer Polska pp. 313-317.
- 28 One example of lobbying is, for instance, the activity of the Society of College, National and University Libraries (SCONUL) which, *inter alia*, acts for the interests of university libraries in UK.
- 29 European Governance. A White Paper, Brussels, 25.07.2001, COM(2001) 428 final.
- 30 *Your voice in Europe*: http://ec.europa.eu/yourvoice/index_en.htm.
- 31 Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, Communication from the Commission, Brussels, 11.12.2002, COM(2002) 704 final. The general principles were also mentioned in the White Paper on European Governance.
- 32 Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, Communication from the Commission, Brussels, 11.12.2002, COM(2002) 704 final, pp 15-16.
- 33 Among such initiatives are legislative proposals, non-legislative initiatives (white papers, action plans, financial programmes, negotiating guidelines for international agreements) that define future policies, implementing measures and delegated acts, see: http://ec.europa.eu/smart-regulation/impact/index_en.htm.
- 34 The issues related to European governance, the Commission consultations and the stakeholder or citizens' involvement in EU policy-making are, by some researchers, analysed from a deliberative democracy perspective, see e.g. Tanasescu, I. (2009), *The European Commission and interest groups: Towards a deliberative interpretation of stakeholder involvement in EU policy-making*, Institute for European Studies - publication series; Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan pp. 198-200.
- 35 Collection and use of expertise by the Commission: Principles and Guidelines, "Improving the knowledge base for better policies", Communication from the Commission, Brussels, 11.12.2002, COM(2002) 713 final.
- 36 Framework for Commission Expert Groups: Horizontal Rules and Public Register, Communication from the President to the Commission, Brussels, 10.11.2010, C(2010) 7649 final, SEC(2010) 1360.
- 37 Xenos, D. (2014), 'Comments on the Composition of EU Commission Expert Groups', <http://dx.doi.org/10.2139/ssrn.2498560>; Vasileiadou, E., 'Consulting Stakeholders? Assessing stakeholder consultations in the European energy policy' in: Tortora M. (Ed), 2011, *Sustainable Systems and Energy Management at the Regional Level: Comparative Approaches*, IGI Global: Heshley, USA, pp. <http://dx.doi.org/10.2139/ssrn.1411774>.
- 38 Follow-up to the Green Paper 'European Transparency Initiative', Communication from the Commission, Brussels, 21.3.2007, COM(2007) 127 final, SEC(2007) 360.
- 39 Interinstitutional Agreement, Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 191, 22.7.2011, p. 29, section IV- 8.
- 40 More on the lobbying regulations and the Transparency Register: Greenwood, J., Dreger, J. (2013), 'The Transparency Register: A European vanguard of strong lobby regulation?', *IGA*, Vol. 2, No. 2, pp. 139-162, <http://dx.doi.org/10.1057/iga.2013.3>; Kretschmer, H., Schmedes, H.-J. (2010), 'Enhancing Transparency in EU Lobbying? How the European Commission's Lack of Courage and Determination Impedes Substantial Progress', *International Politics and Society (IPG)*, Vol. 2010, No. 1, pp. 112-122; Kanol, D. (2012), 'Should the European Commission enact a mandatory lobby register?', *Journal of Contemporary European Research*, Vol. 8, No. 4; Krajewski, M. (2013), 'Legal Framework for a Mandatory EU Lobby Register and Regulations', <http://dx.doi.org/10.2139/ssrn.2284843>
- 41 Commission Staff Working Document, Better Regulation Guidelines, Strasbourg, 19.5.2015, SWD(2015) 111 final, {COM(2015) 215 final} {SWD(2015) 110 final}, pp. 63-85.
- 42 http://ec.europa.eu/smart-regulation/index_en.htm.
- 43 Stakeholder consultation guidelines, Public consultation document, 19.06.2014
- 44 In 2012 DG INFSO turned into DG Communications Networks, Content and Technology (DG CNECT). In November 2014 the copyright unit (D1 in DG MARKET) was moved to DG CNECT (F5). Since that moment, DG CNECT, within the framework of 'content and media', has been coordinating policies related to media, digital culture and copyright, <https://ec.europa.eu/digital-agenda/en/content-and-media>.
- 45 <https://ec.europa.eu/digital-agenda/en/news/timeline-digitisation-and-online-accessibility-cultural-heritage>.
- 46 E.g. Association of European Performers' Organisations (AEPO-ARTIS), International Federation of Musicians (FIM), International Federation of Actors (FIA), Independent Music Companies Association (IMPALA), International Music Managers' Forum (IMMF), International Organisation of Performing Artists (GIART).
- 47 E.g. European Writers' Council (EWC), European Visual Artists (EVA).
- 48 E.g. Federation of European Publishers (FEP), European Federation of Magazine Publishers (FAEP), European

- Newspaper Publishers' Association (ENPA), The International Confederation of Music Publishers / Confédération Internationale des Editeurs de Musique (ICMP / CIEM), International Music Publishers Association (IMPA), International Association of Scientific, Technical and Medical Publishers (STM).
- 49 Greenwood, J. (2007), *Interest representation in the European Union*, The European Union Series, Basingstoke England, New York, Palgrave Macmillan p. 15.
 - 50 Performing artists - no longer be the 'poor cousins' of the music business, Brussels, 14.02.2008, IP/08/240.
 - 51 Gowers, A. (2006), *Gowers review of intellectual property*, Norwich, England, Her Majesty's Stationery Office, p. 56.
 - 52 Review of the EC legal framework in the field of copyright and related rights, Commission Staff Working Paper, Brussels, 19.7.2004, SEC(2004) 995.
 - 53 The additional clauses were, however, envisaged as transitional measures relating to the transposition of a new directive, see Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, Brussels, 16.7.2008, COM(2008) 464 final, 2008/0157 (COD), SEC(2008) 2287, SEC(2008) 2288, Article 1.
 - 54 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1 Article 1(2)(b)&(c).
 - 55 In the Directive the additional measures are no longer of a transitional nature. The first accompanying measure is a special fund: phonogram producers are obliged to set aside, at least once a year, a sum corresponding to 20% of the revenue from the exclusive rights of distribution, reproduction and making available of phonograms. Payment of those sums should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer in return for a one-off payment. The second accompanying measure is a 'use it or lose it' clause: if, in the extended period, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which he has transferred or assigned his rights in the fixation of his performance to a phonogram producer. This right may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract, fails to carry out both of the acts of exploitation. If the contract on transfer or assignment is terminated the rights of the phonogram producer in the phonogram shall expire. The third accompanying measure is a 'clean slate' clause: neither advance payments nor any contractually defined deductions shall be deducted from the payments made to the performer in the extended period. This applies for performers who have assigned their exclusive rights to phonogram producers in return for royalties or remuneration.
 - 56 Impact Assessment on the legal and economic situation of performers and record producers in the European Union, Commission Staff Working Document, Brussels, 23.04.2008, SEC(2008) p. 13.
 - 57 Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, Brussels, 16.7.2008, COM(2008) 464 final, 2008/0157 (COD), SEC(2008) 2287, SEC(2008) 2288, p. 6.
 - 58 Hugenholtz, P. B., van Eechoud, M., van Gompel, S., Guibault, L., Helberger, N., Rossini, M., Steijger, L., Dufft, N., Bohn, P. (2006), *The Recasting of Copyright & Related Rights for the Knowledge Economy, final report*, Institute for Information Law, University of Amsterdam, November 2006.
 - 59 Hugenholtz, P. B. (2008), *Open Letter to the President of the European Commission, dr. J. M. Barroso concerning European Commission's 'Intellectual Property Package'*, Institute for Information Law, University of Amsterdam, Amsterdam, 18.08.2008; Hilty, R. M., Kur, A., Klass, N., Geiger, C., Peukert, A., Drexler, J., Katzenberger, P. (2008), 'Comment by the Max-Planck Institute on the Commission's proposal for a Directive to amend Directive 2006/116 EC of the European Parliament and Council concerning the Term of Protection for Copyright and Related Rights'; Creativity stifled? (2008), 'Creativity stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings', *European Intellectual Property Review*, 2008/9, pp. 341-347.
 - 60 As: Vanheusden, E. (2007), *Performers' Rights in European Legislation: A study prepared for Association of European Performers' Organisations (AEPO-ARTIS)*, Association of European Performers' Organisations (AEPO-ARTIS), Antwerp, Belgium, June 2007; Liebowitz, S. J. (2007), *What are the Consequences of the European Union Extending Copyright Length for Sound Recordings: Prepared for the International Federation of Phonographic Industry (IFPI)*, University of Texas at Dallas, Revised August 2007; PricewaterhouseCoopers (2006), *The Impact of Copyright Extension for Sound Recordings in the UK: A Report for the Gowers Review of Intellectual Property prepared by PwC on behalf of the British Phonographic Industry Ltd*, 28 April 2006.
 - 61 Among independent studies were: Hugenholtz, P. B., van Eechoud, M., van Gompel, S., Guibault, L., Helberger, N., Rossini, M., Steijger, L., Dufft, N., Bohn, P. (2006), *The Recasting of Copyright & Related Rights for the Knowledge Economy, final report*, Institute for Information Law, University of Amsterdam, November 2006; Gowers, A. (2006), *Gowers review of intellectual property*, Norwich, England, Her Majesty's Stationery Office; Review of the Economic Evidence (2006), *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law, University of Cambridge; Kern European Affairs (2006), *The Economy of Culture in Europe: Study prepared for the European Commission (Directorate-General for Education and Culture)*, October 2006.
 - 62 Review of the EC legal framework in the field of copyright and related rights, Commission Staff Working Paper, Brussels, 19.7.2004, SEC(2004) 995, pp. 10-11.
 - 63 Mainly: Association of European Performers' Organisations (AEPO-ARTIS); International Federation of Phonographic Industry (IFPI); International Federation of Musicians (FIM); International Federation of Actors (FIA); International Music Managers' Forum (IMMF); International Organisation of Performing Artists (GIART).
 - 64 Mainly: The International Confederation of Music Publishers / Confédération Internationale des Editeurs de Musique (ICMP/CIEM); Independent Music Publishers and Labels Association (IMPALA); International Music Publishers Association (IMPA); Global Entertainment Retail Association - Europe (GERA).
 - 65 Note from General Secretariat of the Council to Delegations, Proposal for a Directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights - Permanent benefits to performers: Drafting suggestion by the United Kingdom delegation, Brussels, 1.04.2009, 8347/09, Interinstitutional File: 2008/0157 (COD); see also: Paine, A. (2009), *U.K. Biz 'Disappointed' At EU Term Extension Rejection*, <http://www.billboard.com/biz/articles/news/global/1272627/uk-biz-disappointed-at-eu>

- [term-extension-rejection](#), 27.03.2009, Accessed 18.03.2015, Open Rights Group (2009), *Open Rights Group: EU governments vote against copyright extension in Brussels*, <https://www.openrightsgroup.org/blog/2009/eu-governments-vote-against-copyright-extension-in-brussels>, 1.04.2009, accessed 17.03.2015, O'Brien, D. (2009), *Every Vote Counts: the EU Copyright Term Extension Battle Heats Up*, Electronic Frontier Foundation, 30.03.2009, <https://www.eff.org/deeplinks/2009/03/every-vote-counts-eu-copyright-term-extension-batt>, accessed 17.03.2015, Out-Law.com (2009), *Pop star union demands new kind of copyright extension*, <http://www.out-law.com/page-9922>, 2.04.2009, accessed 17.03.2015, Featured Artists Coalition, 'Our Charter': A charter for fair play in the digital age, <http://thefac.org/about/our-charter/>, accessed 17.03.2015.
- 66 The European Consumers' Organisation (BEUC); European Digital Rights (EDRI); Electronic Frontier Foundation (EFF); Consumer Focus; Open Rights Group (ORG); Foundation for Information Policy Research (FIPR); La Quadrature du Net; Foundation for Open Source.
- 67 European Bureau of Library, Information and Documentation Associations (EBLIDA); International Federation of Library Associations and Institutions (IFLA); Libraries and Archives Copyright Alliance (LACA); Society of College, National and University Libraries (SCONUL); British Library (BL).
- 68 Six letters by European Bureau of Library, Information and Documentation Associations (EBLIDA) to the European Commissioners, see: EBLIDA (2008), *EBLIDA opposes Commissioner McCreevy's proposal to extend copyright protection*, Hague, 19.06.2008; EBLIDA (2008), *EBLIDA opposes Commissioner McCreevy's proposal to extend copyright protection*, Hague, 26.06.2008; see also: Open Rights Group (2008), *Response to the proposal to extend term of copyright protection*, London, 29.08.2008; *Reject the Term Extension Directive (2009)*, A joint statement: *Reject the Term Extension Directive*, January 2009.
- 69 Among the most active centres were: Centre for Intellectual Property Policy & Management, Bournemouth University (CIPPM); Institute for Information Law, University of Amsterdam (IViR); Centre for Intellectual Property and Information Law, University of Cambridge (CIPIIL); Max-Planck Institute for Intellectual Property, Competition and Tax Law, Munich (MPI-IP).
- 70 Kretschmer, M. (2008), *Letter to the President of the European Commission, J. M. Barroso*, Centre for Intellectual Property Policy & Management, Bournemouth University (CIPPM), 16.06.2008; Kretschmer, M., Bently L., Pollock R., Hilty R., Hugenholtz P.B. (2008), *The Proposed Directive for a Copyright Term Extension: Open letter to the Members of the European Parliament*, Centre for Intellectual Property Policy & Management, Bournemouth University (CIPPM), 27 October 2008; Newbery, D. (2008), *A Joint Letter Opposing a Term Extension for Phonograms*, University of Cambridge, Faculty of Economics, 10 April 2008; Bently, L. (2009), *Open Letter: Proposed Copyright Term Extension for Sound Recordings*, Centre for Intellectual Property and Information Law, University of Cambridge, 24.02.2009; Joint Press Release (2009), *Joint Press Release by European Academics: The Proposed Directive for a Copyright Term Extension*.
- 71 Hilty, R. M., Kur, A., Klass, N., Geiger, C., Peukert, A., Drexler, J., Katzenberger, P. (2008), 'Comment by the Max-Planck Institute on the Commission's proposal for a Directive to amend Directive 2006/116 EC of the European Parliament and Council concerning the Term of Protection for Copyright and Related Rights'; Helberger, N., Dufft, N., van Gompel, S., Hugenholtz, B. (2008), 'Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea', *European Intellectual Property Review*, Vol. 2008, No. 5, pp. 174–181; Creativity stifled? (2008), 'Creativity stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings', *European Intellectual Property Review*, 2008/9, pp. 341–347; Kretschmer, M., Bently L., Pollock R., Hilty R., Hugenholtz P.B. (2008), 'The Proposed Directive for a Copyright Term Extension: A backward-looking package, Joint Academic Statement on Term Extension'.
- 72 i2010: Digital Libraries, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 30.9.2005, COM(2005) 465 final, SEC(2005) 1194, SEC(2005) 1195.
- 73 European Parliament resolution of 5 May 2010 on "Europeana - the next steps", 2009/2158, INIsec. 33.
- 74 Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, Brussels, 24.5.2011, COM(2011) 289 final, 2011/0136 (COD), SEC(2011) 615 final, SEC(2011) 616 final.
- 75 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5
- 76 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 OJ L 167, 22.6.2001, p. 10
- 77 Cultural institutions may generate revenues in the course of such uses for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public, see Article 6(2) (the proposal envisaged uses for commercial purposes under certain conditions – Article 7 of the Proposal).
- 78 The Commission also analysed other possible legal solutions. For justification of its choice, see Impact Assessment on the cross-border online access to orphan works, Accompanying the document: Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works, Commission Staff Working Paper, Brussels, 24.5.2011, SEC(2011) 615 final, COM(2011) 289 final, SEC(2011) 616 final p. 38.
- 79 Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, Brussels, 24.5.2011, COM(2011) 289 final, 2011/0136 (COD), SEC(2011) 615 final, SEC(2011) 616 final p. 3; van Gompel, S. (2008), 'Memorandum of Understanding on Orphan Works and Other Developments in the European Digital Libraries Framework', *Legal Observations of the European Audiovisual Observatory IRIS 2008-7:5/6*; Memorandum of Understanding on Diligent Search Guidelines for Orphan Works 2008 – p. 1 of the Joint Report; The New Renaissance (2011), *The New Renaissance: Report of the 'COMITÉ DES SAGES', Reflection Group on Bringing Europe's Cultural Heritage Online*, Brussels, 10 January 2011.
- 80 A Digital Agenda for Europe, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 19.5.2010, COM(2010)245 final, Key Action 1, p. 9.
- 81 Mainly: Association des Cinémathèques Européennes (ACE); British Library (BL); Bibliothèque nationale de France (BNF); European Bureau of Library, Information and Documentation Associations (EBLIDA); EUROPEANA Foundation.
- 82 Vetulani, A. (2008), 'The Problem of Orphan Works in the EU, An overview of legislative solutions and main actions in this field: Report prepared for the European Commission, DG Information Society and Media, Unit E4: Digital Libraries and Public Sector Information, February 2008', https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/report_orphan_works_2008.pdf, Accessed 15.03.2015 pp. 20–25 (stakeholders position papers: International Federation of Reproduction Rights Organisations (IFRRO) Statement of 2007; Joint Statement of International Federation of Library Associations and Institutions (IFLA) and International Publishers Association (IPA) of 2007; Libraries and Archives Copyright Alliance (LACA) Statement of 2007; working mechanisms:

- Institut National de l'Audiovisuel (INA), Société d'Auteurs dans le domaine des Arts Visuels (SOFAM); Foto Anoniem; Austrian National Library; Agreement 'Safe Harbour Provisions for the use of orphan works for Scientific, Technical and Medical literature' of 2007).
- 83 Association of European Performers' Organisations (AEPO-ARTIS), European Broadcasting Union (EBU), European Federation of Magazine Publishers (FAEP), European Federation of the Picture Industry (CEPIC), European Newspaper Publishers' Association (ENPA), European Visual Artists (EVA), European Writers' Congress (EWC), Federation of European Publishers (FEP), International Federation of Phonographic Industry (IFPI), International Federation of Reproduction Rights Organisations (IFRRO).
 - 84 The issue of conducting a diligent search prior to the use of a work was of high relevance for publishers, see e.g. High Level Expert Group on Digital Libraries - Copyright Subgroup (2007), *Report on Digital Preservation, Orphan Works and Out-of-Print Works. Selected Implementation Issues*, 18.4.2007 pp. 7-8.
 - 85 European Commission (2009), *Public Hearing on Orphan Works*, Brussels, 26.10.2009, Report, ec.europa.eu/internal_market/copyright/docs/copyright-info/orphanworks/report_en.pdf or particular stakeholder's position papers on: http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm (Accessed 15.03.2015).
 - 86 High Level Expert Group on Digital Libraries (2009), "Digital Libraries: Recommendations and Challenges for the Future", *Final Report*, December 2009 p. 4.
 - 87 Many libraries and archives are unhappy with the diligent search measure due to the high costs of clarification of the copyright status.
 - 88 van Gompel, S. (2011), *The Commission's Proposal for a Directive on Orphan Works*, <http://kluwercopyrightblog.com/2011/06/14/the-commission%E2%80%99s-proposal-for-a-directive-on-orphan-works/>; Hilty, R., Köklü, K., Nérison, S., Trumpke, F. (2011), 'Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Commission Proposal for a Directive on Certain Permitted Uses of Orphan Works (August 10, 2011)', *IIC - International Review of Intellectual Property and Competition Law*, Forthcoming; *GRUR Int.*, Vol. 60, No. 10, pp. 818-821, 2011, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-14, pp. <http://ssrn.com/abstract=1948323>.
 - 89 This issue has been the subject of many in-depth academic analyses, see: Hugenholtz, P. B., van Eechoud, M., van Gompel, S., Guibault, L., Helberger, N., Rossini, M., Steijger, L., Dufft, N., Bohn, P. (2006), *The Recasting of Copyright & Related Rights for the Knowledge Economy, final report*, Institute for Information Law, University of Amsterdam, November 2006; van Eechoud, M., Hugenholtz, P. B., van Gompel, S., Guibault, L., Helberger, N. (2009), *Harmonizing European copyright law: The challenges of better lawmaking*, Information law series, Wolters Kluwer Law & Business; Kluwer Law International; van Gompel, S. (2012), "The Orphan Works Chimera and How to Defeat It: A View From Across the Atlantic", *Berkeley Tech. L.J.*, Vol. 27, No. 3, pp. 1347-1378, <http://scholarship.law.berkeley.edu/btlj/vol27/iss3/5>; Gowers, A. (2006), *Gowers review of intellectual property*, Norwich, England, Her Majesty's Stationery Office.
 - 90 The campaign was spearheaded by Panoptykon Foundation and others, such as Foundation Modern Poland, Internet Society Poland, Centre for Digital Design: Poland, Polish Linux User Group, see Horten, M. (2013), *A copyright masquerade: How corporate lobbying threatens online freedoms*, London [etc.], Zed Books p. 111.
 - 91 See: Recitals 4-17 of Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1
 - 92 Impact Assessment on the cross-border online access to orphan works, Accompanying the document: Proposal for a directive of the European Parliament and the Council on certain permitted uses of orphan works, Commission Staff Working Paper, Brussels, 24.5.2011, SEC(2011) 615 final, COM(2011) 289 final, SEC(2011) 616 final p.9; see also recitals 6, 7 and 25 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5
 - 93 Although the copyright Unit moved from DG MARKT to DG CNECT, interest groups will most likely continue to lobby those units that are most favourable for them. Nevertheless, gathering units that coordinate copyright, digital culture and media policies in one DG (here DG CNECT) gives hope for (though does not guarantee) a more coherent and holistic approach of the Commission to policy development in the area of copyright, in general.
 - 94 The Commission may also chair the groups' works, as in the case of the HLEG.
 - 95 See: [IFRRO Statement on Orphan Works May 2007](http://www.ifrro.org/Statement-on-Orphan-Works-May-2007).
 - 96 Despite most groups being willing to engage in works leading to the establishment of the due diligence criteria, some of them (e.g. some publishers) still contested the whole idea (they argued that any regulation would exclude the possibility for rights holders, once they reappear, to bring users to court for the unlawful exploitation of their works). In the end they got involved in the Working Groups discussions, as the opportunity to make precise claims in relation to how the legal provision should be framed was more profitable than contesting the whole initiative. Author's own observation made during a traineeship at the European Commission, DG INFSO E4 (October 2007 - February 2008).
 - 97 i2010: Digital Libraries, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 30.9.2005, COM(2005) 465 final, SEC(2005) 1194, SEC(2005) 1195 pp. 6-7.
 - 98 Author's own observation made during a traineeship at the European Commission, DG INFSO E4 (October 2007 - February 2008).
 - 99 O'Brien, D. (2009), *Every Vote Counts: the EU Copyright Term Extension Battle Heats Up*, Electronic Frontier Foundation, 30.03.2009, <https://www.eff.org/deeplinks/2009/03/every-vote-counts-eu-copyright-term-extension-batt>, accessed 17.03.2015; Open Rights Group (2009), *Open Rights Group: EU governments vote against copyright extension in Brussels*, <https://www.openrightsgroup.org/blog/2009/eu-governments-vote-against-copyright-extension-in-brussels>, 1.04.2009, accessed 17.03.2015; Out-Law.com (2009), *Pop star union demands new kind of copyright extension*, <http://www.out-law.com/page-9922>, 2.04.2009 accessed 17.03.2015; Paine, A. (2009), *U.K. Biz 'Disappointed' At EU Term Extension Rejection*, <http://www.billboard.com/biz/articles/news/global/1272627/uk-biz-disappointed-at-eu-term-extension-rejection>, 27.03.2009, Accessed 18.03.2015.