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COMMUNICATION FROM THE COMMISSION

Copyright in the Knowledge Economy

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Text with EEA relevance

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1. INTRODUCTION

Creation, circulation and dissemination of knowledge in the Single Market are directly linked to the broader goals of the Lisbon Strategy. Technological developments have facilitated the availability of information in electronic form.

Libraries are interested in mass digitisation projects to preserve their archives and/or disseminate them online, including the use of orphan works (works where right holders cannot be identified or traced). Research and teaching establishments want more flexibility to disseminate materials, including in cross-border distance learning. Persons with disabilities continue to experience obstacles in accessing information or knowledge products. In particular, visually impaired people are pushing to counter their “book famine” - only 5% of European publications are available in accessible formats, a situation compounded by restrictions on cross-border distribution, even between countries sharing a language.

Publishers and authors are concerned that library-sponsored or other mass digitisation projects and online dissemination of their works without due diligence search could infringe their copyright and erode their revenue streams. Publishers claim they already make some 90% of scholarly journals available online, are investing in new and innovative electronic delivery models (e.g. e-books), including for distance learning, and provide access for visually impaired persons.

It is against this background that the Commission launched a public consultation on the Green Paper on Copyright in the Knowledge Economy¹. The aim was to examine how a broad dissemination of knowledge in the Single Market, notably in the online environment, could be achieved in the context of existing copyright legislation, specifically Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("the Directive").² This Communication provides an overview of the outcome of this consultation. It announces a series of preparatory actions which will be a solid basis for concrete follow-up initiatives as part of an ambitious and comprehensive intellectual property strategy to be presented by the next Commission.

2. THE GREEN PAPER AND PUBLIC CONSULTATION

The Green Paper dealt with general issues on exceptions to exclusive rights. It examined whether exceptions that are most relevant for the dissemination of knowledge should be developed. It also looked into the issue of contractual agreements and licensing models. It enquired whether exceptions and limitations relating notably to libraries and archives, teaching and research, and persons with disabilities should evolve in the era of digital dissemination. It raised questions concerning orphan works as well as consumer issues such as user-created content.

The consultation yielded 372 responses. The Commission received replies from: (i) publishers (56); (ii) collecting societies and licensing agencies (47); (iii) universities (47); (iv) libraries, archives and museums (114); (v) industry and commercial federations (30); (vi) organisations representing persons with disabilities (4); (vii) Member States (11); and (viii) others (63).

¹ COM (2008) 466

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19.

Broadly speaking two divergent views emerged. Libraries, archives and universities favor the "public interest" by advocating a more permissive copyright system. Publishers, collecting societies and other right holders argue that the best way to improve the dissemination of knowledge and provide users with increased and effective access to works is through licensing agreements.

Libraries and academics state that certain exceptions are more important for the knowledge economy than others. They favour a mandatory set of core "public interest" exceptions to facilitate "access to knowledge".³ They also expect that these exceptions are not rendered moot by technological protection measures (TPM). The confines of copyright should instead be defined by the legislator.

Publishers, collecting societies and other right holders consider that an equally satisfactory result can be achieved by contracts, often tailor-made to cater to new technologies. Publishers state that mandatory exceptions could undermine economic rewards and encourage so-called "free-riding".

The dawn of the online culture of sharing and swapping, data mining and interactive learning, has exposed a difference of views between those who wish to move toward a more permissive system of copyright and those who wish to preserve the status quo⁴. The challenge is to reconcile these interests. There are several policy tools at the Commission's disposal to achieve this.

3. NEXT STEPS: BUILDING ON THE RESULTS OF THE CONSULTATION

This section of the Communication presents the main findings of the consultation with respect to the issues of digital preservation and dissemination of scholarly, cultural and educational material, the use of orphan works, access to knowledge for the persons with disabilities and user-created content. It also highlights actions which the Commission intends to launch in order to find suitable solutions to the problems that have been identified in the consultation.

3.1. Libraries and archives

Two core issues emerged: the production of digital copies of materials held in the libraries' collections for preservation purposes and the electronic dissemination of these copies to users.

Under the current legal framework, libraries or archives do not enjoy a blanket exception to digitise their entire collections (mass-scale digitisation). The relevant exception is limited to specific acts of reproduction for non-commercial purposes⁵. The digitisation of library collections therefore requires prior authorisation from the right holders. Libraries argue that this system of "prior authorisation" entails considerable transactional burdens (publishers do not often have "digital" rights and the cost of individual right clearance is too high). Additional issues arise when the digitised material consists of unpublished letters, private diaries and business records. In this context, libraries and archives underline their unique role

³ Suggestions for possible mandatory exceptions of Directive 2001/29/EC include among others: (i) private copying (Article 5(2)(b)); (ii) reproductions by libraries, archives and museums (Article 5(2)(c)); (iii) use for educational and scientific purposes (Article 5(3)(a)); (iv) use by disabled persons (Article 5(3)(b)); (v) use for news reporting and press reviews (Article 5(3)(c)); and (vi) use for quotations for purposes such as criticism and review (Article 5(3)(d)).

⁴ The "three-step test" is enshrined in Article 10 of the WIPO Copyright Treaty, Article 16 of the WIPO Performances and Phonograms Treaty and Article 5(5) of the Directive.

⁵ Article 5 (2) (c) of the Directive.

for the long-term preservation and management of the cultural heritage. These stakeholders stress that they go beyond what publishers do since their mission is to act in the public interest while publishers are commercial production enterprises. Public interest establishments also want to make their collections accessible online, particularly works that commercially unavailable and argue that this should not be limited solely to access on the physical premises.⁶ The issue of digitisation was extensively discussed and some first consensus reached in the High Level Expert Group on Digital Libraries. A memorandum of understanding on due diligent search was signed by cultural institutions and right holders. However, no binding solutions to the issues mentioned above have yet been found.

Publishers and collecting societies do not see any justification to broaden the current exceptions on preservation and making available for libraries and archives. They advocate the continuation of the existing system of licensing schemes and contractual agreements to digitise and increase online access to works. They claim that easing the current exception to allow libraries, archives and teaching establishments to provide online services to users would undermine the position of right holders, create unfair competition to publishers and discourage them from investing in new business models. Libraries should continue to provide essential services but the online provision of material should not equate with free access by users or the right to take and use protected works without payment. Guarding against "digital leakage" is imperative in the context of ensuring that libraries limit exceptions to making works available online within their premises.

Next steps

The consultation has revealed that a sustainable system of prior authorisation for a variety of library initiatives requires simple and cost efficient rights clearance systems covering digitisation and online dissemination. In 2010 the Commission will further pursue the work at EU level to deal with the copyright aspects of these matters in the context of the new strategy on intellectual property rights . This work will address, inter alia, the clarification of the legal implications of mass-scale digitisation and possible solutions for the issue of transaction costs for right clearance. It should examine all possible options including collective licensing, which could be supplemented by an extended collective licensing system, whereby a rights manager is deemed to represent "outsiders" -- right-holders not formally members of the clearing system, and on the basis of a due diligent search.

3.2. *On this basis, the Commission will consider whether there is a need for further initiatives as part of the new strategy including the possible creation of a statutory exception for such digitisation efforts. Orphan Works*

Orphan works are works that are in copyright but whose right holders cannot be identified or located. Protected works can become orphaned if data on the author and/or other relevant right holders (such as publishers, photographers or film producers) is missing or outdated.

A work can only be exploited only after obtaining prior permission from the right holders. In the case of orphan works, granting such authorisation is not possible. This leads to a situation where millions of works cannot be copied or otherwise used e.g. a photograph cannot be used to illustrate an article in the press, a book cannot be digitised or a film restored for public viewing. There is also a risk that a significant proportion of orphan works cannot be

⁶ Under current copyright rules this is allowed only for research or private study on dedicated terminals located on libraries' premises (Article 5 (3) (n) of the Directive).

incorporated into mass-scale digitisation and heritage preservation efforts such as *Europeana* or similar projects.

Libraries, universities, archives, some commercial users and several Member States claim that the problem of existing instruments, such as the Commission Recommendation 2006/585/EC⁷ or the 2008 Memorandum of Understanding on Orphan Works and the related diligent search guidelines, is that these are not legally binding acts and that the issue of mass digitisation has not been addressed. Since non-legislative initiatives neither provide sufficient legal certainty nor solve the fact that using orphan works constitutes a copyright infringement, they advocate a legislative approach at the European level to allow different uses of orphan works. It is also stressed that obstacles to intra-Community trade in orphan works may emerge if each Member State were to adopt its own set of rules to deal with the problem.

For publishers, collecting societies and other right holders, orphan works are a rights-clearance issue. They are sceptical about introducing a blanket exception to use orphan works. For them, the crucial issue is to ensure that a good faith due diligence search to identify and locate the right holders is carried out, using existing databases⁸.

Next steps

The overall aim of tackling orphan works - their digitisation, preservation and dissemination - is to establish common standards on the level of due diligence in searching for the owners of orphan works and resolve the issue of potential copyright infringement when orphan works are used. As a key building block in the new comprehensive strategy on intellectual property rights, an initiative on orphan works should provide for an EU-wide solution to create legal certainty, facilitate the knowledge flow necessary for innovation, and prevent obstacles to intra-Community trade in orphan works.

The orphan works problem will be examined in an impact assessment which will explore a variety of approaches to facilitate the digitisation and dissemination of orphan works. Possible approaches include, inter alia, a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, an exception to the 2001 Directive, or guidance on cross-border mutual recognition of orphan works.

The Commission will begin work on an impact assessment in 2009.

3.3. Teaching and research

Teaching, learning and research is becoming increasingly international and cross-border, enabled by modern information and communication technologies. Access and use of information is no longer limited to physical space. Therefore limiting teaching and research to a specific location is considered to be contrary to the realities of modern life.

An issue that has come to the fore is a possible difference between scientific publishing and publishing for literary and artistic aims. While scientific and scholarly authors have other

⁷ Commission Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation

⁸ Several publishers, reproduction rights organisations and libraries have started to work together within the EU-funded ARROW (Accessible Registries of Rights Information and Orphan Works) project to provide users who want to digitise their collections with information on the status of protected works. The ARROW project can be considered as an important first step; however, as yet, it does not cover all EU Member States. ARROW is also not entitled to grant licenses for scanning and dissemination of protected works.

sources of income and publish to further the cause of research and scholarship, literary authors (such as novelists) need to earn a living from the publication of their works. In order to avoid needless duplication of research, published results of publicly-funded research should be available to the entire scientific community and even to the public. This is because all research builds on previous research. In these circumstances, open-access publishing and open repositories for published articles offer solutions.

Libraries and universities underline the complexity and fragmentation of the current system of licensing agreements with publishers. A typical European university is required to sign a hundred or more licenses governing the use of digital research material supplied by various publishers⁹. Examining what each of these individual licenses permit with respect to e.g. access, printing, storage and copying is a cumbersome process. They also contend that trans-national licensing within the EU is difficult or impossible. Libraries and universities assert that it would be more practical and efficient to have one central organisation to grant a wide range of online rights with respect to digital material. They call for mandatory teaching and research exceptions which should also expressly include a reference to distance learning. Libraries and universities also voice concerns that subscription fees for journals are draining resources which they would otherwise spend on research or teaching.¹⁰

Publishers argue that licensing solutions, rather than prescriptive legal norms, provide the required flexibility to cater to the requirements of teaching and research, including distance learning. They stress that they provide a great deal of electronic access to their databases, journals and books to libraries and educational and research institutions through various licensing agreements. In making works available for distance learning or home-use, publishers and licensing agencies stress the importance of ensuring that access is limited to the purposes for which the material is intended (non-commercial and educational purposes).

Next steps

The advent of the Internet and its possibilities for borderless dissemination of knowledge and science has led the Commission, in close consultation with stakeholders, to already take concrete action in relation to open access to publicly-funded research results. Such action will continue in the coming years, as appropriate.

The licensing burden encountered by a typical European university should be reduced. The Commission will consult relevant stakeholders on best practices available to overcome the fragmented way by which universities acquire usage rights to scientific journals.

With respect to distance learning, the Commission will continue to monitor the evolution of an integrated European space for cross-border distance learning. If need be, further measures to accompany such a European space will be considered.

3.4. Persons with disabilities

The debate concerning copyright exceptions for the benefit of persons with disabilities centres on their basic right, enshrined in the UN Convention on the Rights of Persons with Disabilities¹¹, to enjoy equal access to information products, publications and cultural material

⁹ See the submission of the International Federation of Library Associations.

¹⁰ E.g., subscriptions for the Brain Research Journal published by Reed Elsevier, costs €20,835 per year (2008 prices) – ULB submission pg. 3, footnote 6.

¹¹ The UN Convention has been signed by all EU Member States and the European Community. Of particular relevance are Articles 4, 9, 21 and 30.

in accessible formats. Equal treatment of persons with disabilities for access to and supply of goods and services has also been included in the Commission's proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion, belief, disability, age or sexual orientation.¹²

Organisations representing the persons with disabilities highlight the so-called "book famine" - only 5% of books published in Europe are converted each year into accessible formats such as audio, Braille or large print. Moreover, they claim that around 95% of available material is provided by specialist agencies, funded through charities or public subsidies, working under copyright exceptions. Visually impaired persons and other print-disabled people argue that they should have access to books and other protected materials on the same conditions and at comparable prices to everybody else. Their preferred solution is for publishers, at the outset, to provide works in accessible formats that can easily be converted into audio, Braille, or large print.

Although all Member States have implemented copyright exceptions into their national legislation, the approach is not harmonised so a degree of legal uncertainty ensues. More crucially, the cross-border transfer of the already limited supply of material is hampered by the territorial limitation of exceptions under national legislation. To export a converted work to another Member State, an organisation would have to buy the rights in the destination country which is a very costly process. TPM have been cited as an additional impediment as they prevent the conversion into accessible formats of legally acquired works by organisations or individuals. For all these reasons, persons with disabilities advocate an EU-wide standardised and comprehensive mandatory copyright exception.

Publishers agree that the primary goal is for a majority of published books to be available in an accessible format. Their view is that this is best achieved by building on the already existing voluntary licensing schemes rather than through mandatory exceptions. Publishers and other right holders highlight a range of voluntary licensing schemes for persons with visual or print disabilities that are common in the EU.¹³ They point out that the social costs of providing access to works should not be borne solely by the publishers themselves. At the same time, they have expressed a willingness to resolve access issues for disabled persons through a platform of interested parties with the aim to make works adaptable for visually impaired persons.

Next steps

The immediate goal is to encourage publishers to make more works in accessible formats available to disabled persons. TPM should not prevent the conversion of legally acquired works into accessible formats. Contractual licensing should respect statutory exceptions for persons with disabilities including visually impaired persons.¹⁴ The consultation has revealed a range of existing collaborative efforts for visually impaired persons or persons with visual or print disabilities across the EU. Such efforts should be accelerated and applied across the EU.

As a first step the Commission will organise a stakeholder forum concerning the needs of disabled persons, in particular visually impaired persons by the end of

¹² (COM (2008) 426 final)

¹³ Examples of national licensing schemes, voluntary arrangements or guidelines are provided by the Federation of European Publishers (p. 11-13), the UK Publishers Association (p. 5, 13 and Appendices) and the Copyright Licensing Agency (p. 3 and 8).

¹⁴ The British Library found that out of a sample of 100 licences it entered into with electronic publishers only two acknowledged the exceptions for visually impaired people.

2009. The forum would consider the range of issues facing persons with disabilities and possible policy responses. The UN Convention on the Rights of Persons with Disabilities should serve as a benchmark against which to measure progress in this area.

The forum should also look at possible ways to encourage the unencumbered export of a converted work to another Member State while ensuring that right-holders are adequately remunerated for the use of their work. It should look closely at the mutual recognition and free movement of information, publications, and educational and cultural material that is accessible for persons with disabilities and reflect upon online content accessibility issues.

On the basis of the results of the forum the Commission will assess whether any further initiatives are justified.

3.5. User-created content (UCC)

Web 2.0 applications, such as blogs, podcasts, wiki, file or video sharing enable users to easily produce and share text, video and pictures. This has fuelled the development of new applications on the Internet and highlighted the issue of user-created (amateur) content, where consumers are increasingly becoming creators of content, sometimes using copyright-protected material as a basis for their creation.

The Green Paper looked into existing exceptions which might be relevant for UCC (quotations for criticism or review, incidental use and caricature, parody or pastiche)¹⁵ and the possible introduction of a new exception to cater for 'creative, transformative or derivative works'.

The outcome of the consultation shows that most of the stakeholders consider that it is too early to regulate UCC. There is ambiguity as to the scope of UCC. It is also unclear whether both amateurs and professionals should benefit from special rules on UCC and how a distinction between those groups can be drawn or how rules on UCC would relate to existing limitations, such as quotations, incidental use, and caricature, parody or pastiche.

Next steps

As the issue of UCC is still a nascent phenomenon, the Commission intends to further investigate the specific needs of non-professionals that rely on protected works to create their own works. The Commission will further consult on solutions for easier, more affordable and user-friendly rights clearance for amateur users.

¹⁵ Article 5 (3) (d), (i) and (k) of the Directive.

4. CONCLUSIONS

The main conclusion from the above debate is that copyright policy must be geared toward meeting the challenges of the internet-based knowledge economy.¹⁶ At the same time a proper protection of Intellectual Property Rights is decisive to stimulate innovation in the knowledge-based economy. Different interests have to be carefully balanced. The preparatory work announced in this Communication will ensure that the ground is properly laid for appropriate follow-up actions as a core element of the future comprehensive strategy for intellectual property rights. To this end, the Commission will continue to be actively engaged with all stakeholders, including the science community, libraries and the internet-literate public at large.

The Commission is committed to taking appropriate follow-up actions in the context of its future strategy on intellectual property. In the immediate future, the preferred tool for many of the issues raised in the Green Paper is a structured dialogue between relevant stakeholders, facilitated by services of the European Commission. In particular, the dialogue on creating information products, publications and cultural material in formats accessible for persons with disabilities should be taken forward as a priority. Another priority should be finding appropriate licensing solutions for mass-scale digitisation in a European context. The Commission will also conduct an impact assessment on how to foster the clearance issues that arise with "orphan" works. The impact assessment will analyse the necessary level of diligent search required prior to the use of orphan works as well as the mutual recognition of orphan work status across Europe.

¹⁶ The Commission will address some of the wider aspects of this issue in its forthcoming Communication on Creative Content in the Information Society.