



Contribution to the Commission's reflection document on "Creative Content in a European Digital Single Market: Challenges for the Future"

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1 EuroISPA

EuroISPA is a pan European association of European Internet Services Providers Associations. It is the world's largest association of Internet Services Providers (ISPs), representing over 1700 ISPs across the EU and EFTA countries – including ISPs from Austria, Belgium, Czech Republic, Finland, France, Germany, Ireland, Italy, Romania, Norway and the UK. The association was established in 1997 to represent the European ISP industry on EU policy and legislative issues and to facilitate the exchange of best-practice between national ISP associations.

2 Introduction

EuroISPA welcomes the Commission's initiative to consult the industry on the future challenges of the creative content in a European Digital Single Market. We strongly support the need to consider the implication that the Internet and the digitalisation technologies bring together in terms of distribution of content online and stress the fact that while the fundamental revolution of the Internet is global by definition, the copyright management in the EU is territorial.

3 Possible EU Actions for a Single Market for Creative Content Online

3.1 Limitations and Exceptions regime

The next wave of innovation and services is about to hit Europe and the industrialised world, with high-speed broadband networks and new technologies and applications bringing the online single market into a new promising era. It is therefore very timely for the Commission to look again at the issue of copyright exceptions with the intent to reduce any potential barrier to European openness and integration – any improvement in this process will be beneficial for European consumers, business, innovators and the European knowledge economy.

EuroISPA believes that the legislation currently in force needs to be revised in order to improve and harmonise rights as well as protection systems, and adapt them to the development of the Information Society. Some areas of traditional copyright rules risk to become obsolete and unable to keep the pace of changes in the way intellectual property circulates over communications networks. Simply, some business models and some ways to distribute IP over Internet, which are customary today (or even "normal" for Internet natives), were neither possible nor "imaginable" when the current copyright rules were introduced. With the notable and crucial exception of Article 5.1 of Directive 2001/29/EC, little has been done to adapt the exception regime to the changing needs of the Information Society and to ensure that it can adapt quickly to the rapidly evolving environment and, in fact, the entire limitations and exceptions regime proves very limiting when confronted with the necessities of the creative content online market.

It is important to stress that, apart from the lack of harmonisation of copyright exceptions achieved by Directive 2001/29/EC¹, the major issues with the approach of an exhaustive list of strictly defined and implemented exceptions is its lack of flexibility to adapt to the changes occurring in a rapidly evolving environment for content, creation, access and

distribution. This means that European Member States cannot adapt to changing technical circumstances to allow for new exceptions. A change of the existing regime for copyright exceptions, at both national and European level, will require changes to Directive 2001/29/EC and subsequent implementation at national level. While considering the review of the European copyright exceptions, it is important to ensure that innovative and creative development does not depend on lengthy and complicated legislative changes. Failing to do so will create a risk that European companies will not have the legal leeway to take advantage of new technical opportunities while competitors in other world regions may not face similar restrictions.

In the interests of all stakeholders, it is essential to offer the broadest, reasonable and most predictable scope to the exceptions in Article 5 of Directive 2001/29/EC, under the condition that these be read within the context of the three-step test described in Article 5.5. In this respect, it would be interesting for the Commission to provide guiding principles on the way the three step test should be applied and to provide constant monitoring of the application of this regulation by Member States. Copyright exceptions affect a common online market and the European Commission cannot afford having a fragmented regulation on this subject.

3.2 Pan-European and/or multi-territory licensing process

EuroISPA considers that a multi-territory rights licensing may be appropriate to create competition amongst collecting societies and to meet the demands of new services by consumers, in line with the ubiquity of such on-line services. Such system should be driven by rights owners making the choice about how best to license their rights in order to reach their primary and secondary markets effectively. In this context there are many problems relating to music licensing which must be addressed. Copyright in music, in particular, can be split between many right holders. Separate clearance through different licences with each right holder is complex, and becomes more so if such clearance must be carried out on a country-by-country basis. Rights owners should be able to choose a route to market, weighting up the practicalities of direct licensing versus the benefits and related costs of licensing through a collecting society.

Efforts should be also directed at creating online licensing resources, so that multinational acquisition of rights becomes an easy process and transaction cost are lowered in this field. However, even in this scenario, certain rights should be exercised collectively to ensure creative development and the preservation of cultural heritage, otherwise neglected by market developments.

3.3 Freely Accessible Ownership and Licence Information

Obstacles arise from the lack of proper information with respect to the identification of copyright ownership in Europe, as neither collecting societies nor licensees have complete information as to ownership of copyrights. Even if publishers were required to license their rights through collecting societies, in the absence of blanket licenses, whereby a single licence covers substantially all repertoires in a given territory, neither the need for this information nor the problems caused by its absence would be diminished. The identification of right holders can be an issue, as ownership information is not readily available – the latter has been clearly demonstrated by recent debates on orphan works. This leads to a significant risk for commercial users of (a) paying the wrong person for certain rights; (b) paying multiple times for the same rights in the same work or (c) unwittingly making available a work that is not covered by a licence that the commercial user may have. There is a compelling need for a streamlined, efficient pan-European commercial licensing. Therefore, it will be necessary to create a central electronic repository for ownership information into which all collecting societies and other right holders feed information in a common format, and which could be accessed by licensees, so that the problems caused by the information vacuum can be eased, and timely, accurate remuneration can be fostered.

3.4 Harmonisation of copyright laws

Article 5.2 of Directive 2001/29/EC actually provides meaningful measures for the fair use of works. However, harmonisation is lacking since they are based on discretionary provisions. Thus, Member States show great differences in the implementation of Directive 2001/29/EC and in the implementation of the exception regime depending on the structure of the respective copyright laws. In countries where Directive 2001/29/EC is implemented in a modern and updated law, exceptions will be also implemented in a way which is fairly compatible with the digital world; conversely, if the directive is implemented in an old-fashioned copyright regime, then exceptions will adapt to very “classic” models and show minimum compatibility with the real needs of the online market.

Some Member States are even working to use copyright exceptions to prohibit online digital video-recordings for personal use, because it would be considered an unauthorized copy of a protected work!

Therefore, a new harmonisation of exceptions is a necessity if an online EU wide market is to be a reality.

3.5 Alternative Forms of Remuneration from ISPs

The Commission proposes that ISPs should owe rightsholders a form of compensation for mass reproduction and dissemination of copyrighted material (unauthorised file sharing and reproduction).

EuroISPA is sceptical whether alternative forms of remuneration (like compensation through an online subscription fee) are a sustainable solution. We believe in market driven solutions, the competitiveness of which will be driven by effective licensing reform. It is important to create attractive online services that make customers or sponsors want to pay for the content. It is of paramount importance to encourage all stakeholders to develop adequate offers through innovative business models that go beyond classic distribution channels, such as via the Internet. Alternative forms of remuneration could jeopardize and seriously hamper the introduction of innovative business models. EuroISPA believes that it is imperative to ensure that any variant of the online subscription fee would not be diametrical to the development of online business models.

3.6 Governance and Transparency of Collective Rights Management Organisations

The current collective management system is one of the most important impediments to the development of the Online Single Market and access to creativity. The EU should help to install a new, more efficient copyright clearance system which would help all market players to streamline transaction and management of costs. Other barriers may derive from the complexity of the licensing systems and the fragmentation of the European Internal Market. The plurality of authors and publishers, each having an ownership interest in a given work, may negatively impact the growing digital market. In this respect, the availability of “blanket licenses” (i.e. covering a full global repertoire) would be extremely helpful in assisting the development of the market.

3.7 Collaboration with ISPs

We continue to experience a change of the economy with the continuous transformation of existing markets, the evolution of existing business models and the development of channels of distribution for the digital age. The Commission must focus on the development and encouragement of adequate and attractive new business models, with recourse to legislation based on sustainable principles. The development of legal markets promoting and supporting digital content will constitute one element of success in addressing online copyright infringements for the benefit of the creative industries, for consumers and for all stakeholders in the online environment.

The EU could assist the creative industries in shifting towards more sustainable business models by moving its regulatory focus away from enforcement, restrictions and sanctions and towards regulatory measures that promote the establishment of innovative services.

EuroISPA is open for discussions on reasonable and sustainable solutions that respect Fundamental Rights of information, privacy and communication and do not delay the development of new business models. This includes strengthening industry and government efforts to create better awareness on the use of copyrighted works and the public perception of the value of intellectual property as an economic and cultural asset.

Before the EU considers intervention to reduce online copyright infringement, the European Commission should undertake research to understand consumers' behaviours and the implications with the online market. There is currently no independent and transparent studies that identifies the reasons why some consumers unlawfully share copyrighted material and under what conditions their behaviour would change. It is important for independent analysis to confirm whether most consumers who currently infringe copyright would do so if viable legal alternatives were available and at what price these alternatives would become attractive. The current available research is non-transparent, non-independent and ineffective for the comprehension of the online market.

EuroISPA believes that multi-stakeholders cooperation should not be considered simply on the basis of ISPs cooperating with rights holders to defend their existing business models. In practice, a well balanced cooperation must provide far greater scope for online players to displace - through competition - traditional off-line retailers:

- *Widespread availability of legal online content:* As noted on several occasions, EuroISPA believes that the best way to combat online copyright infringements is to ensure that attractive legal alternatives meeting consumers' needs and expectations are available.
- *Legal content stores and broadband media devices should be drivers for NGN deployment:* Illegal content repositories in contrast to legal stores have the advantage of a larger number of "titles" because they are not "bundled" with specific hardware/software requirements. However, illegal content repositories often only "serve" computer-trained users and absorb a large capacity of the ISPs networks hampering their ability to deliver a quality connection. New models should emerge offering a widespread availability of easy to use devices and content stores providing a library of legal content comparable to those available from illegal sources (this need to be done through agreements between content owners on common standards). This would be an answer to ever evolving illegal software featuring more and more user-friendly devices. Easy to use legal content could also fill the "digital content divide" and become one of the main drivers for widespread demand of NGN networks.
- *Education of consumers:* EuroISPA believes that the best solution to strengthen online respect for copyright is to convince users that a legitimate solution is better based on the implementation of attractive business models, pricing and quality of service. In this respect, content owners should accept enforcement methods which rely less on criminal sanctions and are more oriented to prevention, information of consumers about intellectual property rights, and adequately meet their expectations and needs.
- *Industry cooperation and law enforcement:* ISPs reject under any circumstances that they should have any law enforcement role. We do not want this "privatisation of law enforcement" creating situations where cooperation between stakeholders results in an "automatic" chain of enforcement. In particular, Fundamental Rights of information, privacy and communication are severely undermined when right holders become judges and ISPs become prosecutors.

4 Conclusions

EuroISPA is strongly convinced that a transparent, innovation-led and competition-driven approach to the establishment of a creative content European Digital Single Market, together with proportionate solutions respectful of Fundamental Freedoms, could be the way forward to ensure the development of new business models able to meet today consumers' needs.

Therefore we support:

- The modernisation of the exceptions and limitations regime of Directive 2001/29/EC
- The need for multi-territory rights licensing
- The need to create a central electronic repository for ownership information
- A more efficient copyright clearance system

EuroISPA is open for discussions on reasonable and sustainable solutions that respect Fundamental Rights of information, privacy and communication and do not delay the development of innovative services that benefit consumers and contribute to the economic growth.