

EU Reflection Paper Reponse of the Open Rights Group

ORG thanks the Commission for the opportunity to comment on this important reflection paper, in advance of any more detailed proposals for copyright reform that might be forthcoming.

The paper discusses at a high level matters relating to many specialised fields, in law, technology, and in business practice. Rather than respond in great detail to ideas that are at this stage interesting sketches rather than blueprints, this response relates these ideas to some principles that ORG feels should be the foundation of our European copyright framework.

1. Creative Citizens

It is disappointing to see a reflection paper introduced with such a one-sided and contentious statement, that 'copyright is the basis for creativity'. Creativity flourished in Europe before copyright was codified, and before corporations had developed to exploit it. The pre-pended statements from Commissioners Reding and McCreevy make no such claims, and rightly focus on consumer interests in accessing and in using content, and in copyright's contribution to Europe's economic competitiveness.

Commissioner Reding's model of 'innovative consumers' is an interesting starting point. The EU should be bold in defining a copyright framework for 'creative citizens', recognising the role of copyright in wholesale content markets, but giving far greater prominence to access rights, such as fair use and re-use. The EU should also strengthen protection for creators and ensure that rights intended for creative people are not unfairly assumed by corporations.

This paper leans towards depicting creativity as a corporate endeavour. If it carries this attitude through to a new legal framework we are in danger of losing diversity and opportunity to content manufactured by large corporations. Europe's cultural heritage has been generated by individuals, some of them labouring for lifetimes without hope of reward or recognition. The exploitation of their work by corporations has made a very few of them extremely rich, but has not added to our collective cultural wealth. While we would not recommend the starving artist as a model for public policy, we would strongly urge the Commissioners to put the creative citizen at the heart of a new copyright framework.

2. Costs and Restrictions

The administration of copyright and the collection and distribution of royalty payments is an expensive and time consuming activity. According to the Commission's own survey music industry collective management organisations in 2005 extracted €1.1b in costs, and CMOs are only part of the picture. Across all the creative sector the costs of administering copyrights will be many times this figure.

Being an exclusive right with some limited exceptions copyright by its nature prevents uses that have not been codified and legislated for. This makes it badly adapted to a fast moving environment, such as the digital economy, and a difficult area for a public policy designed to encourage innovation. In some sense innovation has to have been anticipated by legislators before it can be enabled, and even the Commission will agree this is unlikely to happen.

It is extremely difficult to study the costs and benefits of copyright, and even if some reasonably reliable figures could be arrived at the analysis would not necessarily help in reforming the framework. There is however every reason to try to make the direct costs and the opportunity costs far more apparent than they currently are so that all interested parties including creators and consumers can ask the question 'who benefits?' both under the current regime and under any proposed changes.

3. Owners versus Creators

Copyright law distinguishes between three interested classes, creators, rightholders, and consumers, and aims

adequately to protect each of their interests, finding a balance where those interests are not entirely aligned. The Commission needs to equip itself to take a sophisticated view, and not limit the discussion to content businesses and consumers.

Tilting the balance in favour of holders of large portfolios of rights might well act against the interests of creators, by strengthening the control those businesses exercise over remunerative distribution channels and thereby allowing them to offer worse terms to artists and performers. This will over time reduce choice and freedom for creators, and may well threaten diversity by concentrating the market for professionally produced content.

Competition in content markets should reflect and enhance cultural diversity, to the benefit of citizens and creators alike. By recognising the multiplicity of interests in creative industries, and strengthening creators' and consumers' interests, the Commission will encourage a greater diversity in the future and protect our shared culture from the dominance of a small handful of large rightholding companies.

4. Complexity

Copyright creates an extremely complex set of interests and obligations for anyone who makes, distributes, re-uses, or consumes content. We have already remarked on the costs of administering this complexity. There are additional costs, particularly in the uncertainty that any new form of exploitation will be permitted by all the relevant stakeholders, or whether any individual or class of stakeholder will ransom innovation by withholding permission.

It is unreasonable to expect that normal consumer behaviour should demand a sophisticated understanding of copyright law, or that small businesses and community organisations should have to navigate complex licensing schemes if they wish to perform or experience creative works. Territoriality adds further complexity with each matrix of stakeholder interests being potentially treated differently in each Member State.

Equally, 'grace and favour' exceptions, such as vague public statements about private copying, are no substitute for clear and simple rules that consumers can understand and respect. The Commission should seek to simplify copyright and licensing wherever possible, particularly in case where there are multi-stakeholder permissions required for seemingly simple uses.

We also note that a single copyright title would not necessarily prevent rights owners from splitting up territories contractually. The experience of the 1993 Satellite Directive, which in effect created a single EU wide satellite communication right by extending the law of the 'uplink' territory, shows how a single right can be divided in practice.

Mandatory exceptions with a clear policy purpose should be harmonised, and not overridable by contract. However, otherwise it would be beneficial to let member countries experiment with further exceptions appropriate to the digital environment, responding to new issues and cultural preferences. The exhaustive list of the 2001 InfoSoc Directive was not required by the WIPO Internet Treaties, and should be opened up again.

5. Exceptions and Fair Use Rights

This reflection paper touches on consumer rights with respect to content they have bought, and is very cautious in its discussion of exceptions and limitations, but this is a very important area where the Commission has a key role to play. Member States, as has been mentioned, have a wide range of different implementations of copyright law with respect to private copying, fair use, fair dealing, and other exemptions.

Citizens should be able to expect a clear set of reasonable rules about what they may or may not be able to do with content. Tolerating a situation where there is almost universal infringement, such as the use of portable media players in Member States without a private copying exemption, inevitably reduces respect for the law itself. Harmonising consumer rights across Europe, and ensuring that consumers are given fair, simple, and clear information should be a very high priority for the Commission.

Many Member States make provisions for citizens to use copyright material either for private study, or for

activities that build on our collective cultural wealth, such as comment or review, or indirect comment through parody, or for preservation in publicly owned archives. Without strong policy to protect these exemptions copyright can be used to prevent or limit free expression and criticism, with damaging effects on culture and civic life.

All citizens have equal rights to access cultural goods. Just as with fair use, the Commission can act to bring all Member States up to the same high standards for access, especially for the disabled, but also general public access through libraries and national archives. Publishers and content providers need very clear guidelines as to how they may or may not limit access through contract or through technology.

6. Sustaining and Regenerating the Copyright Infrastructure

The paper mentions briefly the idea of an 'online database' for rights information, but does not expand on who should own such a thing or how it should be funded. Maintaining a capable and efficient infrastructure for administering copyright in Europe is a challenge that no single group of stakeholders has yet been able to meet. Reform of copyright should be accompanied by a detailed study into the impact of proposed changes on the administrative infrastructure, and it should go without saying that any impact should be to increase access to markets and transparency for rightholders.

The Commission should consider carefully the benefits of including in any package new obligations on Member States to ensure that full and accurate records of copyrights are kept and made available, and also that any protected work is offered to national archives for public access, where the creator wishes to benefit from the protection and commercial opportunities copyright presents. Works intended to be offered under open licensing schemes or assigned to the public domain, and copyrights created by ordinary every day activities such as writing email or leaving answerphone messages, do not require mandatory registration, and private repositories are likely to be widely available at low cost.