VERBAND DER CHEMISCHEN INDUSTRIE e.V.
WIR GESTALTEN ZUKUNFT.

VCI-Comments on the EU-copyright-consultation (answer to questions 47 – 49)

Preliminary note

Verband der Chemischen Industrie e. V. (VCI, the German chemical industry association) represents the political-economic interests of some 1,650 German chemical companies and German subsidiaries of foreign businesses. The VCI stands for over 90 percent of the chemical industry in Germany. In 2012 the German chemical industry realised sales of some 186 billion euros and employed over 434,000 staff.

VCI is listed in the EU-Transparency-Register (Organisation-ID-Number Transparency Register: 15423437054-40).

VCI-Comments

As a research and innovation-driven industry, the chemical industry depends in a very special way on easy access to and the archiving of electronic reproductions of publications. Most notably, in efforts to realise its research and development projects the chemical industry relies on scientific literature. Scientific publications in specialist periodicals have a major role when gathering information for research purposes.

Furthermore, access is needed to information about new markets, the needs of customers, and technological and societal trends generally – to make sure that there is a demand for newly developed products and services in the relevant markets. Against this backdrop, also publications from these fields are greatly important to the companies.

Consequently: easy, fast and favourably priced access to reproductions of scientific literature, the possibility to centrally store (archive) such reproductions and to structure them (e.g. by means of indexing) – in order to enable repeated access to their contents – are essential for companies who want to make their research and development plans a reality.

This holds also true with the ever rising volumes of information so that the analogue information management of only recent years is practically no longer possible today.

Moreover, numerous pieces of national and European legislation oblige the chemical industry to keep available and, where necessary, submit to the competent authorities certain items of literature: within registration and authorisation procedures and product monitoring or in case of emission incidents. Here some examples of such obligations:

- Requirement to provide information on (eco-)toxicity in emission incidents;
- submission of information under the REACH Regulation. The items of information required by the European Chemicals Agency (ECHA) can include scientific documents, e.g. comprehensive study reports in the form of essays in periodicals etc;
- obligation to provide proof regarding literature quotes used when answering enquiries from competent authorities, as regards chemicals assessments/ dossiers;
- legal provisions requiring literature data for the assessment of (eco-)toxicological endpoints (e.g. REACH, German animal protection act/TierschutzG);
- requirement to understandably document the classification of substances/ products under REACH;
- notification requirement in cases of suspected severe adverse drug reactions with an evaluation of topical literature under the German medicinal products act (AMG);
- obligation to provide proof on scientific findings in the medicines authorisation procedure under the German medicinal products act (AMG).

Also worth mentioning is the patent application procedure where the companies must provide proof on the state-of-the-art by means of scientific publications. If they fail to fulfil this requirement, they run the risk of their patent applications being rejected. Such losses of rights can negatively impact the competitiveness of companies.

Furthermore, the companies need to keep available comprehensive documents on dangerous goods, which can comprise scientific tracts, within TUIS (Transport-Accident-Information and Emergency Response System of the chemical industry).

The companies depend on access to and the possibility of archiving scientific literature in electronic form, both when realising their research projects and in order to comply with their legal obligations.

The keeping available of analogue reproductions in physical libraries no longer meets the needs of modern workflows in the research departments of companies and in dossier preparation. Today's research activities of companies are usually carried out in an interdisciplinary, decentralised – and partly cross-border – approach. The different legal provisions and licensing models in the various EU Member States render this cooperation between several countries very difficult, because it is only partly permitted to exchange the required documents across national borders.

Most research projects stretch over several years. Therefore, it is essential for staff of the involved departments to have fast and repeatable access to sources of scientific findings – which needs to be ensured for various access points and at various times. This is reliably possible only by enabling electronic access to existing literature.

Moreover, many legal requirements include the obligation to electronically submit scientific literature sources. For example, electronic submission is mandatory for information under the REACH Regulation or for documents in authorisation procedures for medicines or plant protection products. Obviously, this presupposes that the companies keep available the relevant items of information in electronic form.

In Germany neither the access to nor the archiving of scientific literature are regulated in a manner satisfactory for industry.

In the implementation of Article 5 (3) (a) of Directive 2001/29/EC – by way of § 53 (2) sentence 1 nos. 1 and 2 of the German copyright act (UrhG) – the German legislator makes the admissibility of taking copies of scientific literature dependent on the absence of a *"commercial purpose".* The term *"commercial purpose"* is interpreted widely so that all industrial companies work "commercially". Consequently, the companies themselves are not permitted to reproduce scientific literature for research purposes.

Moreover, also in public libraries in Germany the transmission of electronic copies of scientific literature is permitted only to the extent that this is justified by a non-commercial purpose.

Companies are also not permitted to electronically archive reproductions of their own work items, because the UrhG – § 53 (2) sentence 1 no. 2 in conjunction with sentence 2 nos. 2 and 3 – privileges solely the analogue use and publicly accessible archives, respectively.

For this reason, at present the companies need to acquire separate licenses each for their own reproductions of scientific literature for research purposes and for the archiving of such reproductions. However, this does not meet the real needs of the companies in many ways:

- Obtaining scientific literature within "package solutions" either does not cover all the relevant publishers, or costly multiple licensing must be accepted. Moreover, usually the right to electronically archive scientific literature is only limited or linked with further conditions. Additionally, the high costs of such licensing negatively impact especially small and mid-sized enterprises (SMEs).
- Individual licensing through publishers involves much time and administration, causing excessive burdens particularly for SMEs in both industry and publishing; such companies usually lack the necessary resources in terms of personnel, organisation and finance. Moreover, obtaining scientific literature fast by way of individual purchases is normally not possible. In many cases, this runs counter to the legal obligations of a timely communication of scientific findings.

- Individual licensing through public libraries does not include the permission to electronically archive the thus obtained literature. This is excluded under the licensing agreement and technically not feasible, either.
- Licening of isolated articels for the purpose of electronic storage (archive) is often not provided by publishers or again involves much time and administration.

By contrast, Article 5 (3) (a) of Directive 2001/29/EC allows copies for scientific research to the extent justified by a *"non-commercial purpose"*.

According to Recital 42 of Directive 2001/29/EC, when applying this exception, "*the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect*."

It would be desirable to amend Directive 2001/29/EC to the following effect: Irrespective of the question whether a commercial purpose is pursed or not, storage and reproduction should be permissible if the storage and reproduction of works serve the purpose of complying with a legal obligation or with an order imposed by a public authority or a law court. Then, this exception should apply to acts of use performed by a service provider who is retained by the user and who serves the user for complying with the legal obligation or with the order imposed by a public authority or law court (e.g. a lawyer or a patent attorney).

Beyond the field of scientific literature, the purchase of licenses for the use of copyright-protected works should be simplified generally – enabling the use of such works also across national borders and at uniform conditions.

The multitude of contractual conditions and licensers renders the building up of internal information systems highly complex and, consequently, cost-intensive. Here, firstly a more uniform licensing practise, which ensures a certain "minimum standard" for licensing conditions – would be helpful. Secondly a central licensing agency (like e.g. a collecting society or a "clearing office") would bring much improvement, because then licensing would be necessary with only one or, at most, a small number of partners.

Such supplementary provisions could significantly improve the situation for industry.