

20 November 2015

## Position paper on EU copyright framework

Modernising the EU's copyright framework is one of President Juncker's priorities, and this is reflected in the EC's Digital Single Market Strategy which was released on 6 May, 2015. The EP's own initiative report adopted on 9 July, 2015 took stock of the existing copyright issues and the EPRS ex-post impact assessment provided a detailed analysis of the implementation of Directive 2001/29/EC. All this process prepared the context for the upcoming European legislative proposals, expected partly before the end of 2015 and partly in spring 2016.

This position paper aims to underline the key copyright policy-related issues for [OpenForum Europe](#), and to provide recommendations from the perspective of an organisation whose mission is to facilitate open, competitive choice for IT users.

OpenForum Europe (OFE) is a not-for-profit industry organisation launched in 2002 and supported by major IT suppliers, as well as SMEs, user and consumer organisations, and national partners across Europe. Our 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 [OpenForum Academy](#) programme, we encourage constructive policy debates by running a series of focused [Round Tables](#) that bring together academics, industry experts and policy makers. Our last Round Table in last month looked at [How to unleash the innovative potential of text and data mining in the EU](#). This position paper takes into account the conclusions from that event, which brought together representatives from the Commission, the Parliament, as well as academic researchers.

# Hyperlinking

**Current situation:** Recent European case law on the matter includes the “Svensson” case<sup>1</sup> and the Bestwater case<sup>2</sup>, 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 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 the “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 use of short snippets of their text. In both cases this has led to early failures. Services such as Infoalment 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 aggregation services, 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:**

OFE considers 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. A link is no more than a pointer to a place where to find a web page; 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 to neither permission nor payment.

The right of users to link and point to information should be strongly recognised and upheld. EU rules should be enforced to nullify national legislation which amounts to a levy on linking and free expression. Any EU provision about the 'rights of communication to the public' and 'making available' should not endanger the freedom to link as being an essential function of the Internet.

# Text and data mining

**Current situation:** Data mining and analytics generally involve making temporary (transient) copies of all or part of the data being processed during the data analysis. Journals, documents or

---

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

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

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 to extract facts which one already has the right, as a human, to read and mine “manually” (assuming that any applicable reader subscription fee has been paid). Content mining used in commercial areas could be deemed to infringe copyright, even when it uses content that is freely available on the public internet. There is currently no harmonised copyright exception for TDM across Europe.

### **Our recommendations:**

OFE considers that the focus should be applied to the purpose of the mining activities (i.e., education or scientific research), instead of on the person or entity conducting the activities. This would ensure that no limitations impeding citizens, SMEs and private companies from participating in mining activities for the benefit of society at large are unreasonably enforced.

The expected upcoming policy and legislative measures should take into account the increasing public-private partnerships concluded for the development of research projects, as well as the increasing number of SMEs which can use TDM activities, for the purpose of education or research activities, and then decide to launch startups based on the TDM output or outcome.

As far as access to content is concerned, as long as the material is lawfully accessed in the first place, mining should not be further restricted. Requiring TDM-specific licences, which would be imposed "on top of" today's licences for access to content, would ignore the failure of the [Licences for Europe](#) stakeholder dialogue of 2013 and the calls from the research community to make “the right to read the right to mine” (see notably the [Hague Declaration](#)). Together, these have shown that this is not an acceptable option.

## **Private copying levy**

**Current situation:** Most but not all EU countries have implemented a copyright levy system to compensate rightholders for the alleged harm resulting from private copying of copyrighted material. According to a recent press release<sup>3</sup> from Eurostat, 55% of European users use cloud services as a form of protection against data loss. Their main motivation to use cloud services is to back data up, not to store protected content. Moreover, most of the content created and uploaded to cloud services 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<sup>4</sup>.

<sup>3</sup> Internet usage by individuals in 2014, 16 December 2014, accessible at <http://goo.gl/nNcjLh>

<sup>4</sup> Business insider, "The future of digital" (2013)

This system has led to significant market distortions and high administrative costs. The issues associated with the current system can often lead to duplication of payments or undue payments being made.. Moreover, there is no justification for compelling users to pay "private copying" levies for content which they have themselves created.

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

*For more information, please contact OFE's CEO Graham Taylor at [graham@openforumeurope.org](mailto:graham@openforumeurope.org) or OFE's Senior Policy Analyst Diana Cocoru at +32 2 210 02 92 or [diana@openforumeurope.org](mailto:diana@openforumeurope.org).*

#### ***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.*