

Comments
on
Creative Content in a European Digital Single Market:
Challenges for the Future
Submitted By
The Software & Information Industry Association

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With over 500 member companies, the Software & Information Industry Association (“SIIA”) is the principal trade association of the software code and information content industry. SIIA is the oldest and largest trade association representing the software and digital content industries. Our members are global industry leaders in the development and marketing of software and electronic content for business, education, consumers and the Internet. They range from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies are leading providers of, among other things:

- business, enterprise and networking software
- software publishing, graphics, and photo editing tools
- corporate database and data processing software
- financial trading and investing services, news, and commodities
- online legal information and legal research tools
- tools that protect against software viruses and other threats
- education software, digital content and online education services
- open source software, and
- many other products and services in the digital content industries.

The innovative companies that make up SIIA’s membership rely upon copyright and other intellectual property protections to protect their copyrighted works from infringement and to enable ongoing investment in human capital and innovation throughout the EU.

When copyrighted software or digital content is infringed, whether online, via organized criminal counterfeiting, or within an organization, publishers are effectively deprived of taxable sales and income—either directly or indirectly—that could be put to use to develop more, new or better works. Every year the software and digital content industries lose hundreds of millions of taxable Euros due to copyright infringement – depriving the public of new innovations, costing the EU thousands of high-skilled jobs every year, and hurting overall economic growth. Because many of the largest software and content publishers are public companies, this loss of economic

growth significantly impacts both the tax base of the EU and the overall value of investments in the retirement portfolios of large numbers of average EU citizens.

These negative consequences would be substantially limited if consumers and users of content took the time to understand and respect the law, and the cumulative adverse effect of software and content piracy across the EU. In SIIA's view more can and should be done to ensure that EU citizens truly understand the value of legal software and content usage under the copyright law and the damaged cause by the widespread failure to abide by the law.

The Reflection Document suggests that a broadening of copyright exceptions and defenses might be appropriate. Any alteration to the rights or exceptions found in copyright law would be of significant concern to software and information publishers as it could have the effect of offsetting the delicate balance between the rights of copyright owners and the interests of users. In a world in which piracy of copyrighted works is so easy and persistent, and where criminal organizations exploit piracy for huge untaxable gains, any expansion of existing copyright law exceptions may only serve to further reduce the market for legitimate copies of copyrighted software and content and the incentives of authors to create and disseminate new copyrighted works for the public to enjoy, especially if such changes are unaccompanied by improvements in the law and government resources that help better combat piracy.

To the extent the law includes any exceptions it is essential that they comply with the Berne Convention's three-step test, which requires the exception be limited to: (1) certain special cases; (2) which do not conflict with the normal exploitation of the work; and (3) which do not unreasonably prejudice the interests of the rights holder. This test establishes the essential balance between the rights of owners with the interests of users and should be strongly adhered to when crafting any exceptions under the copyright law.

We fully understand the need to address the interests of users in getting access to copyrighted materials, but we believe there are already a myriad of efficient and effective ways to do this – namely through *voluntary* licensing schemes – without unnecessarily expanding or unduly continuing exceptions in copyright law. Over time, the open and highly competitive market for software and content, lead by user demands for increasingly lower cost (and even free) solutions, has lead to licensing regimes that have proven to be extremely flexible and preferable -- obviating any need for inflexible legal exceptions or compulsory licenses that governments are notoriously slow to change once they become outdated.

Publishers and user should retain the freedom to structure license and usage agreements as they desire -- and as the extremely competitive market dictates, while retaining clear consumer protections. This is more important now than ever before because in an increasingly digital knowledge economy it is almost certain that software and content publishers will make their products and services available subject to critical contractual terms -- without which they would simply be unable to create and supply value.

One example of how this benefits EU citizens every day is user segmentation. Through contract and licensing mechanisms, publishers of software and information products can extend the accessibility to their products through price differentiation – for example, through charging

different prices for the same or very similar products to different users with restrictions on transferability. Software publishers use this mechanism to make their products accessible to, for example, students and charities at a significantly lower price than is paid by users and large for-profit corporations. However, these publishers will not be able to extend the audience for their products through price differentiation unless copying and resale are controlled through adequate statutory protection that does not impinge upon the principle of freedom of contract.

It is important to understand that SIIA members are both copyright owners and users of the copyrighted works of others. As such, they have a strong interest in supporting the wide dissemination and use of copyrighted works under established principles of copyright law. They also have considerable experience in seeking permission for the use of copyrighted works. SIIA's members understand the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining necessary permissions, and would welcome changes that help to address those issues in a manner that conforms with international best practice and legal norms.

The issue here is how and under what circumstances a user of a copyrighted work should be permitted to lawfully use the work when the user cannot identify and locate the copyright owner for purposes of obtaining permission for such use. We propose that the solution is to limit an owner's legal remedies when a user could not, after a diligent and documented search, identify and locate the copyright owner before commencing use of the work. If the copyright owner were to come forward after such a use has commenced, the copyright owner would be entitled only to a reasonable, market-established licensing fee or royalty. In these cases, we agree that the copyright owner should generally not be entitled to recover statutory damages, the user's profits, or attorneys' fees. Nor should there be any criminal penalties for such uses.

While we think it is important to obtain clarity on liability for use of orphan works, we do not believe that the issue is ripe to be addressed by way of a community statutory instrument. In particular, since the aim of such an exercise would be to find an objective standard of what would constitute a diligent search, what is reasonable could depend very much on a variety of local circumstances, such as the maintenance of right holder registration information, risk of liability, and the existence of search tools which vary from jurisdiction to jurisdiction. Consequently, any attempt at harmonizing the diligent search standard (or other standards in the law) by way of a community statutory instrument could have the unfortunate result of creating an objective diligent search standard that is much too low or too vague.

At the same time, however, we are in favor of encouraging consistency between standards being adopted by member states. We think more work needs to be done in this area to better understand the different capabilities and resources of member states relevant to locating and identifying copyright owners. In particular, further examination of the issue needs to take place for there to be a better understanding of, among other things: (1) the different effects an orphan work defense might have on different copyright industries; (2) best practices for identifying and locating copyright owners; (3) various resources available in each member state for identifying and locating copyright owners; (4) the resources available in each member state for finding owners of different types of copyrighted work at issue; and (5) different standards for liability in each member state.

In closing, we would like to thank the Commission for providing us with the opportunity to submit our comments. We would again like to emphasize that we and our members are ready to engage at all levels in constructive discussions aimed at creating and preserving a flourishing market for copyrighted works, where European consumers have ready-but-rightful access to copyrighted works, and where publishers have the ability to continue to innovate and contribute materially to economic growth.

We look forward to working with the Commission as it continues to consider and address these important intellectual property issues. If we can provide any supplemental information or clarify any of our comments please do not hesitate to contact us.