Do ask, do tell, do nothing: the EU Commission and all those copyright consultations

"Do ask, do tell, do nothing: the EU Commission and all those copyright consultations" is Deputy Editor Eleonora Rosati's editorial for the October 2014 issue of JIPLP, which we are delighted to reproduce below in full:

Following the big wave of 1990s-early 2000s EU copyright reforms (Directive 2001/29/EC—the so called InfoSoc Directive—was adopted in 2001), over the past few years the main feature of EU Commission's copyright policy has probably been consulting with interested stakeholders about the need for further updates or major reforms of the *acquis*.

It is however difficult to think of consultations that have translated to actual reform proposals.

The 2008 Green Paper on *Copyright in the Knowledge Economy*included a call for comments (there were about 350 in the end) on issues pertaining to exceptions and limitations in Article 5 of the InfoSoc Directive. Nothing changed as a result of this stakeholder exercise, unless you consider the creation of the Content Online Platform, ie a “stakeholders’ discussion and cooperation platform”, an actual step forward for EU copyright reform debate. The outcome of the 2009 *Consultation on Creative Content Online*was not more encouraging. Despite being aimed at discussing the challenges facing digitization of content and distribution channels, it attracted around 200 responses (which is over 40% less than its 2008 predecessor), and passed unnoticed outside niche—possibly too niche—circles.

Switching for a moment away from public consultations, in its 2011 blueprint ambitiously titled *A Single Market for Intellectual Property Rights boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe,* the Commission anticipated a number of (minor, I think) legislative initiatives (on orphan works and collective rights management) and—again—a new round of consultations on two topical copyright issues, ie further harmonization of copyright laws of Member States, and re-opening the InfoSoc Directive. While the EU has adopted specific directives on orphan works (Directive 2012/28/EU) and collective rights management (Directive 2014/26/EU), no progress has been made on the front of the two really big policy issues identified in the blueprint.

Proof of the above is the most recent *Public Consultation on the Review of EU Copyright Rules* that ran between December 2013 and March 2014. Again, the Commission asked about deepening the harmonization of the copyright laws of EU Member States and the need for changing/clarifying/updating key provisions of the InfoSoc Directive with regard to both exclusive rights and related exceptions and limitations. Following the conclusion of this last consultation, there should be (or rather: should have been, considering that current Commission's term of office will end in October this year?) a White Paper aimed at identifying potential areas for legislative intervention, and an Impact Assessment. Draft versions of both documents have been already leaked, and do not look particularly ambitious. All this creates the impression that—also this time—no real copyright reform will occur.

This may not be the worst case scenario though.

What is most worrisome is in fact the high—and at times fairly intolerable—degree of partisanship of those involved in the copyright debate and the instrumental use that the Commission itself has made of the instrumental data thus collected.

In a recent briefing prepared for the European Parliament and entitled *Adapting the EU Copyright Rules to the Digital Transformation,* Stéphane Reynolds reviewed the implementation, application and effectiveness of EU copyright policy over the past few years. He observed that public consultations have featured prominently and have essentially served to gather and confirm qualitative—rather than quantitative—data. In other words, you were not mistaken in thinking that all those stakeholder exercises looked like sort of a *déjà-vu*: they were.

To this add the sudden rise in the numbers of participation: the 2013–14 Public Consultation received 9,500 responses. This was not because Europe has been recently invaded by armies of copyright enthusiasts, but rather because popular stakeholder-driven initiatives such as Fix Copyright!, Creators for Europe and Copywrongs.eu really boosted participation by providing pre-filled response forms. While this is good for creating a copyright culture also among non-specialists, it also strengthens the impression that consultations are bound to become even more repositories of sclerotized data that can hardly be considered economic evidence (apparently the only real, acceptable type of evidence), if evidence at all.

Besides well-known refrains on competitiveness and effectiveness of the EU single market, it is still unclear where EU copyright policy is heading. Moreover, it seems that asking repeatedly the same people might not help see the way. The next Commission will hopefully appreciate the actual legacy—if any—of these years spent consulting, as well as the quality of the data used to carry out the most recent (minor) reform agenda. But will it?