

EC Orientation debate - Comments on main points for discussions

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PART I BALANCE OF RIGHTS AND OBLIGATIONS

A few comments:

- The growth of the Pirate Party should not be presented as a mere fact to be stated without substantiation or qualification; the growing frustration with the party and decline of support for it, for instance in Germany¹ and in Sweden should also be noted.
- Why are publishers, RROs and other CMOs offering collective licensing, and aggregators not included in the main blocks of the value chain, for instance in block two? Clearly the paper risks failing to draw appropriate conclusions if such important elements in the value chain are not considered.
- The paper alleges that “*new on-line applications allowing fewer intermediaries...*” leads to “*access to a larger public*”. These allegations, which imply that publishers, for instance are no longer needed, are unsubstantiated. They also hide the fact that studies show that most self-published works sell less than 100 -150 copies².
- The paper has a paragraph in the middle of page 3 on the possibilities that Internet provides for direct licensing. Current copyright legislation is no hindrance to that; in fact these options have emerged and are probably stimulated by current legal frameworks. So why make changes to what already works?
- The statement on the bottom of page 3 of the paper that “fair use” offers “more flexibility” is unsubstantiated and probably also incorrect. As stated also in the paper, it is an imprecise concept which requires interpretation by the courts; it is complex and therefore costly, without offering more flexibility.
- The paper fails to refer to studies that show that “*changes to education exceptions trades off longer-term provision of educational materials and continued growth of an innovative exporting industry in favour of minor short-term cost savings*”³, and that income from secondary uses of copyright works impact positively on the innovation of new content and the ways of presenting and making it available⁴.

In conclusion:

1. The analysis of the developments as presented by the General Secretary’s paper cannot be shared
2. The terms of revision of the copyright directive cannot be appropriately assessed on the basis for the Secretary General’s paper
3. Assessment of the current legal framework requires a revised background paper which accounts more precisely for the current state of affairs; this can be achieved through some form of stakeholder consultation on the background paper, including presentations of opinions and facts in a workshop for the Commission to which stakeholder representatives may be invited to contribute.

¹ <http://www.spiegel.de/international/germany/german-voters-grow-disillusioned-with-pirate-party-a-863234.html>

² <http://www.nytimes.com/2012/08/16/technology/personaltech/ins-and-outs-of-publishing-your-book-via-the-web.html?src=me&ref=general>

³ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf, page 5

⁴ http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf, pages 3-5

PART II SPECIFIC ISSUES

These Notes do not comment on whether the six specific issues suggested by the Secretary General's paper are the appropriate ones to discuss, or if there are others to be added. Rather the comments are limited to assess the issues suggested by the Secretary General's paper.

1. Cross-border portability

This is an issue of concern also to rightholders. In Europe, rightholders do not, as a general rule, impose restrictions on cross-border sales of their works – to the contrary they want as much legal sales of their products as possible; some of the internet retailers apparently do impose unjustified territorial restrictions (but often, without foundation, blaming the rightholders).

In conclusion: (i) Appropriately framed mechanisms to prevent unjustified restrictions on cross-border sales should be considered; (ii) we offer to work with the EC to put such mechanisms in place.

2. User-Generated Content

The issue as presented by the Secretary General's paper correctly makes the UGC an information issue and not a question of legislation. As stated in the paper: "*The major challenge for content creators is to know*" whether a licence is required and remuneration is due. (If we do not know whether the limit for drinking and driving is one or two glasses of wine one does not remove the limit and say you can drink as much as you like and drive), one reinforces information activities. It is the same with UGC, the law does not require changes but we need to work collaboratively to enhance information, and also facilitate licensing processes. Stakeholders work collaboratively to address those issues. Examples are Linked Content Coalition (LCC) and ARROW, which are both initiatives supported by the EC.

In conclusion: the issue of UGC does not require changes either in EU or in national copyright legislation. EC initiatives to facilitate, support and assist in enhancing information and the development of appropriate licensing mechanisms are welcome.

3. Text and data mining

As emphasised also in the Secretary General's paper, this is again not a question of changing the laws but of facilitating the licensing process: "*In addition to licence for access to the content it requires the permission from each right-holder to copy and reformat...*" The stakeholders are working collaboratively on facilitating licensing, for instance through the EC supported LCC initiative. In addition we will examine further whether collective licensing can represent an additional adequate solution to the challenges created by text and data mining.

In conclusion, it is again not a question of modifying legislation but rather of making existing legislation, information and licensing mechanisms work. EC initiatives to support and facilitate joint stakeholder projects are welcome.

4. Private copying levies

The information in the Secretary General's paper is unsubstantiated and also incorrect. Studies carried out document that there is no correlation between levies and the price on devices. A study carried out by IFRRO on the 50 most sold devices and the prices on those devices in 19 different countries is attached to these Notes. The lack of correlation between levies and prices on devices was also clearly evidenced by the fact that, when levies were scrapped in Spain as from the beginning of 2012 prices on devices were not reduced and no new device was introduced into the market as a result of the levies being removed.

In conclusion: The levy issue is one of coherent implementation within existing legal frameworks, which, as mentioned in the Secretary General's paper, is an issue that Commissioner Barnier is already addressing through the mediator Vitorino.

5. Audiovisual sector

This is not our sector so I shall refrain from commenting.

6. Cultural heritage

Again this is not a legal issue, as also clearly stated in the Secretary General's paper: "*The copyright framework provides exceptions for activities of cultural heritage institutions, but the Member States implement them differently, and some are falling behind the modern needs of those institutions.*" Firstly, there might be perfectly legitimate reasons why a Member State has not implemented certain exceptions, without this impacting on the digitisation and making available of cultural heritage. Furthermore, the issue, as stated also by the Secretary General's paper, is not one of modifying legislation but of implementing the existing one. In addition, cultural heritage institutions, authors, publishers and IFRRO have worked collaboratively to develop solutions to address challenges met by the institutions in making cultural heritage available, a substantial part of the work facilitated by the EC:

- a. Cultural institutions focused on the challenge of orphan works and out-of-commerce works. Response: (I) Facilitated by the EC, stakeholders agreed on (i) criteria for diligent search for rightholders; (ii) criteria for registries; (iii) criteria for licensing; (iv) MoU for making available out-of-commerce works, including across borders; (v) model licences – for internal networks as well as for making works available on open networks, such as on the Internet. (II) EU Orphan Works directive
- b. Cultural institutions focused on the time and costs involved in carrying out diligent search and licensing. Response: Joint development of the EC sponsored ARROW system, which in average reduced the time and costs involved in the search by 95%, for instance in the UK from 4 hours to 5 minutes per work⁵.
- c. On the issue of format shifting, stakeholders have agreed that certain institutions, i.e. publicly accessible libraries, educational establishments, museums and archives, should be authorised to make more than one copy (an open-ended number of copies), if this is necessary in order to ensure the preservation of the work⁶.

In conclusion:

- The issue of making cultural heritage is not one of modifying the legal framework but rather to make it work and work within the existing one. In this respect, the main issue is lack of funding made available to enable the digitisation and making available of cultural heritage by the cultural institutions.
- The stakeholders have established a task force to facilitate the implementation of the EC facilitated MoU on out-of-commerce books and journals; lack of funding has meant that there are no projects except the French, Norwegian and some minor pilots.
- Commissioner Barnier and DG Internal Market, and, for certain issues, DG Connect, have provided the necessary tools; DG Connect and other DGs need subsequently, in their turn, to make efforts to ensure their implementation:
- The Commission can (i) raise political awareness with the Member States of the importance of prioritizing, also in their budgets, the making available of cultural heritage, including works in copyright,; and (ii) release seed-corn funding to stimulate projects to digitise and make available cultural heritage, which also allows payment to rightholders for the making available of their works, when appropriate.

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- END -

⁵ <http://arrow-net.eu/experience-using-arrow>

⁶ http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/hlg_final_report09.pdf