Institut der deutschen Wirtschaft Köln
Cologne Institute for Economic Research

IW policy paper · 4/2016

Contributions to the political debate by the Cologne Institute for Economic Research

Digitisation and European Copyright Protection

– Between Economic Challenges and Stakeholder Interests –

Author:

Dr. Marie Möller
Phone: 0221 4987-757
Email: moeller@iwkoeln.de

3 February 2016

Postfach 101942 - 50459 Köln

Konrad-Adenauer-Ufer 21 - 50668 Köln

www.iwkoeln.de

Contents

JEL classification:
O34: Copyright protection
O33 Technological change
K00: Law and economics

Abstract

The increasing digitisation necessitates amendments to copyright protection. Both the European Parliament and the European Commission have now presented proposals addressing this issue. This is necessary because the way in which creative goods are produced and distributed has been changed dramatically by digital technologies and the spread of the internet. One challenge that arises from this is the application of the Country of Origin principle and the resulting practice of geo-blocking. The resale of digital good represents another challenge in this context. Individual stakeholders have different interests with regard to copyright protection in a digital economy. For example, consumers (private or institutional users) have an interest in the resale of digital goods, whereas suppliers (authors, collecting societies, publishers) do not. The EU Parliament's proposal for copyright reform sides more with the suppliers than with the consumers. Future policy at EU level should attempt to create a clear, comprehensible legal framework and thus establish legal certainty.

1. The significance of copyright protection in Germany and Europe

The latest hit, a gripping novel or a well-researched newspaper article: Digitisation and the internet simplify and facilitate access to these goods. European copyright law exists to reward and protect the work and creativity of the authors of these works: It protects the creator of a creative work of literature, science or art (BMJV, 2015a) because only the rights holder may use the created goods (texts, images, pieces of music, films, software, etc.). Intellectual property rights (IP rights) are supposed to enable their holders to benefit economically from their works. In addition, IP rights should protect them against third party manipulation of the original content. In Germany, copyright law is supplemented by "ancillary copyright". It protects works that do not satisfy the creative threshold of originality of work as defined by copyright. Newspaper articles are an example for such works. In addition to copyright protection, there are three other intangible property rights in the European Union. These forms of protective rights for intellectual property cover patents, brands and designs. However, in contrast to copyright and ancillary protection, these property rights must be applied for officially (BMWi, 2008).

Protection of intellectual property is essential with regard to economic development because intellectual property is the "oil of the 21st century" (bpb, 2015). Without adequate protection, there is possibly too little incentive to produce innovative creative works. The "fourth industrial revolution" has created new technologies, communication media and forms of expression. That way, it has partly changed the traditional triangular constellation between originators, exploiters and users of creative works (European Parliament, 2015a). As a result, in the age of digitisation, copyright has developed into a central, across-the-board right of the information society (BMJV, 2015b).

Against the background of digitisation, the question arises which challenges for copyright in Germany and Europe result from an economic point of view. The purpose of this paper is to identify these challenges and to discuss the interests of the individual stakeholders. Apart from private users, the stakeholders affected by copyright protection reforms include businesses, authors, artists and copyright collectives, producers, publishers and intermediaries, such as the providers of online services. Service providers are, for example, internet providers, search engines, video portals, providers of email services and social networks. After analysing copyright protection from an economic point of view, the challenges caused by digitisation – especially by the internet – are deduced and explained. Four central problem areas are then assessed from the perspective of the stakeholders. This includes an examination of the extent to which the European Parliament's existing

proposal for the reform of copyright protection takes into account the stakeholders' interests. Finally, policy recommendations are given for the EU.

1.1 The importance of the cultural industries

Copyright protection provides the legal framework for the production and distribution of information goods (Handke et al., 2015, 343). Information goods are goods which can be digitised and which not only contain pure data but also knowledge (Shapiro/Varian, 2003, 48 ff.; Linde, 2009, 294). The framework conditions set by copyright protection have direct effects on the development of the cultural industries (film, music, art and book, broadcasting and press, advertising, software and games industries, designers and architects, and performing arts). In 2012, cultural industry sales in Germany amounted to more than 140 billion euros and thus accounted for around 2.3 percent of the gross domestic product (GDP) (BMWi, 2014). Almost 250,000 businesses operate in these industries employing around one million employees (ibid.).

Copyright protection provides the foundation of flourishing cultural industries at European level, too. According to estimates, more than seven million people are employed in this sector in the European Union (EU) that contributes 4.2 percent of the EU GDP (EU Parliament, 2015a). Creative work and the copyright-intensive industries are the strengths of the EU in global competition. Even during the economic crisis from 2008 to 2012, jobs were created in these industries (ibid.). Still, the copyright framework is also relevant for other areas, such as research-intensive industries.

1.2 The Digital Single Market and copyright protection

Especially with regard to the creation of the Digital Single Market (DSM) in Europe, one of the major projects of the EU, the copyright framework is of considerable importance. The aim is to enable EU citizens and businesses to buy and sell goods and services online easily, regardless of their location or nationality. Obstacles to cross-border online trading and to the use of online tools and services currently still exist between the EU countries. These trade barriers, which have long since disappeared in the analogue world, are partly caused by deliberate technological barriers or legal uncertainties (EU Commission, 2015b). Consequently, only seven percent of small and medium-sized enterprises (SME) in the EU currently market their products across borders on the internet (ibid.).

An open Digital Single Market would be an obstacle-free economic region in which legal certainty exists. This would be the ideal framework for trade and innovations with enormous growth potential (EU Commission, 2015b). One requirement for the creation of a DSM is access to digital services, since this is associated with a large economic growth potential. Demand for digital entertainment and media is expected to reach double-figure growth rates until 2020 (ibid.). In 2014, 49 percent of Europeans already accessed music, videos or games online (Eurostat, 2014). However, cross-border access has hardly played any role at all until now: According to the Eurobarometer 2015, 92 percent of Germans and 89 percent of EU citizens have not yet tried to use online services that are actually destined for users in another EU country. Yet more than one quarter of those surveyed are interested in accessing audio or audio-visual content destined for another EU country. Also, more than one quarter of the Europeans questioned are interested in a subscription that can be accessed across borders (EU Commission, 2015c). According to the EU Commission, modernisation and harmonisation of copyright law is required in order to facilitate the utilisation of this potential and to ensure that no citizen of the EU is prevented from acquiring copyright-protected works or services electronically in the DSM.

Since the Berne Convention for the Protection of Literary and Artistic Works in 1886, an international agreement, a certain degree of copyright protection is granted in virtually every country. Nonetheless, differences exist in the scale of this protection – even within Europe. Despite the so-called Copyright Directive (European Directive on the harmonisation of certain aspects of copyright and related rights in the information society), which was implemented in national law in Germany in 2003, the EU member states can implement a range of exceptions to copyright protection (EU Parliament, 2015a). Therefore, there are 28 different national laws in total at EU level, which is a challenge, as the discussion on freedom of panorama showed: For example, some member states demanded that the ban on photographing and graphically reproducing public buildings without the consent of the originator, which applies in France, should be transferred to the whole EU. The European Parliament decided against including the restriction of freedom of panorama according to the French model in the list of proposals, however. Based on the full list of proposals submitted by the Parliament, the Commission will construe a draft law on the harmonisation of copyright in Europe. The results of the EU consultation on the topic of copyright protection, held from December 2013 to February 2014, will also be taken into account. The basic skeleton of the EU copyright reform was presented on 9 December 2015 (European Parliament, 2015b); however, it does not yet contain any specifics. The Commission always has to balance the originators' and the users' interests. Their goals are mostly conflicting, however.

2. Economic aspects of copyright protection

Copyright protection is supposed to ensure that the authors of creative works are compensated adequately if their works are used. In theory, copyright protection thus provides an incentive for creativity and the creation of works (Handke et al., 2015). The following analysis shows how this theoretical relationship can be explained and substantiated empirically.

Against the background of digitisation, the so-called fixed-cost dominance of copyright-protected goods necessitates a reform of copyright protection. Most of the costs of these goods are fixed costs that occur during the development of the goods. Their variable costs, i.e. for reproduction and distribution, are very low in contrast.

If competitors are able to avoid spending the fixed costs and enter the market as imitators, market failures occur (Peters, 2010). The imitators could then offer the product at marginal costs. The original producers on the other hand, who bear the development costs, would consequently not be able to compete with these low prices. A pure ban on imitation is not sufficient to prevent such a market failure. The sale of modified goods can also threaten the market. Even if it is prohibited to copy a DVD, a film screening could be provided as a service. This would also reduce the sales of the original producers. This is where copyright protection comes into play. It creates a monopoly for a limited time due to an extended ban on imitation. The producers receive temporary exclusive rights to their work and can thus pass the development and production costs on to buyers. These costs only occur during the creation of the first original copy of the product and not in the reproduction (first copy costs). The temporary monopoly position protects the producers from competitors (imitators) and allows them to achieve profits (Handke et al., 2015, 344). The property rights therefore ensure that the creators profit financially from their work, and that sufficient incentives exist for production and innovation.

In theory, copyright protection guarantees that a market for creative goods is created or rather continues to exist. Therefore, the primary objective of copyright protection is to encourage innovation (Handke et al., 2015, 343). De facto copyright protection is relevant for commercial use. De facto copyright protection consists of copyright framework and its private and public enforcement as well as the development and spread of copying technology. In recent years, the spread of digital copying technology has brought about a dilution of de facto copyright protection (Handke et al., 2015, 344). However, empirical studies substantiate that reduced copyright protection does not have any impact on the creation of creative works. For example, Handke et al. (2015, 345) show that – despite unchanged user reviews and decreasing sales since 2000 – the number of new album releases in the music

market in Germany has increased. As de facto copyright protection has been reduced due to the spread of copy technology, a decreasing number of new releases would have been expected according to theory. The number of new releases in the film industry in 13 European countries also increased between 2000 and 2012 although turnover dropped (Handke et al., 2015, 347). Other studies for Germany and the USA substantiate that the spread of digital copying technology has not had any significant influence on the growth of released music albums (Handke, 2012; Waldfogel, 2012).

Although reduced copyright protection does not impair the creation of creative works, it leads to a decline in sales. Nonetheless, illegal copying and sharing has only been the cause of ten to 20 percent of the overall drop in sales in the music industry (Deutscher Bundestag, 2011, 62). Furthermore, an increase in sales in the music industry can be observed since 2012: Sales revenues from physical sales declined, but these were more than compensated for by the rise in digital sales (Musikindustrie, 2015). In addition, studies show that while there is a decline in turnover from physical sales in the music sector, sales in other areas (e.g. concerts) have increased (Deutscher Bundestag, 2011, 62).

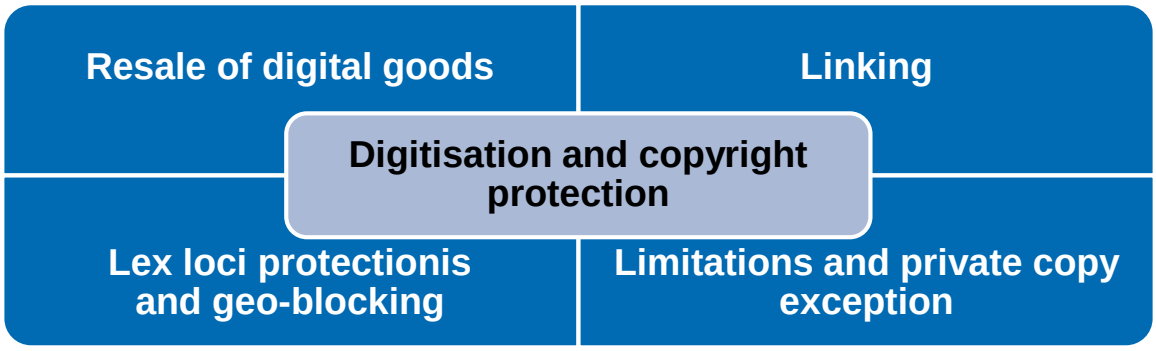
The example of live streaming also shows that declines in turnover for physical sales can be offset by innovative ideas, which bring about sales increases in other areas. The example of the interactive internet radio Spotify demonstrates this. In 2014, the company achieved a turnover of 1.3 billion US dollars and thus an increase of 48 percent compared to the previous year’s results. This corresponds with the results of a large-scale study, the Hargreaves Report (2011): According to the report, the economic success of creativity decisively depends on commercialisation being able to happen quickly (speed to market). This requires the market to be accessible, with simple rules and low transaction costs such as transport, customs duties and sales and distribution. Copyright protection and patents are only named as subordinate criteria for the economic success of creativity.

If it is taken into account that digitisation enables fast publication or release of new works, strict copyright protection is accordingly not required. Basically, copyright protection is necessary due to fixed-cost dominance. However, the degree of protection really has few effects on the number of creative works created. Apart from the reduction in de facto copyright protection due to digital copies, digitisation leads to other changes in the market, though, which entail copyright challenges that require European solutions.

3. The influence of digitisation

Digitisation results in three central changes with regard to distribution and copying, from which four central problem areas with respect to copyright protection can be deduced regarding (see Figure 1).

Figure 1: Challenges for copyright protection due to digitisation



Source: Own illustration

1. Digitisation makes creating digital copies of texts, images and sound recordings as well as software possible. In principle, this enables cost-free reproduction without a loss of quality. In consequence, questions arise regarding the **resale of digital goods**.
2. The internet enables simple and fast distribution that causes a problem with regard to **linking online content**.
3. As content can also be easily distributed across national borders, and copyright arrangements in the countries differ, additional challenges arise. One of them is the application of the **lex loci protectionis principle**. According to this regulation, the copyright framework of the country in which the content is available applies. This is the reason for geo-blocking, that is access restriction to online content based on the geographical location of the user.
4. Distribution of content across national borders implies that problems can occur with respect to the **limitations** or rather **exceptions** of copyright protection, as these differ from country to country.

These four problem areas, which the European Parliament (2015a) has also taken into account in its proposal for a European copyright protection reform, are discussed in the following.

3.1 Resale of digital goods

Many copyright-protected products, which before digitisation were available to consumers as physical goods only, are now also available as digital goods. These include books, magazines, videos, music and e-learning offers (Clement/Schreiber, 2013, 43 ff.). In addition to these, there are digital services such as communication or intermediary services and digital television programmes. This development causes drastic changes to the market. The reason for this is that digital goods have different properties than physical goods and are therefore subject to completely different conditions with respect to production and sales and distribution (ibid.).

A major difference is the reproducibility of digital goods. Compared to physical goods, digital goods can be reproduced significantly cheaper and without a loss of quality. Copying an mp3-file takes virtually no time at no cost except for memory space. In the analogue world, consumers were unable to reproduce a record because a copy could only be made by analogue methods, i.e. with a loss of quality. In addition to this, unlike physical goods, the value of digital goods is not reduced when they are passed on to other consumers. A resold mp3-file exists twice instead of once. A used record on the other hand is worth less than a new one. Furthermore, multiple ownership of digital goods is possible and they are non-excludable. The record can only be possessed and used by one person at any time, whereas the mp3-file can be possessed and used by an infinite number of individuals.

These properties mean that it is more difficult for the rights holder of digital content or the producer of digital goods to assert their rights. In addition, legal and economic questions arise regarding the resale of digital goods. At EU level, legal uncertainty currently prevails: Since the UsedSoft judgment of 2012, as a digital commodity, software **may be resold under certain circumstances (see** BMJV, 2015a and **Usedsoft, 2015). The question is whether this is also applicable to other digital goods, for example to e-books. The suppliers currently still technically prevent their resale. In Germany, a regional high court in Hamm has prohibited the sale of used audio files and e-books (Hoeren/Jakopp, 2014).**

With respect to the new EU copyright regulation, a general decision at EU level is expected regarding whether the exhaustion principle which applies to physical goods can or must be applied to digital goods, too (Wengenroth, 2014). This principle states that the originators' right to distribution is exhausted as soon as they have placed the commodity on the market for the first time (Kreutzer, 2015). After purchase, it may therefore be freely traded. This is not a problem with physical goods. As the new commodity has different properties than the second-hand one, a primary and secondary market for physical goods can exist alongside each other. However, in

case of digital goods the primary market could collapse. The reason for this is that the quality of digital goods is not reduced when resold. A secondary market would therefore be created where the same products would be offered at a lower price. Despite this, the primary market does not have to collapse. This is because even digital goods are subject to ageing and thus lose value or deteriorate. Even digital content loses quality if it becomes culturally or fashionably out-of-date. It can even age technically if new formats appear on the market (ibid.).

In the discussion on whether digital goods may be resold, a legal issue needs to be raised first: Do physical and digital goods have to be treated equally? If digital goods are construed as physical goods, then the exhaustion principle and thus the right to resale would also have to apply to them. However, the sellers would then have to ensure technically that they are not able to retain a permanent copy to use (ibid.). If digital goods are construed as services, then the right to resale should not apply, as the exhaustion principle does not apply to services.

3.2 Linking

A further challenge for copyright protection because of digitisation arises with respect to the distribution of content by means of hyperlinks. If internet users set hyperlinks to copyright-protected material, the question is whether they have to obtain the right to do so from the creator of this material. The EC Directive of 2001 states that originators are entitled to the exclusive right to allow or forbid public reproduction of their works and making them available to the public (Lischka, 2014).

However, the European Court of Justice has decided that setting hyperlinks to copyright-protected material does not require any permission from the originator (ECJ, 2014). Nevertheless, the permission to set hyperlinks only exists if the material in question has already been made available to the public and the link does not create new demand. This not only applies to setting hyperlinks, but also to the embedding of third-party content on a website. This means that search engines on the internet can freely link protected content. The permission to link could lead to further distribution or transmission of the content. Thus, it would reduce de facto copyright protection. Linking to newspaper articles constitutes a special problem. Here the challenge is that the hyperlinks often already contains part of the content of the article. News aggregators can therefore inform users without them having to visit the newspaper websites. The resulting reduced number of clicks on these websites imply a loss of advertising income for the newspapers. A similar situation exists with *instant articles*, which can be integrated directly in a social network, without the user having to visit the homepage of the newspaper.

3.3 The lex loci protectionis principle and geo-blocking

In Germany, the lex loci protectionis principle applies to the provision of online content. It is derived from the so-called territorial principle. The lex loci protectionis principle states that in case of infringement of their rights, originators can appeal to the law applicable in the country in which the infringement took place (EU, 2007). This means that the same copyright applies to them as to the country's residents. Thus, with the creation of their work, originators do not receive a single worldwide IP right, but a bundle of IP rights instead. As the internet facilitates that making content available in one country is synonymous with making it available worldwide, originators would theoretically have to insure themselves of the rights of all countries. As soon as content is made accessible online, each country is a potential country protectionis. To encounter this problem, access to copyright-protected content from other countries is technically partially prevented. This practice is called geo-blocking.

If rights needed to be obtained in all potential countries of destination in order to make digital content available, cross-border trading would be aggravated or prevented. Therefore, as an alternative to the lex loci protectionis principle, the application of the country of origin principle is being discussed. It is derived from the principle of universality. According to this, the law that applies in the country in which the copyright material is made accessible would be applicable. Accordingly, it would suffice for originators to acquire a licence for the country in which the provision takes place. The problem here is that online content can of course also be called up from countries for which a licence has possibly not been acquired, as online availability is difficult to limit. This could result in the originators not being appropriately financially rewarded.

The application of the country of origin principle would result in a reduction of de facto copyright protection, as the making available could take place in the country in which the lowest protection level applies (*forum shopping*) (EU Commission, 2014, 13). In order to counteract this problem, the country of origin could be defined as being the place in which the provider has their main place of business rather than the place in which the server is located.

A further disadvantage of the country of origin principle is that in case of dispute the country in which first-time publication or release took place would have to be determined. This is difficult, and in some cases even impossible. To prevent forum shopping, an introduction of the country of origin principle at EU level would only make sense if copyright laws were to be harmonised. If the lex loci protectionis

principle were to be retained, geo-blocking would constitute a suitable method for preventing content from being called up from countries without a licence. However, residents of a country should be able to access online content they have paid for in their home country when they are abroad. The same applies to access to media libraries of public broadcasting companies (TV and radio). As Germans pay a TV and radio licence fee for public broadcasting ("Rundfunkbeitrag"), it is irrelevant from an economic point of view whether they access these media libraries in Germany or from abroad. In consequence, access should be possible from anywhere.

3.4 Limitations and exceptions

There are several limitations ("Schrankenregelungen") to copyright protection. The rights of the originator or copyright holder are limited, among other things, by conflicting basic rights of third parties, for example, freedom of information (Durantaye, 2014, 63ff.). One of these limitations in Germany is the limitation of the rights of the originator or copyright holder in favour of education and science. Making content available to the public for teaching purposes is therefore possible without the permission of the copyright holder if there are no commercial objectives. However, this limitation to copyright protection is only free from permission, not free of charge.

This so-called science and education limitation ("Wissenschafts- und Bildungsschranke") affects the accessibility of scientific research, for example. It enables universities and research institutions to grant their scientists and students access to the relevant works by acquiring licences. This is relevant for companies in research-intensive industries such as chemical companies as well. Digital access to current international publications is important to them.

In the case of the science and education limitation, German copyright follows the continental European legal tradition. Anglo-American copyright law contains equivalents to the German science and education limitation; the so-called fair-use provision in the United States (Deterding/Otto, 2008) and the fair-dealing provision in the United Kingdom (Durantaye, 2014, 116). This legal tradition is based on a flexible general clause passed by the respective parliament and on court decisions, which open up a precedence effect for other cases (ibid.). It states that under certain conditions and purposes, copyright-protected material may be used without the permission of the originator or copyright holder (Biermann et al., 2012).

Transferring the fair-use provision to the whole EU, for example, would simplify the using digital content for science and education institutions. On the other hand, it would not only result in increased work for the courts, but it would also reduce legal

certainty in Europe. The reason for this is that due to different legal traditions in the individual member countries within the EU, the respective courts would probably frequently make divergent decisions. In contrast, there is a longstanding tradition and experience in interpreting disputed cases in the United States (EU Commission, 2014, 34).

In addition to limitations, there are also exceptions to copyright protection. The most prominent of these exceptions is the private copy exception (§ 53 Urheberrechtsgesetz (German copyright law); BMJV, 2015a). The person who has purchased the copyright-protected content may make copies, i.e. of texts or pieces of music for example, for private usage. To ensure payment to the copyright holder for these copies, the manufacturer of blank media and devices that enable private copies (PCs, photocopiers, etc.), must pay levies. These copyright levies on devices used for copying are mostly passed on to the consumer in form of a price mark-up. This private copy exception and the associated costs are regulated differently in the European member states, so that problems can also occur here. An example for this are providers of cloud services. They work under legal uncertainty, as the storage of a private copy in the cloud is regulated differently in the different EU countries. Furthermore, an infringement of the private copy exception frequently occurs with digitised products: This is the case if a purchased music file has copy protection, so that the person who has purchased it cannot make a private copy.

In the case of cloud services, there is also a need for regulation regarding the levies: If a private copy may be stored in a cloud, the question arises whether a blanket levy on cloud systems (similar to that on photocopiers or blank storage media) would be justified. Here a problem of multiple charging would occur which already exists for the levy on a PC: If an individual purchases a copyright-protected commodity, they pay for it and in doing so they acquire certain rights. The private copy limitation allows copies. A levy must be paid for a PC that saves these copies, so the problem of double charging occurs anyway. If a cloud service were also used to store copies, a levy on this would be the third time that a payment would be made.

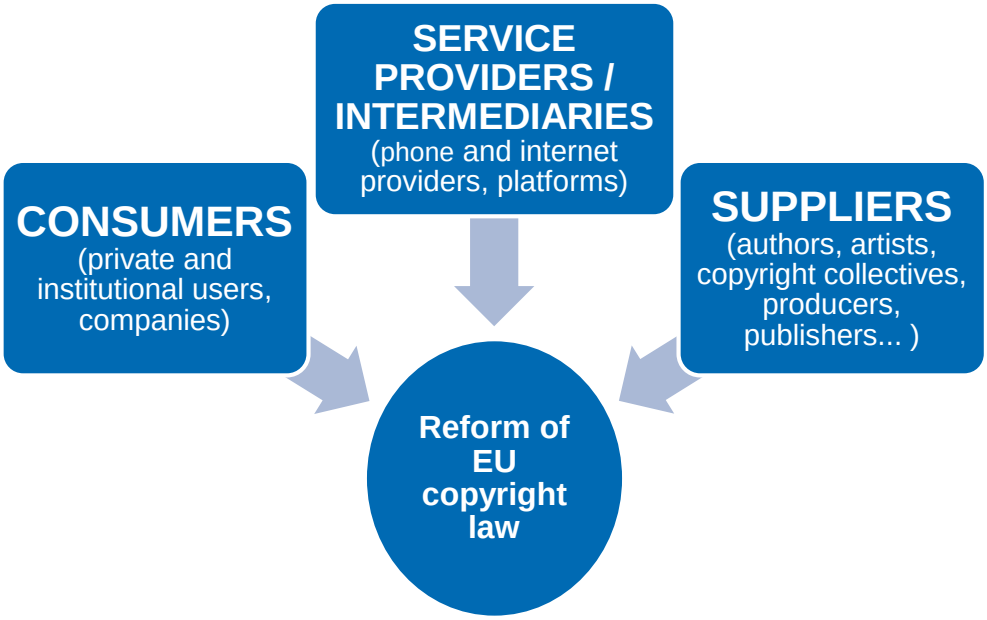
Existing limitations are not uniform in the EU, but optional in the member countries. Harmonisation of copyright at European level would have advantages and disadvantages for the individual stakeholders, as shown in the next chapter. In addition, it is questionable whether the limitations are sufficiently flexible with regard to technological development. It would be possible to open the list of exceptions, so that if necessary, for example, in case of new challenges due to technological change, further exceptions could be added.

These four challenges that arise for copyright protection because of digitisation are discussed in the following from the view of the different stakeholders.

4. The interests of the stakeholders

The central players affected by copyright legal provisions can be divided into consumers, providers and intermediaries (Figure 2).

Figure 2: The stakeholders



Source: Own illustration

The consumers primarily include the private users of texts, music and other goods covered by copyright protection as well as the institutional users, such as libraries or research institutions. However, the group also includes companies, whose interests with respect to copyright protection match those of consumers in many respects. In the German industrial sector, property rights in form of patents, registered designs and trademarks are exercised far more frequently than copyrights. Nevertheless, copyright protection is relevant in some areas (BMWi, 2008, 35). This applies, for example, to research-intensive industries or in the area of corporate communication. Many companies are also affected by copyright due to the device levy, for example, for photocopiers.

The providers (suppliers) consist of the authors and artists (for example actors, journalists, authors, and composers), the copyright collectives, producers and publishers as well as broadcasting companies. The copyright collectives represent

the providers of content as they operate in the interests of the originator or copyright holder: They receive the levies on blank storage media and photocopiers from their manufacturers and redistribute this income to authors, composers, etc (bpb, 2007).

The third group includes service providers such as phone or internet providers and platform providers or general intermediaries. However, the platform providers and intermediaries have a special position, as they appear not only as providers, but also as consumers.

The following shows that interests the individual stakeholders represent with regard to the challenges defined in chapter three. Divided into interest groups, the four challenges are discussed.

4.1 Consumers

Consumers have an interest in **digitals goods' resale** being allowed. The advantage of resale is that the original purchase investment is partially compensated for. On the other hand, it is advantageous for the purchaser because instead of buying new digital goods they may possibly be able to purchase used digital goods less expensively. The resale of a digital commodity is de facto not possible if digital content is tied to a user account or similar. This causes unequal treatment of digital and physical goods, which is disadvantageous for users, especially if digital and physical versions cost the same (EU Commission, 2014, 20). From the consumers' point of view, the risk of collapse of the primary market is rather low (ibid.). Used digital goods are less valuable than new ones, for example, because they are less up-to-date or have fewer functions – they age just as physical goods do (Kreutzer, 2015). Companies are affected by this problem with respect to software whose resale is allowed at EU level under certain conditions.

From the consumers' point of view, it would be disadvantageous if **setting hyperlinks** to copyright-protected material were to fall under copyright. This would increase legal uncertainty and transaction costs. Especially in social networks, linking is also a central feature of using the network.

For private users, an application of the country of origin principle would be advantageous as it is less complex than the **lex loci protectionis principle**. Due to its better manageability, the country of origin principle would result in greater legal certainty and clarity for private users. An application of the country of origin principle would also be very advantageous for businesses that have a website and, for example, use images licensed in Germany for it, even more so if this website is

accessible worldwide. If the lex loci protectionis principle were adhered to, uniform regulation would be desirable from the consumers' point of view, at least for Europe. This would make it significantly easier to comply with copyright regulation and at least establish legal certainty that is not the case with the current application of the lex loci protectionis principle. From the consumers' point of view, **geo-blocking** should be abolished as it prevents them from accessing digital content.

Worded positively, the **limitations** of copyright for private users tend to constitute "rights of use" (Durantaye, 2014, 117). The term "limitations" alone is assessed by some as being legally ambiguous which makes dealings more difficult for consumers. Harmonisation of the limitations at EU level would be advantageous for consumers and would significantly increase user-friendliness.

The **limitation provision for education and science** is problematic for consumers because it differs in the EU countries. Teachers, students and other actors in the educational system or sciences can therefore hardly be expected to know precisely what is allowed and what is not. Harmonisation would be desirable from their viewpoint. Furthermore, especially for institutions such as libraries as well as for schools, having to obtain licences for all copyright-protected material involves a large amount of bureaucracy. From their point of view, a general, broadly defined exception for teaching purposes in all European countries would be sensible.
In general, from the users' point of view, simplification and alignment of the limitations would be useful because correctly complying with copyright regulations is often problematic for them: A survey shows that almost 40 percent of users find it difficult to differentiate between legal and illegal online content (music, e-books or films) (GfK, 2013).

For scientists, the current limitation is unsatisfactory as access to scientific publications is very expensive. If scientists are not affiliated with an organisation, such as a university research institution, that owns a licence, access to individual scientific texts is very costly.

The science limitation is especially relevant for research-intensive industries. A large problem is that international access to scientific studies is complicated and expensive. What is more, profit-oriented companies are not allowed to reproduce the content – even if it is only for research purposes (Durantaye, 2014, 81 ff.). Especially for SMEs, acquiring the respective licences or accessing chargeable articles can constitute a large financial burden.

The **private copy exception** for digital goods is frequently circumvented by copy protection. This contradiction is problematic from a user point of view: They are

allowed to copy, but cannot do so. Private users have an interest in a general ban of copy protection. From a consumer point of view, it would be advantageous if greater transparency existed regarding the blanket levy on blank storage media and photocopiers. This way, when they purchase empty storage media, for example, they know what proportion of the cost is due to the blanket levy. For companies as users, not only the transparency of the blanket levies is relevant. From the view of the producers of photocopiers, it would be desirable if there were no subsequent adjustments to the blanket levies on photocopiers.

4.2 Suppliers

The suppliers of relevant goods reject the **resale of digital content**. A resale option and the associated trading of "used" online content would interfere with their economic exploitation interest and possibly reduce their earnings (EU Commission, 2014, 21). From their point of view, there is also a problem associated with the lending of digital goods (e-lending). The secondary could eliminate the primary market. One solution for this conflict could be to incorporate certain weaknesses in the digital goods so that, for example, only one user can read an e-book at a time. This way, it could be ensured that passing on digital goods constitutes real passing on and is not the equivalent of reproduction.

With regard to the **setting hyperlinks** to copyright-protected content, it would be in the interest of the providers of this content if links also fell under copyright. That way, the works of the originators or copyright holders would be protected better. The existing law at EU level would have to be reformed for this. A further argument against allowing linking without the permission of the originators is that the link could create a new access to the work. In this case, the rights holders would lose adequate compensation. This would be especially problematic for newspaper publishers: If the link to an article already contains part of the article content (snippets), customers are kept from the website of the newspaper that might be financed through advertising. At least, free-of-charge commercial use of content should be prevented from the newspaper publishers' point of view.

For the providers of digital goods it would be advantageous for the **lex loci protectionis principle** to be preserved. If the country of origin principle were applied, these stakeholders would face a large risk of forum shopping which could result in a lowering of de facto copyright protection and thus to a reduction in their compensation. For the users, the application of the lex loci protectionis principle would also be advantageous, as they could sell licences for the use of works in different countries at the same time. This would increase their turnover and possibly

their profits, too. The option of geo-blocking also constitutes an advantage for the providers, as in this way they can ensure that content can only be called up from those countries for which a licence has been purchased.

For providers, it is especially important that authors and artists are compensated if limitations are harmonized across borders. The **limitation in favour of education and science** could be disadvantageous for some providers with respect to teaching. For example, textbooks are provided free of charge on the intranet of several universities in Germany. However, if these textbooks are designed especially for teaching, this could cause a loss of earnings for the authors. This could also result in a smaller incentive to write such books. Harmonisation of this practice, which is common in Germany, for example, means risking a drop of the quality of teaching material. By contrast, the science limitation is not problematic for the providers. Access to scientific texts mostly requires a licence that institutions or individuals can purchase. Compensation of the originators is ensured and publishing companies have an incentive for publishing good quality. The providers would benefit from the introduction of the **private copy limitation** in all European countries, as authors and artists everywhere could then be compensated for their loss of profits due to private copies because a device levy would be incurred everywhere.

4.3 Intermediaries and service providers

The group of intermediaries and service providers is very heterogeneous, so that different interests exist regarding the four problem areas. For example, on the issue of the **resale of digital goods** there are opposing interests within this group. A platform for the resale of used goods would benefit if digital goods could also be resold. The amount of goods being traded would increase. In addition, this would offer the opportunity of new business models, such as special selling or swap platforms for used digital goods. Sales platforms for new, unused digital goods such as app stores and streaming services would have no advantage from such a framework because the demand for their offers would possibly decrease.

Intermediaries and service providers have no interest in **linking** falling under copyright law. The business model of some platforms, for example news aggregators, consists of precisely this, i.e. linking third party content. Such a regulation would also be a disadvantage for social networks: Users could feel restricted in their right to freedom of expression (EU Commission, 2014, 19). Furthermore, linking to videos or texts accounts for a large proportion of typical usage behaviour in a social network. If this were no longer allowed, the benefit of

social networks would be reduced and therefore the number of users would decrease.

For service providers and intermediaries, an application of the **lex loci protectionis principle** increases transaction costs. In some cases, they would have to negotiate with several copyright collectives and different licences would have to be purchased. Nonetheless, it would be feasible to offer their services in individual countries only. Furthermore, a lot of effort would be required to find out which right applies in which country. As uncertainties often exist regarding this, greater transparency would be an advantage from this group's point of view. A solution based on the country of origin principle would make the activities of these stakeholders easier (EU Commission, 2014, 10f.). As **geo-blocking** generally restricts the availability of online content, the intermediaries would profit from a general ban of this practice.

With regard to **limitations**, it is particularly important for service providers that legal certainty exists. They would benefit from greater harmonisation at EU level, as the many different provisions and exceptions make their work difficult. While this group is hardly affected by the **education and science limitation**, the **private copy exception** is relevant for it. This especially applies to the providers of cloud services: Harmonisation of the private copy exception would be advantageous on the one hand, as this would solve the problem of legal uncertainty. On the other hand, a blanket levy on cloud services would make their use more expensive which is not in the interest of these stakeholders.

Easing and simplification of copyright regulation in the interest of user-friendliness would be in the interest of both private and institutional users. Companies would also benefit from uniform provisions within the EU – among other things, for reasons of legal certainty and clarity. Providers on the other hand would not necessarily gain from uniform EU law. This would especially not be the case if harmonisation were to lead to a reduction of their rights. From the intermediaries' point of view, alignment of the rights would tend to be useful overall.

5. The parliamentary proposal and stakeholder interests

The proposal of the European Parliament which is enters drawing up the draft law of the Commission contains the following recommendations regarding the four identified challenges due to digitisation (for the following, see EU Parliament, 2015a).

- Regarding the **resale of digital goods** the Parliament calls for measures that ensure fair and adequate compensation for digital sales – but it does not put forward any specific proposals.

- The Parliament pleads against extending the German ancillary copyright for press publishers to the whole of Europe. This implies that copyright protection will continue not to apply to **setting hyperlinks**. The Parliament, however, calls upon the Commission to take into account the important role of journalists, authors and media service providers in order to safeguard quality journalism and media diversity in the digital age.

- The **lex loci protectionis principle** should continue to apply. A general ban on geo-blocking is therefore not recommended. On the other hand, users should not be prevented from obtaining paid access to content from abroad. The Parliament is therefore in favour of making the portability of stored data easier.

- The parliamentary proposal points out how important it is to establish legal certainty and security. Ultimately, it moves toward leaving most of the regulations as they are. This includes leaving the non-uniform **limitations** and exceptions as they are. Regarding the **education and science limitation,** the European Parliament recommends that the Commission examines whether certain exceptions should be mandatory. The Parliament pleads in favour of also taking into account consumer rights that require clear definition. For example, the **private copy** should continue to be allowed. However, the proposal is in favour of fair and transparent compensation for originators or copyright holders in the whole EU. This would basically only be possible through harmonisation at EU level; however, the Parliament does not argue in favour of this. The levies for private copies should be made transparent according to the Parliament's proposal.

Table 1 gives an overview of the stakeholders' interests and the parliamentary proposal in the four relevant areas. In the four problem areas, it can be seen that in three cases (lex loci protectionis principle, geo-blocking, and limitations) the Parliament tends to represent the providers’ side and in one case the consumers’ side (linking). In the discussion of the private copy exception, the parliamentary proposal deviates from the point of view of all stakeholders. Regarding the question as to whether digital goods may be sold, the Parliament does not set any direction with its proposal.

Table 1: Overview of stakeholder interests and the proposal of the EU parliament
Reform of EU copyright protection law

Problem area	**Stakeholders**			**Parliament**
	Consumers	**Suppliers**	**Intermediaries**	**Parliamentary proposal**
Resale of digital goods	Allow	Do not allow	Divided	Unclear
Linking	Allow	Protect	Allow	Rather allow
Lex loci protectionis vs. country of origin principle	Country of origin principle	Lex loci protectionis principle	Rather country of origin principle	Lex loci protectionis principle
Geo-blocking	Prohibit	Allow	Prohibit	No general ban, ensure data portability
Limitations	Harmonise	Do not harmonise	Harmonise	Do not harmonise, revise
Private copy exception	Retain and harmonise	Retain and harmonise	Retain and harmonise or do not retain	Retain, increase transparency and do not harmonise
Harmonisation of EU law	**Yes**	**No**	**Rather not**	**Rather not**

Source: Own illustration based on EU Commission, 2014

6. Conclusion and Recommendations

The analysis shows that the interests of the stakeholders diverge greatly when it comes to copyright. While consumers or users have an interest in simple and internationally uniform rules as far as possible, and in a rather low protection level, the provider side tends to be interested in a high protection level. Regarding harmonisation, different international laws for publishers, for example, can even be advantageous, as in many areas publishers can issue licences that might result in a profitable business model. For users, on the other hand, this can mean that they cannot access certain content.

The challenges that result for copyright law because of digitisation and the internet can be met in different ways. Here the interests of consumers, providers and

intermediaries differ sharply. The Parliament states that the position of the originator or copyright holder should be strengthened within the European context, so that their works are also protected in times of digitisation. Apart from the originators, the publishers should also be compensated appropriately. Private and institutional users and scientists should be able to benefit from more flexibility and simplicity while using copyright-protected works. However, in its proposal, the Parliament remains vague and does not name any specific measures. On the one hand, it attempts to create an adequate working environment for authors, for example. On the other hand, it aims to establish legal certainty in everyday actions for users (EU Parliament, 2015b). The creation of the DSM is very much about achieving benefits for users (such as a greater choice of goods). In the parliamentary proposal on copyright reform, consumers' interests tend to be taken into account less distinctly.

As expected, the European Commission spoke in favour of greater harmonisation of European copyright (EU Commission, 2015d). However, the paper published in December 2015 does hardly contain any specific measures. Details of whether linking should fall under copyright in the future are not expected until 2016 (SZ, 2015). Other specific requirements are also not to be developed until 2016, following the end of several still ongoing consultations of the EU Commission. Here it should be taken into account that the countries' individual laws are an expression of the respective cultures. The different arrangements that currently exist represent the diversity of the individual EU member states (EU Parliament, 2015a). The Commission must also deal with the conflicting goals that the parliamentary proposal raises: For example, cross-border access to online content should be made easier, but the principle of territorial licences should be retained.

A clear objective for the Commission should be to create a comprehensible legal framework and to establish legal certainty. A copyright in an easily understood and implementable form can help to raise users' awareness of copyright protection and to achieve greater compliance with the law. The provisions concerning the education limitation in particular should be put to the test.

That a copyright reform is required at European level is beyond debate. Especially for equal treatment of digital and physical goods and the topic of geo-blocking, solutions are required at European level. Against this background, it is to be welcomed that the Commission plans to eliminate geo-blocking and improve the portability of content (EU Commission, 2015d). A draft regulation for the latter already exists: Thus, users should be able to access purchased or leased online content from another EU country than their residential country. Work on the regulation for a comprehensive ban on geo-blocking is still in progress (Krempl, 2015). However, it is planned for freedom of panorama to be codified Europe-wide in future. General harmonisation of

copyright protection at European level is merely outlined by the Commission as a long-term goal (Krempl, 2015). Against this background, a comprehensive assessment of the copyright policy of the EU Commission is difficult at the present time. It can be be hoped that the Commission will actually shape copyright protection in a way that the Digital Single Market quickly becomes reality.

References

Beck, Jonathan, 2015, Es ist Zeit für einen Aufschrei der Kreativen, http://www.sueddeutsche.de/digital/urheberrecht-die-doppelmoral-der-netzgemeinde-1.2572984 [10.9.2015]

Biermann, Kai / **Braun**, Jessica / **Beuth**, Patrick, 2012, Urheberrecht für Anfänger, http://www.zeit.de/digital/internet/2012-07/glossar-urheberrecht [9.10.2015]

BMJV – Bundesministerium für Justiz und Verbraucherschutz, 2015a, Gesetz über Urheberrecht und verwandte Schutzrechte, http://www.gesetze-im-internet.de/urhg/ [10.9.2015]

BMJV, 2015b, Interview promedia: "Keine fundamentalistische Debatte mehr", http://www.bmjv.de/SharedDocs/Interviews/DE/2015/Online/20150330_promedia_Urheberrecht.html?nn=2708420 [10.9.2015]

BMWi – Bundesministerium für Wirtschaft und Technologie, 2014, Kultur- und Kreativwirtschaft, http://www.bmwi.de/DE/Themen/Wirtschaft/Branchenfokus/kultur-kreativwirtschaft,did=626448.html [10.9.2015]

BMWi, 2008, Die volkswirtschaftliche Bedeutung geistigen Eigentums und dessen Schutzes mit Fokus auf den Mittelstand, Forschungsbericht No. 579, Berlin

bpb –Bundeszentrale für politische Bildung, 2015, Dossier Urheberrecht, http://www.bpb.de/gesellschaft/medien/urheberrecht/ [10.9.2015]

Clement Reiner / **Schreiber**, Dirk, 2013, Internet-Ökonomie, Grundlagen und Fallbeispiele einer vernetzten Wirtschaft, Heidelberg

Deterding, Sebastian / **Otto**, Philipp, 2008, Urheberrecht und Copyright – Vergleich zweier ungleicher Brüder, http://www.bpb.de/gesellschaft/medien/urheberrecht/63355/urheberrecht-und-copyright [10.9.2015]

Deutscher Bundestag, 2011, Dritter Zwischenbericht der Enquete-Kommission „Internet und digitale Gesellschaft“: Urheberrecht, http://dip21.bundestag.de/dip21/btd/17/078/1707899.pdf [10.9.2015]

Dobusch, Leonhard, 2014, EU Kommission legt Bericht zur Urheberrechtskonsultation vor, https://netzpolitik.org/2014/eu-kommission-legt-bericht-zur-urheberrechtskonsultation-vor/ [15.10.2015]

Durantaye, Katharina de la, 2014, Allgemeine Bildungs- und Wissenschaftsschranke, Münster

EU Kommission, 2015a, Mitteilung der Kommission an das europäische Parlament, den Rat, den europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, Strategie für einen digitalen Binnenmarkt für Europa, Brussels

EU Kommission, 2015b, Why we need a Digital Single Market, Factsheet, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-factsheet_en.pdf [9.10.2015]

EU Kommission, 2015c, Flash Eurobarometer: Grenzüberschreitender Zugriff auf Online-Inhalte, http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059 [16.11.2015]

EU Kommission, 2015d, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a modern, more European copyright framework, Brussels

EU Kommission, 2014, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf [15.10.2015]

EU Parlament, 2015a, Harmonisierung bestimmter Aspekte des Urheberrechts und der verwandten Schutzrechte, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0273+0+DOC+PDF+V0//DE [4.9.2015]

EU Parlament, 2015b, Urheberrechtsreform: Kulturelle Vielfalt fördern, den Zugang sicherstellen, http://www.europarl.europa.eu/news/de/news-room/content/20150703IPR73903/html/Urheberrechtsreform-Kulturelle-Vielfalt-f%C3%B6rdern-den-Zugang-sicherstellen [4.9.2015]

EU – Europäische Union, 2007, Verordnung (EG) Nr. 864/2007 des Europäischen Parlaments und des Rates vom 11. Juli 2007 über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II"). Kapitel II - Unerlaubte Handlungen (Art. 4-9), https://dejure.org/gesetze/Rom-II-VO/8.html [9.10.2015]

Eurostat, 2014, Community Survey on ICT usage in households and by individuals, http://ec.europa.eu/eurostat/cache/metadata/DE/isoc_bde15c_esms.htm [25.11.2015]

FAZ, 2015, Gesperrte Videos im Internet - Oettinger gegen schnelles Ende von Geoblocking, http://www.faz.net/aktuell/wirtschaft/netzwirtschaft/oettinger-gegen-schnelles-ende-von-geoblocking-13512507.html [10.9.2015]

EuGH – Gerichtshof der Europäischen Union, 2014, Urteil in der Rechtssache C-466/12: Der Inhaber einer Internetseite darf ohne Erlaubnis der Urheberrechtsinhaber über Hyperlinks auf geschützte Werke verweisen, die auf einer anderen Seite frei zugänglich sind, http://docs.dpaq.de/6432-cp140020de.pdf [9.10.2015]

GfK – Gesellschaft für Konsumforschung, 2013, Studie zur digitalen Content-Nutzung (DCN-Studie) 2013, http://www.musikindustrie.de/fileadmin/news/publikationen/DCN-Studie_2013_Vollversion_Final.pdf [1.9.2015]

Handke, Christian / **Girard**, Yann / **Matte**, Anselm, 2015, Fördert das Urheberrecht Innovation? Eine empirische Untersuchung, Studien zum deutschen Innovationssystem, No. 16-2015, DIW Econ, Berlin

Handke, Christian, 2012, Digital Copying and the Supply of Sound Recordings, in: Information Economics and Policy, Vol. 24, No. 1, pp. 15–29

Hargreaves, Ian, 2011, Opportunity - A Review of Intellectual Property and Growth, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf [9.9.2015]

Hoeren, Thomas / **Jakopp**, Sebastian, 2014, Der Erschöpfungsgrundsatz im digitalen Umfeld – Notwendigkeit eines binnenmarktkonformen Verständnisses, https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjdgP6RoNHJAhXOhhoKHQb0BMcQFggcMAA&url=http%3A%2F%2Fwww.uni-muenster.de%2FJura.itm%2Fhoeren%2Fveroeffentlichungen%2FErsch%25C3%25B6pfungsgrundsatz.pdf&usg=AFQjCNGGJJpcgsmJTAfmgpat0J6PLd4IMA&bvm=bv.109395566,d.d2s&cad=rja [9.10.2015]

Krempl, Stefan, 2015, Neues europäisches Urheberrecht: Google-Steuer, besserer Urheberschutz, EU-weite Panoramafreiheit?, http://www.heise.de/newsticker/meldung/Neues-europaeisches-Urheberrecht-Google-Steuer-besserer-Urheberschutz-EU-weite-Panoramafreiheit-3038357.html [11.12.2015]

Kreutzer, Till, 2015, Weiterveräußerungsfähigkeit von digitalen Gütern, http://www.verbraucherportal-bw.de/site/pbs-bw-new/get/documents/MLR.Verbraucherportal/Dokumente/Dokumente%20pdfs/Verbraucherschutz/Urheberrecht/15_10_20%20Studie%20Weiterver%C3%A4u%C3%9Ferungsf%C3%A4higkeit%20von%20digitalen%20G%C3%BCtern_Dr.%20Till%20Kreutzer.pdf [28.10.2015]

Linde, Frank, 2009, Ökonomische Besonderheiten von Informationsgütern, in: Keuper, Frank/Neumann, Fritz (ed.), Wissens- und Informationsmanagement. Strategie – Organisation – Prozesse, Wiesbaden, pp. 291–320

Lischka, Konrad, 2014, Urheberrecht: Europäischer Gerichtshof entscheidet fürs freie Verlinken, http://www.spiegel.de/netzwelt/netzpolitik/urheberrecht-europaeischer-gerichtshof-erlaubt-direktlinks-a-953229.html [27.10.2015]

Musikindustrie, 2015, Musikindustrie in Zahlen 2014 – Umsatz, http://www.musikindustrie.de/jahrbuch-2014-umsatz/ [9.10.2015]

Peters, Ralf, 2010, Internet-Ökonomie, Heidelberg

Shapiro, Carl / **Varian**, Hal R., 2003, The Information Economy, in: Hand, John R.M. / Lev, Baruch (ed.), Intangible Assets. Values, Measures, and Risks, New York, pp. 48–62

Süddeutsche Zeitung (SZ), 2015, Oettinger will Geoblocking in Europa abschaffen, http://www.sueddeutsche.de/digital/digitalisierung-eu-kommission-will-geoblocking-in-europa-abschaffen-1.2774744 [9.12.2015]

Usedsoft, 2015, Erschöpfungsgrundsatz im Urheberrecht, https://www.usedsoft.com/de/gebrauchte-software/usedsoft-wiki/glossar/lizenzrecht/erschoepfungsgrundsatz-im-urheberrecht/ [27.10.2015]

Waldfogel, 2012, Copyright research in the digital age: Moving from piracy to the supply of new products, in: The American Economic Review, Vol. 102, No. 3, pp. 337–342

Wengenroth, David, 2014, Der Streit ums E-Book und seine Erschöpfung, http://www.buchreport.de/nachrichten/verlage/verlage_nachricht/datum/2014/10/28/der-streit-ums-e-book-und-seine-erschoepfung.htm [9.10.2015]