

European Commission Public Consultation on the Review of the EU Copyright Rules

Introduction

Similar to the decades-long debate taking place at the global stage, copyright discussions are focusing on how to align copyright law with the Internet and its technologies. The central issue is whether copyright rules remain relevant in the age of information and open standards networks. Questions (some of them raised also in this consultation process) focus on whether copyright – under its current form – is able to support innovation (as exemplified because of the Internet) or whether it can encourage existing and new forms of creative expression.

With the increasing involvement of more actors who both influence and get influenced by copyright policy, it is important to have processes in place that are inclusive of different and divergent voices. To this end, the Internet Society appreciates the effort of the European Commission to solicit public responses and encourage multistakeholder input on a ranging of issues relating to copyright.

A. Rights and the Functioning of the Single Market

The Commission should use this consultation process to encourage regulatory measures that will increase the cross-border availability of content services in the Single Market, while ensuring adequate protection for right holders and the public interest.

One of the most fundamental principles of intellectual property law – including copyright – is that of territoriality. Notwithstanding the recent decision of the Parliament to amend and adopt the Directive on “Collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market”, European copyright law continues to impose a framework of certain restrictions that operate to the detriment of EU’s freedoms relating to the free movement of goods, capital, services and people.

With the Internet, such territoriality’s implications come to the fore pressing for immediate reconciliation of the global nature of the network with national copyright laws. The Internet’s global nature and instantaneous capabilities for creating, distributing and accessing content manifested more clearly the types of problems the lack of having in place a common licensing structure may create. Users in Europe should be able to access content in a synchronous and systematic way.

An effective way to achieve this is for the Commission to ensure that copyrighted material ‘travels’ across the borders of all European Member States through a licensing regime that is not bureaucratic, does not create unnecessary costs and – to

the extent possible – is compatible with the way the Internet works. The Internet recognizes no physical boundaries by carrying data in a simultaneous way. The physical place of where content is created becomes immaterial as data travels systematically through Internet tubes. Removing the requirement for individual licenses and moving towards a more integrated licensing scheme will facilitate innovation and allow new business models to develop. A common license would incentivize innovative and new business models within Europe, contributing to Europe's digital agenda and to a technology-driven Union.

In seeking to find the best solution, the Commission should consider how to better marry technology with legal terminology. For instance, the recent interpretation of the European Court of Justice¹ on the levels of control copyright owners should have over linking and hyperlinking, successfully attempts to do this; we, therefore, invite the European Commission to use this opportunity to establish legal rules that reflect the role of the Internet in current copyright structures.

Additionally, in seeking ways rights should function in the Single Market, it is an opportune moment for the Commission to facilitate and streamline the easy identification of copyrighted works. Users should be able to easily receive information regarding the protections – if any – for content. The longer copyrighted works are protected, the harder it becomes to identify the owner. This becomes particularly evident and problematic in the global Internet environment. Expanded copyright protection increases the complexity in identifying who the 'true' right owner is. Furthermore, longer copyright terms makes it harder for existing ideas to pass to the public domain, thus incentivizing creativity in the content industry.

B. Limitations and Exceptions in the Single Market

In light of the successful conclusion of the first international instrument of copyright focusing on limitations and exceptions – the WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities – the Commission has a unique opportunity to strengthen the culture of limitations and exceptions, as they exist in Europe's copyright law.

Limitations and exceptions do not constitute complimentary provisions of copyright law; rather, they are deeply ingrained in the philosophy, culture and overall DNA of the copyright regime; they ensure inclusion and promote creative expression. It is because of the affordability of limitations and exceptions that copyright is not an absolute monopoly right, every use of copyrighted material is not subject to permission and knowledge is not hindered. Moreover, without limitations and exceptions the core function and role of certain institutions, in particular libraries, would be placed in jeopardy.

To this end, making limitations and exceptions optional tools of copyright endangers the very foundation of what copyright is meant to preserve – the public interest. The

¹ Reference for a preliminary ruling from the Svea hovrätt (Sweden) lodged on 18 October 2012 – Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retreiver Sverige AB (Case C-466/12)

Commission could pave the way and encourage not only the mandatory adoption of limitations and exceptions across all Member States but further facilitate their integration into Europe's copyright law.

The significance of limitations and exceptions is particularly evident when it comes to such issues like research. Whether through private agreements or through a more institutionalized legal framework (e.g. Regulations, Directives, etc.) copyright law ought to facilitate and enable research and research activities. Part of copyright's original and quintessential mandate is to assist the progress of science and knowledge; in this sense, a significant element of copyright law resides "in a public interest in having access to works for cultural, educational and scientific progress".²

Given the copyright's territorial restrictions, it was almost acceptable – in the pre-networked era – for researchers and students to be subjected to geo-blocks. But, with the Internet, this consent has diminished and the institutional framework of copyright law has not done a good job in managing the expectations of users and ensure that such geo-blocks are completely eliminated. To this end, there is a unique window of opportunity to ensure that knowledge is accessed undisturbed and libraries are able to perform their intended purpose.

Mass Digitization

There lack of clarity regarding the parameters of authorial consent, which does not only bear the cost of legal uncertainty, but it can also lead to new and not readily transparent monopolies on information and knowledge.

Mass digitization refers to the desire to make works available and a necessary precondition of satisfying the commitment to the advancement of learning in the digital age. Despite the fact that mass digitization has proven key for cultural development and access to information and knowledge, it remains legally complex and vague with an uncertain legal of legitimacy. This is particularly evident when it comes to access to and computation with works, which appear to raise more issues compared to mere preservation of work. This is due to the fact that they are most easily exploited in a way that is unrelated to the public interest utility of making works accessible.

In this process, the Commission we would like to encourage the Commission to consider expanding limitations and exceptions to include creativity expressed in the form of remixing and mash-ups, the status of which under the current copyright regime is highly unsettled. There is an entire generation that is now being born and raised with the Internet and the immense capabilities that it offers. It is essential that any copyright framework incentivizes users to be creative and take full advantage of the opportunities for innovation.

Teaching and Research

² Catherine Colston, Jonathn Galloway, *"Modern Intellectual Property Law"*, Third Ed. Routledge, 2010, at p. 279)

We would like to encourage the Commission to adopt a more harmonized approach that will allow Europe's copyright framework to make room for the advancement of knowledge. Providing a robust and well-protected environment where education institutions can exchange and transfer knowledge constitutes a pre-requisite for a group of states that prides itself to be the place where content proliferated since Ancient Greek times and continued to proliferate during the Renaissance and the Enlightenment years.

Disabilities

The Internet Society followed closely the discussions and negotiations of the WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. The Internet Society welcomed the successful completion of the Treaty in June 2013 in Marrakesh. We believe that the Commission should encourage all Member States to ratify the Treaty as soon as possible so that to ensure that any existing obstacles for the disability community are eliminated. This is further compatible with the foundation of preserving the EU's single market culture.

Text and Data Mining

The Internet Society agrees that text and data mining constitute inseparable parts of the way information is currently accumulated and knowledge is distributed. We would encourage the Commission to take a close look at text and data mining and ensure that certain provisions are incorporated in its copyright framework that facilitate such a process.

Discussions regarding the way text and data mining relate to copyright and how copyright can effectively address this issue have been quite controversial. In 2011, Professor Hargreaves released a report commissioned by the UK Government, stating on this particular issue: "That the new uses [text and data mining] happen to fall within the scope of copyright regulation is essentially a side-effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect".³

But, even the publishing industry sees the importance of text and data mining and the potential it has for research and knowledge: "The true research potential of knowledge that is captured in data will only be released if data mining and other forms of data analysis and re-use are not in any form restricted by license requirements. The inclusion of the Creative Commons public domain dedication will make it clear that data from articles in BioMed Central Journals is clearly and unambiguously available for sharing, integration and re-use without legal restrictions".⁴

³ Hargreaves Review of Intellectual Property and Growth, (2011), UK Intellectual Property Office.

⁴ <http://www.biomedcentral.com/presscenter/pressreleases/20130821i>

Finally, the International Federation for Libraries and Archives (IFLA) mentioned: “IFLA maintains that legal certainty for text and data mining (TDM) can only be achieved by (statutory) exceptions. As an organization committed to the principle of freedom of access to information, and the belief that information should be utilized without restriction in ways vital to educational and cultural well-being of communities, IFLA believes TDM to be an essential tool to the advancement of learning, and new forms of creation”.⁵

User-Generated Content (UGC)

UGC constitutes the most profound iteration of the ability of the Internet to drive creative expression. As opposed to copyright, using unique Internet tools and platforms, users are provided with the necessary incentives to produce unprecedented volumes of content. UGC has blurred the traditional distinction between creator and audience; now, everyone can become a creator. Since UGC will only continue to increase, as more users get online, the Commission could seize this opportunity to draw clear lines regarding the reach of copyright.

The importance of UGC has been recognized by the UK government and as part of its promise to promote “the interests of citizens and consumers” as well as “opportunities to participate”, it commissioned a report, which stated: “The spread of User Generated Content (UGC) represents a profound shift in the relationship between the media, consumers and technology. The traditional, one-way producer-consumer contract has been complemented with a set of malleable, constantly shifting transactions in which the “end-user” is now, potentially, just one node on a production-distribution-consumption cycle. As its best, UGC gives rise to vastly increased social and political participation and more widespread creative practice. But it comes with challenges too: it is profoundly disruptive to content and media incumbents and presents that public with significant dangers in terms of privacy and security”.⁶

User-generated content, therefore, is inseparable to the way the Internet functions. A key driver for innovation and for the evolution of the Internet itself, policy makers should encourage the spread of user-generated content and one way to do so is through copyright. In this context the same OFCOM report stated: “We break down the value of UGC into three key areas: political/social, economic and cultural (entertainment/the arts, etc.). Economically, UGC is driving innovation in the tech sector and creating new business and new business models in areas like aggregation, recommendation and curation, and is, more basically, a driver of consumer take-up. In social terms, UGC stimulates political participation and mass debate, as well as creates value in areas such as education, health care and hyperlocal media. Culturally, UGC drives creative participation, as well provides cultural incumbents

⁵ <http://www.ifla.org/publications/ifla-statement-on-text-and-data-mining-2013>

⁶ Report for OFCOM: The Value of User-Generated Content, June 2013, <http://stakeholders.ofcom.org.uk/binaries/research/research-publications/content.pdf>

with opportunities in areas such as audience engagement, talent spotting and skills development”.⁷

The Internet Society supports UGC as a way to drive innovation in the Internet and empower user to be expressive and creative. We would like to encourage the Commission to continue deliberating on this issue with the view of how to strike a balance taking into consideration the insurmountable value UGC has for society.

C. Other Issues

Any copyright reform should pay regard to the need for innovation and creativity as supported by the Internet’s open standards.

Innovation should become part of any future copyright deliberations. The European Commission has an opportunity to commit towards establishing a more robust innovative culture supported by copyright. Innovation requires a copyright system that helps innovators nurture their ideas, turn them into tangible ones and, ultimately, generate economic value.

The Internet, a loosely organized international collaboration of autonomous, interconnected networks supports host-to-host communication through voluntary adherence to open protocols and procedures defined by Internet Standards. This is reflected in the 2026 Request for Comments (RFC), which (alongside other RFCs) constitutes the main source for the standards community in describing methods, behaviors, research or innovations related to the operation of the Internet. The importance of standards in the Internet ecosystem is such that there are also many isolated interconnected networks, which are not connected to the global Internet, but use the Internet standards. The importance of preserving open standards was further reflected in the recent EU Commission Communiqué on “Europe’s role in shaping the future of Internet Governance”, where the Commission considers it crucial to “support the implementation of open standards by the European Internet industry and the involvement of the European Internet industry in the development of open Internet standards”.⁸

In this environment, the Internet Society believes that open standards, innovation and intellectual property can complement each other. We believe that copyright can take advantage of the Internet’s openness, the same way users have taken advantage of it to create, remix and generally generate content. Under its current state, copyright appears to be at odds with the Internet as, for example, often sites abuse this openness, by employing automated copyright filters and tools that seek to filter and/or block copyrighted content or parts of it, which ultimately might stifle

⁷ *Id.*

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Internet Policy and Governance, “Europe’s role in shaping the future of Internet Governance”, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2014:0072:FIN:EN:PDF>

the creativity that is currently exemplified through remixing. Another example is the discussions regarding the role of intermediary actors in preserving copyright. The Internet Society always argued about the need to preserve the clear roles and responsibilities of each of the actors in the Internet ecosystem and intermediaries should not be asked to be in charge of substantive determinations; rather, the Commission should continue to encourage transparent and cooperation in good faith.

History is replete with examples of how innovation and creativity depend on the exchange and the borrowing of ideas. One of the most noteworthy examples is Henry Ford, who echoed the story of Marconi and the invention of the radio, stating at the time: *"I invented nothing new. I simply assembled the discoveries of other men behind whom were centuries of work. Progress happens when all the factors that make for it are ready and then it is inevitable"*.

To this end, it becomes crucial that copyright law makes room for new Internet business models that can encourage and support a space for creativity and can create new or enhance existing partnerships based on multi-participatory models. For this to occur, however, it requires effective use of copyright tools and practices that can help minimize the risks for interested participants and play a major role in enhancing competitiveness of technology-based ideas. It further requires a balanced copyright framework that is able to respect the limitations instructed by the rule of law and operate under substantial due process requirements.

In 2013, the Internet Society reflecting on intellectual property issues came to the following conclusion, pursuant to a broad consultative process: when we talk about a balanced intellectual property framework, we should, additionally, bear in mind a structure that, amongst others, fosters competitive markets and enables new actors to enter. Copyright constitutes essentially a government grant of a costly private monopoly over ideas, this monopoly is not meant to encourage restrictive structures. Standing alone, copyright may be able to exclude others, but it should not be used to forestall the introduction of innovative and creative ideas.⁹

The Internet Society appreciates this opportunity to provide our views in response to this Notice. We look forward to provide further input and work with the European Commission in moving the discussions forward.

The Internet Society is a non-profit organisation, founded in 1992 to provide leadership in Internet-related standards, education and policy. It is a principles-based organisation, dedicated to ensuring the open development, evolution and use of the Internet for the benefit of people throughout the world.

⁹ Internet Society Issues Paper on Intellectual Property on the Internet, http://www.internetsociety.org/sites/default/files/Internet%20Society%20Issues%20Paper%20on%20Intellectual%20Property%20on%20the%20Internet%20Final_EN.pdf

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