OpenForum Europe Response to the Public Consultation on the review of the EU copyright rules

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Introduction

We believe that the development of new technologies has fundamentally changed the way that the online knowledge economy operates, and thus welcome the initiative by the European Commission to review the EU copyright rules so as to adapt them to the current reality. We need to create a system that maximises Europe's creativity, innovation, access to information and culture, and competitiveness.

In our response to the consultation, we have decided to focus on four areas that we believe to be key to the openness of ICT in Europe :

Linking and browsing constitute fundamental functions of the Open Internet. We advise against putting further restrictions on a practice that has become essential to the way we communicate and share information online.

Text and data mining frequently faces artificial restrictions in the form of separate licenses which burdens and limits the enormous potential of techniques that will be key contributors to innovation and growth in Europe in the coming years. We recommend the introduction of a clearer copyright exception.

Private copying and reprography are increasingly becoming unadapted to an economy of streaming and digital contents. We believe that levies should not be applied to cloud services.

Software interoperability should not be restricted in any way by copyright rules. In particular, the possibility for software to circumvent DRMs for interoperability purposes should be enshrined by law.

Linking and browsing

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

No - we consider the act of linking to be a fundamental function of the Internet that we know today, which should not be subject to copyright authorisations. Tim Berners-Lee, inventor of the World Wide Web, says that the possibility for "any person could share information with anyone else, anywhere"[1] was key to the original philosophy of the Web and its success. Further, a link is not a use of a work in copyright law unless it is used in a way to circumvent restricted accessibility of copyright protected documents: it is neither a transmission nor a communication of a work in stricto sensu. In particular, a link merely points to a place where content is available, like an address or library record.

In this regard, the ECJ drew the same conclusion in his most recent ruling on reference to a preliminary question in the Svensson case (C-466/12)[2] whereby stating that "[...] making available the works concerned by means of a clickable link [...] does not lead to the works in questions being communicated to a new public" because "the users of the site [...] must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication." (See para. 25, 27 of the Svensson case C-466/12) That is also in line with a common sense; as long as the copyright-protected content is stored on a server other than that of the entity linking or framing, there is simply no "copy" made on which to base the liability. A creator of the link draws only attention to a work that is freely available and accessible on another website.

12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

No - in so far as the temporary copy is necessary for accessing the online material, this should not trigger the copyright. It has never been unlawful to merely view or read copyrighted material in a physical form, and there is no reason why the online equivalent should be any different.

1 'Long Live the Web: A Call for Continued Open Standards and Neutrality' (May 2011), available at http://www.scientificamerican.com/article.cfm?id=long-live-the-web

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

Text and data mining

54. If there are problems, how would they best be solved?

In order to analyse text or data a computer must copy that data, which can be derived from databases (under copyright protection) or even the open Internet. The data within those sources is not protected by intellectual property, but the journals, documents or databases that are mined may be protected. The act of copying is made for technical purposes, since it is the only way to transform it into a machine readable format. Text and data mining (TDM) simply employs computers to “read” material and extract facts one already has the right as a human to read and extract facts from. It is difficult to see how the technical copying by a computer can be used to justify copyright and database laws regulating this activity. When material is accessed lawfully, it should be able to be fully mined without any further requirements.

55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

The Commission should clarify that data-mining activities are not subject to specific copyright permissions, in all contexts. We advocate for the introduction of a mandatory exception to copyright that would permit the use of analytics for all types of uses, as long as the material is lawfully accessed in the first place. Additionally, in the context of research, TDM exclusions in contracts for access to research material should be removed. We believe that a legislation that prohibits clauses implementing such restrictions on a contractual basis is essential.

There is evidence that clearly show that market failures exist and hamper innovation. New business models for supporting text and data mining are emerging and represent an enormous potential of growth and innovation. A text and data mining exception, if it were to be implemented, would remove a key barrier thus better enabling service solutions supporting text mining to emerge from the market.

Private copying and reprography

64. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?

Imposing levies on cloud services should be clearly and firmly excluded by the new framework. The cloud and Internet services are global. Levies are applied by national collecting societies on a strictly territorial basis and are triggered each time a good crosses a border. Each time this occurs, levies add up, bringing multiple payments, administrative costs and associated procedures. This is fundamentally at odds with the vision of the EU single market and the global nature of cloud services. Charging levies on cloud services will undermine the digital single market in cloud services before its opportunities have even materialized. Yet a single market in digital services is key to driving cloud services forward in the EU. Only a digital single market can attract investment in early stage offerings from EU innovators.

Access anytime, anywhere, is the driver of growth in the creative industries. Much of the growth in the creative industries in the past decade (some 30 billion Euros) has been driven by digital technology. Consumers can access content anytime, anywhere, fuelling consumption, which, in the creative sector, is up by 25%. Imposing levies on cloud services hurts the development of new revenue streams for rights holders. It leads to multiple payments for the same content as consumers would pay for content, pay a device levy, and pay a levy to use content delivered over the cloud. As the UK or Ireland illustrate, there is no harm to rights holders in allowing consumers to make private copies of legal content. On the contrary, access to legal content anytime, anywhere, and the development of new services drives more revenue to rights holders.

While there is no demonstrated harm to rights holders from cloud services, the current application of levies to devices clearly shows the disproportionate market distortions and administrative costs involved with any levy system.

Moving levies to cloud services, to retailers or elsewhere can only make the problem worse. 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.

Other issues

80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

Article 6 of the 'Computer Programs Directive'[3] 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 "interoperability exception" has proven to be essential to guarantee software interoperability and needs to be maintained.

In a similar fashion, we believe that the EU legal framework would be improved by ensuring that circumventing Digital Rights Managements (DRMs) for interoperability purposes does not violate copyright. Uncertainties over this has for example lead to the situation whereby the VideoLAN project, best known for developing the popular open source media player VLC (used by 150 million people across the world[4]), cannot implement the possibility for their media player to read Blu-Ray discs protected by DRMs and are stuck in a legal grey zone despite their efforts to clarify the situation.[5]

Another example comes from the ECJ recent case law. As a matter of fact, the ECJ used 'the interoperability exception principle' in the Nintendo case[6] whereby stating that 'a technical measure' put in place to protect the copyrights can be circumvented, meaning thus decompiled and/or re-configured, provided that the predominant purpose thereof is to use the protected device for other commercial uses than these set out by the rightholder. Even though this argument comes in question with regard to video games that are specific by its nature, and lays down also other aspects to factor in the legal assessment, it withstands its value. The Court argued under the Copyright directive (2001/29/EC) that the protection given by therein is not absolute and recognized de facto the right of third parties to use and adapt protected devices for their activities while weakening the protective measures of these devices provided that the predominant purpose of such activities is not to circumvent the copyrights. Therefore, with regard to the legal certainty and for the purpose of a fair competition on the market, the 'interoperability exception' should be made as a general principle to the copyright protection in the context of the EU copyright legislative framework.

3 Directive 91/250/EEC 2009/24/EC

4 VLC saisit la Hadopi pour ouvrir les verrous des Blu-ray (in French, April 2012), available at http://www.lepoint.fr/chroniqueurs-du-point/guerric-poncet/exclusif-vlc-saisit-la-hadopi-pour-ouvrir-les-verrous-des-blu-ray-03-04-2012-1448011_506.php

5 La Hadopi rend son avis sur la lecture des Blu-ray par VLC (in French, April 2013), available at http://www.lemonde.fr/technologies/article/2013/04/08/la-hadopi-rend-son-avis-sur-la-lecture-des-blu-ray-par-vlc_3156110_651865.html

6 Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Sri* [2014]

Notes:
OpenForum Europe (OFE) is a not-for-profit member organisation based in both Brussels and the UK, established to support an 'open' and competitive IT market in Europe. OFE is supported by some of the most influential ICT companies including Deloitte, Google, IBM, Oracle, and Red Hat, but also particularly works in strong partnership with a long list of both national and European partners. OpenForum Europe acknowledges all the input received from its members and partners in the compilation of this document. However, OpenForum Europe does not seek to represent any specific community nor present their opinions as being unanimously supported by their full membership. References given are fully attributed and every effort made to ensure they have been taken in true context.
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