

Response of KLYS and Copyswede to the Reflection document Creative Content in a European Digital Single Market

1. Introduction

KLYS and Copyswede are very positive to dissemination of creative content online, not only as this provides new possibilities for authors and performers to reach existing and new audiences in more efficient ways, but KLYS and Copyswede also acknowledge that a general shift in distribution technology would greatly aid in the realization of the objectives laid down in the Lisbon Agenda.

KLYS and Copyswede also welcome the general emphasis on practical solutions in the Reflection Document. Too much effort has hitherto been wasted on theoretical exercises and wishful thinking.

However KLYS and Copyswede miss a deeper analysis and emphasis on the mutual interest of creators and end-users in a strong copyright protection. This interest is manifold. Copyright has a crucial role in a democracy. After all, the existing copyright (droit d'auteur) shares the roots with the civil rights and freedoms that are universally acknowledged as the basis of western democracy. A strong copyright protection provides the necessary prerequisite for perpetual financing of new works and performances. Copyright also fosters the personal relationship between the artistic work/performance and its creator, and provides for the artistic freedom and integrity of the author/performer.

The role of copyright protection as the basis for creativity and cultural diversity, as well as the importance of authors and performing artists being entitled to fair and adequate remuneration for their artistic work are clearly highlighted in the Reflection document, which KLYS and Copyswede strongly support. Payments based on copyright are one of the most important sources of income for artistic and literary professionals.

KLYS and Copyswede would like to stress that a copyright where the authors and the performing artists have influence over their work and can get fair conditions and compensations for the use of their work, is necessary for and promote the development of new content services in the EU. To be able to offer the consumers of Europe increased access to artistic and literary content there is a need for a dynamic, creative sector that is treated and paid appropriately. Otherwise the artistic and literary creation, production and dissemination of creative content online will diminish.

KLYS and Copyswede would also like to point out that it is not just the economic rights of the authors and performers that need to be protected in the digital environment. The Moral rights of the authors and performers – which are not mentioned anywhere in the Reflection document - are of equal importance. The Moral rights protect the authors and performing artists from violating changes to their works and performances. Moral rights also include a right for the authors to have their name stated, when their work are made available to the public. These Moral rights are also of great interest for the consumers, who want access to undistorted protected works and information on the identity of the author.

The Commission puts great emphasis on the importance of cultural diversity in the reflection paper. In KLYS' and Copyswede's opinion the cultural diversity in European countries is the very strength of a dynamic Europe. In order to protect and promote cultural diversity inside and outside Europe it is essential to offer a broad, diversified choice of arts and culture in media, cinema, books, magazines etc and to counteract cultural standardization. A true cultural diversity requires a strong and well functioning copyright system. The copyright systems, international, European and national alike, have strong implications on cultural policies on the national level.

According to article 151 of the Treaty of Amsterdam, the EU shall strive to promote and respect cultural diversity. The EU has also ratified the UNESCO convention on protection on cultural diversity, which gives the states a right to have its own national policies for culture. One might argue that the EU objective of cultural diversity and the EU objective of a single market are not compatible in all respects.

KLYS and Copyswede believe that it is through well-functioning collecting societies (CMOs) and through increased cooperation between CMOs in Europe and worldwide that licenses will be granted in a transparent and non-discriminatory way, which benefits both users and the individual creators. The effective and established arrangements for collective rights administration that have been

developed in the Nordic countries on the basis of the rules of extended collective licensing can serve as models for CMOs in Europe.

As a general remark, KLYS and Copyswede would like to emphasize that the dynamics between the main stakeholder groups; rightholders, consumers and commercial users, are less clear-cut and unambiguous than it might appear in the Reflection document. It would be very constructive if the Commission could more specifically describe what it visualizes in terms of how the commercial users in spe might act in respect of the objectives laid down in the Reflection document, and what kind of competitive eco system might be anticipated to develop.

2. The evolution of technology and content markets

KLYS and Copyswede think that the reputed dichotomy between professional and so called user created content is artificial and contra-productive. Existing copyright provides for all the freedom and flexibility that could reasonably be required in this respect.

KLYS and Copyswede agree with the Document's general description on the convergence and integration of distribution roles, but argue that the notion that traditional practices for rights management, exploitation and distribution are not adapted to digital distribution is premature and uncalled for as realistic viable value chains are unknown to everybody at this point.

When assessing the risks involved in making creative content available on line, KLYS and Copyswede think that it is a point to be made in distinguishing between on line distribution in general and distribution on the public Internet (www below). Online does not equal the www and until legal conditions are created which enable online services dedicated to creative content on www to be priced according to sound economical parameters, other forms of online distribution has to be considered and promoted.

In general, KLYS and Copyswede think that a more thorough analysis of actual demand and actual supply has to be made before any measures of legal EU action is to be contemplated.

2.1 Music

KLYS and Copyswede agree with the Document's description of legal conditions for the licensing of recorded music and the contractual practices developed, but argue that it is premature to assess that these conditions and practices are a reason for the present whereabouts of the online music market. In general KLYS and Copyswede think that the virtues of the traditional CISAC model have not yet been duly appreciated.

2.2 Publishing

As for the need for a single EU market for protected literary works KLYS and Copyswede think that there is a point to be made in the fact that the linguistic, and thus cultural, fragmentation (cultural diversity) in Europe will prevail in all foreseeable future and that demand for unadapted literary content in Europe is primarily and quite overwhelmingly national.

2.3 Audiovisual (AV)

Also in the field of AV the demand is overwhelmingly national due to the linguistic and cultural fragmentation. Sure enough there is and will hopefully be increased demand for foreign European AV in adapted form, but this does not require or justify actions for a single online market.

Copyswede has for years been involved in collective management of rights and remunerations in the field of AV. According to our experience such collective management is a requirement for authors and performers to be able to get a fair share of the revenues for exploitation of AV in different ways. Since recently, Copyswede and its member organisations are involved in several licensing projects with the objective to enable creative content to be distributed online. KLYS and Copyswede believe that also in the field of AV collective management has a crucial role to play in the realization of viable online distribution.

In general it could be argued that there is no element of economy of scale in respect of online distribution of copyright protected works. Costs for copyright fees and digitization measures are typically proportional per capita, while other costs, like for storage and distribution, are microscopic and sinking rapidly. If you can not make your online service lift off in the national market, things will not improve by adding foreign member state repertoires.

It can also be argued as a general remark that the satisfaction of the demand for adapted creative content can not rely completely or even primarily on commercial solutions. It will most likely depend on public funding conditioned on national cultural policies to fulfil and further develop this.

4. The main challenges

The main challenge is to find constellation of parties that can realistically be able to co-operatively create viable business models for online distribution of protected creative content. A big problem is that despite some considerable time having elapsed by now and massive efforts and money having been invested well functioning business models on the www are scarce.

Apparently no one is able to price creative content services properly on the www. It could be argued that the reason for this is the impossible task of competing with semi-legal services like YouTube and with illegal file sharing. Entrepreneurs vainly believe that if they could only hit a price level close enough to free, end-users would suddenly begin to stream over to the legal services. Surprisingly, such hopes still linger in the political sphere both nationally and at Community level.

In KLYS' and Copyswede's view there is no such price level. Until illegal distribution is effectively marginalised, legal services for online distribution of protected creative content will not be priced according to sound economical parameters and will not generate enough revenue for the rightholders to be able to uphold the perpetual stream of new diverse high-quality works and performances that is one of the ultimate objectives of copyright.

This however requires true leadership from the political sphere, nationally and not least from the Community institutions. According to KLYS and Copyswede a key element in the struggle against illegal distribution is to revise the E-commerce Directive in order to involve ISPs in the responsibility for content distributed in their broadband infrastructure. Full responsibility might not be appropriate, but responsibility for passivity and negligence should be explicitly outlined and elaborated on. Such a revised E-commerce directive would provide an effective foundation for courts on which to build appropriate precedents and for industry on which to create business codes of conduct. It would also give the ISPs incentive to indulge in the, omnipresently wished for, closer co-operation between ISPs and rightholders aimed at creating viable business models. It must be made a mutual interest of rightholders, network operators and legal distributors that illegal distribution is marginalised!

KLYS and Copyswede object to the notion that technical progress enables rightholders to manage rights individually. Anyone propagating such a notion has to justify how much time and effort the creator is to diverge from her creative work to working with rights administration. KLYS and Copyswede think that it is of utmost interest of all parties concerned that CMOs has the possibilities to affiliate as many national right holders as possible and that international webs of mutual agreements between CMOs are not ruptured.

5. Possible EU actions for a single market for creative content online

KLYS and Copyswede welcome the suggestion of extended collective licensing as a way of dealing with, for example, the issue of orphan works. Orphan works could be included in an extended collective license scheme after a diligent search has confirmed their orphan status.

We would like to recommend the extended collective licensing system also in other situations of mass use of copyright protected works and performances in the digital environment. The idea of the extended collective licence is to offer a solution to the practical difficulty encountered when a large number of works and performances need to be licensed at the same time in the same agreement, and when it is not possible for the contracting parties to know in advance which rightholders' works will be involved in the planned use. This licensing system also offers the authors and the performing artists a certain degree of control and influence over the use of their works, since the licensing conditions has to be negotiated between the rightholders and the users.

KLYS and Copyswede hope to be able to elaborate on the virtues of the Nordic model for extended collective license within the framework of the special study on the subject matter presently conducted.

Concerning limitations and exceptions, KLYS and Copyswede are not in favour of the introduction of any additional exception to the existing long list of exceptions in the Infosoc Directive of 2001, nor do we see any advantages in further harmonization of the optional exceptions by making some of them mandatory.

KLYS and Copyswede object to the suggestion in the Document that the rationale of the Sat/Cab Directive is unambiguously in favour of single market solutions. This Directive lays down several principles. One, applicable to satellite transmissions Direct-To-Home, is that of uplink territory clearance in cases where the rightholder establishes a direct contact with the end-user without having to involve intermediaries. This principle is in fact broadly and quite organically applied as we speak in respect of online distribution when the rightholder connects directly with end-users. Typically this is possible where the rightholder is funded by public means. Where, on the other hand, the rightholder has to rely on commercial revenues for sustenance and development, and intermediaries are involved to this end, the contrary principle is applied, namely that of territorial clearance in respect of intermediate users. This is incidentally also a principle laid down in the Sat/Cab Directive in respect of cable retransmission. The value chains that can realistically be envisaged for the online markets are typically of the latter kind and thus the rationale of the Sat/Cab directive is in favour of national solutions.

The Document relates the idea that with a fully harmonised Community Copyright Law practically all the reputed problems at hand would be solved. This description is quite incomprehensible, but has obviously stirred the imagination and hopes of several influential players. Until the idea has been further explained it has to be noted that, by virtue of the Berne Convention, to which all EU member states are affiliated, any national copyright title has instant world wide effect. This however does not entail that the rights imbedded in the title has been licensed for any exploitation or use, nor would a Community Copyright title.

KLYS´ and Copyswede´s view on alternative forms of remuneration is that apart from disrupting the basis for a functional copyright in the interest of rightholders and the public alike, such models would, like the Document hints at, preclude any economically sound commercial service on the www, or online in general for that matter.

KLYS and Copyswede are very much in favour of the idea of more elaborate measures on the governance and transparency of collecting societies.

6. Conclusions

KLYS and Copyswede support the intention of the EU Commission to take a pro-active role in order to ensure a culturally diverse and rich online content market for consumers and an appropriate playing field for commercial and public users, including adequate possibilities for remuneration and improved conditions in the digital environment for authors and performing artists and other rightholders.

However, KLYS and Copyswede mean that demand is primarily national in scope, that supply of online access is primarily national in scope as well, that broadband penetration is primarily conditional on national politics and that funding and financing of new creative works, performances and products are primarily conditional on national funding and revenues.

KLYS and Copyswede therefore suggest the possibility that the development of a thriving online market for creative content in Europe would be best served, at least at this stage, by an approach in favour of national/territorial application of copyright and by promoting the development of extended collective licensing systems where appropriate.

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