Openforum europe
open, competitive choice for IT users

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Position paper on the implementation of Directive 2001/29/EC

This document is meant as an input to the European Parliament's Evaluation Report of the implementation of Directive 2001/29/EC. Its aim is to provide the position of OpenForum Europe and it covers four topics: hyperlinking, text and data mining, private copying levies and software interoperability.

About OpenForum Europe (OFE)

OpenForum Europe (OFE) is a not-for-profit industry organisation launched in 2002 with the mission to facilitate open, competitive choice for IT users. OFE is supported by major IT suppliers, as well as SMEs, user and consumer organisations, and national partners across Europe. Our mission objective is to help deliver an open, competitive ICT market. We maintain an ongoing dialogue with key decision makers, participate actively in public consultations, and often serve as an interlocutor between legislators and the wider open computing community. Through our programme OpenForum Academy, we also encourage constructive policy debates by running a series of focused roundtables that bring together academics, industry experts and policymakers.

Hyperlinking and framing

Current situation: Recent European case law on the matter include the "Svensson" case[1] and the Bestwater case[2], where the judge concluded that "making available the works concerned by means of a clickable link does not lead to the works in question being communicated to a new public". However, the lack of any clear EU-wide legislation on this topic has led to notable national

1Case C-466/12 Nils Svensson and Others v Retriever Sverige AB [2014]

2 C-348/13 BestWater, International GmbH v Michael Mebes and Stefan Potsch [2014]

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divergences, with negative impact on the functioning of the EU internal market. Recently both Germany and Spain have introduced so-called ancillary copyright (in Spain, also dubbed "AEDE tax" - effectively a levy on links and quotations) for press publishers which require online services and apps, including news aggregators, to pay royalties to publishers for linking or using short snippets of their text. In both cases this has led to early failures. In Germany publishers decided to grant Google free use of their text snippets to maintain their visibility and traffic, whereas in Spain Google News and other services such as Infoaliment and Multifriki were simply shut down, resulting in a net loss for both readers and publishers. Crucially, this type of legislation creates an obstacle to the provision of cross-border services of aggregation and only serves to restrict a competitive Internet – increasing barriers to entry for Internet based services, making it harder for smaller publishers, bloggers or pure Internet players to be successful online.

Our recommendations: We consider the act of linking to be a fundamental function of the open Internet that we know today, which should not be subject to any copyright authorisations or arbitrary levy that covers any type of content. Links are no more than pointers to a place where to find a webpage; and quoting e.g. a title or a few words and linking should be recognized as rights, falling outside the scope of copyright protection throughout the EU, subject neither to permission nor to payment. EU rules should be enforced to nullify national legislation which amounts to a levy on linking and free expression. We also believe the rights of users to link and point to information should be strongly recognized and upheld.

Text and data mining

Current situation: Data mining and analytics generally involves making temporary (transient) copies of all or part of the data being processed during the data analysis. Journals, documents or databases that are mined may be protected by copyright. But the act of copying is made for technical purposes, as it is often the only way to transform it into a machine readable format. Text and data mining (TDM) simply employ computers to "read" material and extract facts one already has the right as a human to read and mine "manually". TDM when used for data mining in commercial areas – i.e. analytics could be deemed to be infringing copyright even when it uses freely available content on the public internet. There is currently no copyright exception for TDM in Europe.

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1. Non-commercial use of TDM

Copyright exceptions for data analytics are possible under the 2001 Directive, but are not mandatory and are limited in scope. Thus only some Member States have implemented them (notably the UK), with the limitation that TDM is for non-commercial purposes. The principle here is that as long as the material is lawfully accessed in the first place, text and data mining should not be further restricted. EU research would greatly benefit from generalising this exception. In the research context, contracts by which access to research material is secured from the copyright owner should fully ensure the ability of the user to data-mine these materials.

2. Commercial use of TDM where no economic harm to the copyright holder ensues:

As a starting point, an explicit narrow copyright exception for text and data mining of Internet content would clarify the law and thereby benefit the European economy if it were to be structured as follows:

Where the owner of a copyright work makes it available to the public in digital form over a network without any technological measures restricting access or use, it shall not be an infringing act to make, use and modify a temporary copy of the copyright work for the purpose of text or data analysis where such making, using and modifying does not conflict with a normal exploitation of the work, does not unreasonably prejudice the legitimate interests of the owner, and where any material resulting from the text or data analysis which is made available to the public does not contain substantial protectable expression taken from the copyright work. "

Private copying and reprography

Current situation: Most but not all EU countries have implemented a copyright levies system to compensate rightholders from the alleged harm suffered from private copying. According to a recent press release[3] from Eurostat, 55% of European users use cloud services as a protection against data loss. Their main motivation to use cloud services is backup data, not store protected content. Moreover, most of the content created and uploaded to cloud service is created professionally or by users themselves. For example, in 2013, 758 million photos were uploaded and shared online each day, and, according to Eurostat, 83 million European uploaded self-created content online in 2012[4].

This system has led to significant market distortions and high administrative costs. Moreover, there is no justification to make users pay private copying levies for the content they create themselves.

3 Internet usage by individuals in 2014, 16 December 2014, accessible at http://goo.gl/nNcjLh
4 Business insider, "The future of digital" (2013)

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Our recommendations: While it may currently be difficult to completely phase out private copy levies, we believe that at the very least their scope should not be further extended to new technological supports. In particular, we warn against applying levies to remote storage or cloud services. Digital and cloud services are driving the growth of revenue for content owners. Levies would merely reduce the creative and economic opportunity for creators. Rather, policy makers should provide the optimal conditions for creators to create, distribute and sell in order to provide a sustainable basis for the creative sector. Making cloud solutions more expensive would punish consumers, businesses, creators and innovators by reducing the take-up of new technologies and increasing cost.

Software interoperability

Current situation: The 2001 Directive does not deal specifically with software, which is tackled in the lex specialis Directive 2009/24/EC (aka the "Software Directive"). Article 6 of this Directive guarantees that copyright cannot be used to prevent the decompilation of the program when and in so far as necessary to ensure that it operates with other programs or devices. This clause has been detailed and developed in recent case law, notably in the 'SAS Institute Inc v World Programming Ltd' case where the judge ruled that "neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program for the purposes of the Software Directive".

Our recommendations: This "interoperability exception" has proven to be essential to guarantee software interoperability and should be maintained. No change to the 2001 Directive should be necessary for this to be achieved.

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About OpenForum Europe
(OFE) is an independent, not-for-profit organisation, supported by major IT suppliers including Deloitte, Google, IBM, Oracle and Red Hat, as well as SMEs, user and consumer organisations, and national partners across Europe. It focuses on delivering an open, competitive ICT market. Views expressed by OFE do not necessarily reflect those held by all its supporters.

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