



The Response of European Digital Rights to: Green Paper – Unlocking the potential of cultural and creative industries (COM(2010)183)

Introduction

European Digital Rights (EDRi) is an association of 27 privacy and digital civil rights associations from 17 European countries. We have a particular interest in open and balanced approaches to access to content and welcome the opportunity to respond to the European Commission's Green Paper. Due to our focus, we will respond primarily to the first set of questions in the Green Paper, which focus on the general environment for cultural content in Europe.

**How do we create more spaces and better support for experimentation, innovation and entrepreneurship in the CCIs?
More particularly, how do we increase access to ICT services in/for cultural and creative activities and improve the use of their cultural content?
How could ICTs become a driver for new business models for some CCIs?**

These questions overlap to a considerable extent and can be answered by making reference to several very insightful statements made in the Green Paper.

Access to and use of creative content

The Green Paper explains that the “ability to create social experiences and networking is now a factor in competitiveness”. One of the core aspects of our social interaction is cultural and creative content and new technologies are increasing our ability to access, share and reuse content, also across borders. Unfortunately, it is not clear for European citizens within their national borders and certainly not across the EU's internal borders, what they may and may not do with cultural content – even when they have paid for it. How one can reuse copyrighted material is governed by the national regime for exceptions and limitations, which is exceptionally fragmented in the EU. This exacerbates the problems caused by barriers to cross-border access to digital content.

In order to take advantage of this new “factor in competitiveness”, it is crucial not to impose old models on new environments. New approaches are becoming increasingly visible, which can be seen in new open licensing approaches (such as Creative Commons, GNU General Public Licence and the EU Public Licence). The need for new thinking and a new approach in this area – for the benefit of citizens and creators alike – is neatly summarised in this analysis from a recent study undertaken for the European Parliament:

Especially under the conditions of the digital environment, the existent models are often too rigid to allow full realisation of the possibilities of the digital mode of content production and distribution, or render them illegal, possibly chilling a great amount of creative activities and creative potential. These deficiencies have been exposed by the emergence of new hybrid models for the protection of authors' rights, such as the Creative Commons (cc) licence, which short of a comprehensive copyright reform, allow managing and spreading content under a “some rights reserved” mode.¹

The significance of this fragmentation was starkly illustrated by Commissioner Kroes, when she made the

¹ Implementing the UNESCO Convention in EU's Internal Policies – Note, Ms Mira Burri, World Trade Institute, University of Bern, Switzerland. Available from <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=31355> (last visited 27 July, 2010)



point that “piracy has created the single market in music and films that EU legislators have failed to build.”²

Citizens

In the digital environment, exceptions and limitations to copyright are governed by the Directive on Copyright in the Information Society. This gives the 27 Member States a list of 15 non-mandatory exceptions/limitations to be implemented based on their 27 national interpretations of the WIPO “three-step-test”.

This creates a variety of different barriers to the supply and use of creative content in Europe. Firstly, it means that citizens generally do not know what they are allowed to do with content that they purchase. For example, in some countries, private copying is allowed (with content owners being “compensated” for this by a set of untransparent levies, as in Belgium, for example) while in others, it is not (with consumers nonetheless paying higher prices for equipment to subsidise those countries with high levies, in order to keep prices broadly even across Europe).

According to one study, 73% of British consumers³ did not know what they were “allowed” to do with music that they had already purchased. The same research indicated that a large proportion of consumers (38%) consciously break the law by copying their legally purchased music onto MP3 players. While certain politicians talk about “educating”⁴ consumers to respect copyright law, practice in the real world involves often farcical laws educating them to do the exact opposite.

If we then look at the cross-border environment in the “single market”, the situation becomes even more ridiculous. A Belgian buying a CD from UK company Play.com, for example, would be permitted to make a personal copy while a British person would not. The meaning of the exceptions/limitations regime for use of copyrighted content for creative activities, such as audio-video “mash-ups” in a social networking environment is anybody's guess. In a context where more and more Internet users are adding creative content on the Internet, this lack of clarity limits the freedoms of citizens, reduces opportunities for innovation by creative and cultural industries and undermines the perceived legitimacy of intellectual property law.

This incoherence and lack of clarity about the law means that the use of creative content for the kind of social experiences and networking that the Green Paper refers to is close to impossible from a legal standpoint. **This also has the knock on effects of rendering the copyright legal framework essentially illegitimate in the eyes of citizens.** This is an illustration of the fact that Directive 2001/29/EC creates, rather than removes, barriers to citizens' rights and the single market. There is, as the Green Paper correctly points out, “a need to recognise and support new ways of experiencing culture, which plant the seeds of curiosity, analysis and demystification for a lifelong relationship with culture”.

This whole situation is made even worse by the incoherence of EU copyright law in general, leading to a situation a consumer in any part of the EU can buy a music CD from any part of Europe over the Internet, but it remains impossible to do the same for online music. It is particularly crucial that the situation regarding collecting societies, currently under review by the European Commission, succeeds in developing a model that is fit for this purpose. As Commissioner Almunia said recently: “the fragmented national monopoly model and the de facto allocation of customers can no longer stand in their current form. Unregulated monopolies are not a great solution.”⁵

2 <http://www.out-law.com//default.aspx?page=10996>

3 <http://www.consumerfocus.org.uk/news/outdated-copyright-law-confuses-consumers>

4 See, for example the “Gallo Report” on enforcement of IPR, as voted in the Legal Affairs Committee of the European Parliament: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2010-0175+0+DOC+PDF+V0//EN&language=EN>

5 <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/365>



Industry

If we imagine a European enterprise which has the “next big idea” for an online service that would rely on a fair and proportionate exceptions/limitations to copyright and which had the necessary venture capital, what would be the wisest course of action as regards where to set up the business?

On the one hand, it could set up in one EU Member State and try to survive the legal challenges to its service in that country, before then moving on to the next country and the next and the next – all the while alienating customers who see the service being provided in neighbouring countries without being available to them. Alternatively, it could simply go to the United States, which has one “fair use” regime, build up its base there and then return to Europe once it had the funds to support arguing its case in 27 legal systems, with no European company able to compete with it, due to the power, branding and funding it developed in the American “single market”.

The current exceptions/limitations and, more generally, the fragmented copyright regime provide a positive incentive for such companies to leave Europe. Resolving this problem is an important element in the challenge identified in the Green Paper of putting “the right enablers in place by increasing the capacity to experiment, innovate and succeed”. Indeed, it was precisely for this reason that an international group of libraries associations, industry associations, consumer and civil rights groups worked together to produce the “Copyright for Creativity – A Declaration for Europe,” which was published in April of this year.⁶

In short, the current exceptions and limitations regime in Europe undermines the goal expressed in the Green Paper of creating larger audiences and a more diverse cultural offer for citizens. The assertion in the Green Paper that “the focus is clearly on the use and management of rights, looking for a balance between the necessary protection and sustainability of creation and the need to foster the development of new services and business models” is, unfortunately, factually incorrect in the digital environment. A study on the current online business success models that use Internet as a promotion for creative content would reveal more in-depth information about this subject.

Benefiting from the openness of the Internet to maximise the potential for CCIs

The Green Paper points out that cultural content plays a crucial role in fuelling investments in broadband infrastructure. As a result, it explains that certain players now have the potential to act as “gatekeepers”. This is increasingly correct and, were this to happen, it would fundamentally undermine the fantastic opportunities that the Internet offers creators to communicate directly with the public and develop new business models by and for the creative sector.

Ironically, parts of the established content industry (the music and film industries in particular) has been pushing for several years for exactly this outcome, repeatedly (and incorrectly, for now) referring to Internet access providers as “gatekeepers” and demanding that they be made legally responsible for the activities of their consumers. This approach is also being promoted in the DG HOME dialogue with Internet hosting providers on takedown of allegedly illegal websites, DG MARKT with regard to monitoring of allegedly unauthorised uploading/downloading, DG TRADE in its discussions on liability of internet intermediaries in ACTA and Commissioner Malmström’s financial support for “self-regulatory” Internet blocking and the legal obligation for Internet Access Providers to introduce blocking which was proposed in a recent draft Directive on child exploitation.

Once online intermediaries, voluntarily or by law, become responsible for what their users are doing online, they will be forced to invest in technology and processes to become “gatekeepers”. This will undermine the

⁶ <https://www.copyright4creativity.eu/bin/view/Main/Declaration>



potential for European creative industries in two overlapping ways. Firstly, by creating the potential to restrict access to (particularly bandwidth-hungry creative content, such as audiovisual material), it will reduce the free and open innovative space that is currently available to any innovator. Secondly, and as a result, this will change the nature of competition in the digital environment, giving more power to larger, established vested interests, to the cost of both citizens and new creators from the digital world.

Conclusions

The success of the Internet is based on the fact that it created the largest possible competitively neutral space for innovation. This success is currently being restricted in the EU by incoherent, inflexible and unclear rules for copyright (including exceptions and limitations), which give creators and creative industries in other jurisdictions a huge competitive advantage. This imbalance risks being exacerbated by an undue – and quite probably illegal – focus on forcing or coercing Internet intermediaries to give up their “mere conduit” status to become a bottleneck on the Internet, strangling rather than supporting innovation.

In short, we urge the European Commission to modernise the EU Copyright regime (especially, with regard to exceptions and limitations, digital rights management and collecting societies) in order to encourage the open usage of the Internet as a tool for new ways of expressing creativity. Furthermore, we urge the European Commission to avoid forcing Internet intermediaries into a gatekeeper role which will permanently damage creativity, free speech and competition in the digital environment.