

Dear European Commission,

Summary: The goal of copyright is to get more money to more authors and more cultural works to more citizens. Due to the changes the free copying of the internet brings, additional protection doesn't help achieve that goal. The proposal paper goes into many technical details, but loses the focus on the benefit of copyright to the citizens - and what kind of copyright protection is useful today. Due to this, many of the measures (especially DRM) have to be reevaluated, if they really benefit our society and cultural development, or only try to cement a status which doesn't benefit the citizens in the light of the changes to technology and consumption of cultural works.

Please keep in mind that copyright is no inherent right. Instead it's a state given information monopoly with a simple goal: Increase the quality and quantity of creative works available to everyone.

As such, copyright law grants authors (copyright holders) the right to control who may be in possession of their works, because being able to make money with ones creations helps creating more and higher quality works.

Also it grants middlemen the right to make money from copies by establishing treaties with authors. These middlemen are useful, as long as they offer a major contribution in getting the works to the public and getting money to the author.

And it grants fair use rights to all citizens, which helps spreading the works and enabling more people to enjoy our culture the way they enjoy it most. These fair use rights are being accompanied by flat payments which are given directly to the authors, so creators of creative works money from an additional pool whose size is related to the amount of cultural works people share.

Currently the best balance between these different kinds of rights (copyright of the creator, use rights of the middlemen and fair use rights of the citizens) is changing due to almost costfree copying of digital content.

Now the middlemen often no longer serve as waybuilders between authors and citizens, but as gatekeepers who lock out citizens from our culture. Also they often take a high percentage of the money citizens pay for cultural works, even though their costs for spreading works (and finding good works) were reduced greatly. When a musician gets a few tens of a Euro from each sale of a 15 Euro CD, it's quite clear that the middlemen use up money which then doesn't help the authors create more cultural works.

Traditional (expensive) ways of spreading content are becoming unnecessary by the faster ways of spreading content digitally. But the middlemen control the flow of content from author to citizens (partly by copyright law), and they use their control to draw a major share from the money citizens want to give the author of the works they enjoy.

More: They often also hinder citizens from telling others about the works they like. In the digital world, people can instantly send music they enjoy to their friends, and if their friends

like it, they can buy it - or send it onward to other people who might like it more. And once someone gets something she/he enjoys very much, she/he most times *wants to* give the author money, so the author can create more works she/he enjoys.

By using "illegal downloads", people learn about new works and decide whether they are worth paying money - and recent studies show that those who use p2p networks to download music illegally are also the ones who buy the most music.

Because of this, I think that the paper focusses too much on the "protection of the copyright holders" and too little on the question, how laws can help making as many cultural goods available to every citizen as possible. So I want to offer some thoughts:

To achieve that goal, copyright always has to strike a balance between different objectives:

- 1) Authors need money to be able to work full time. So they want as much money as possible for their works. Some kinds of works take far longer to create, but have great cultural value (for example science books and investigative journalism), so authors who spend very much time on research (or similar) need a way to earn enough from their work, even though they have a smaller quantitative output.
- 2) Citizens want as much culture *they enjoy* as possible for the money they have available.
- 3) Authors and citizens need to find each other, so the citizens can find works they enjoy.
- 4) Cultural works have to be brought from the authors to the citizens and money has to be brought from citizens to authors of works they enjoy (with as little loss as possible). "Bringing works to the citizens" can include polishing the work, so the citizens can enjoy the works more. A book with 10 errors on each page is very hard to enjoy for most people, as is one with glaring errors in the plot. And a CD without coverimage will find far fewer listeners, regardless of the quality of the music.

In earlier times, the balance which brought citizens the highest amount of cultural works they enjoy was to have big middlemen who were able to shoulder the high cost for printing books, recording tapes, pressing CDs and carrying these from country to country (as well as a part of the risk of promoting unknown authors).

Today the cost for *spreading* cultural works is almost zero (more exactly: We already pay it by paying for our broadband connections) and finding an author I enjoy is easier with a search engine or using resources written by online communities for free, so the best balance is shifted. Due to this, having stronger fair use rights (so people can more easily pass on works and turn others into paying fans *of an author*) could be a far more efficient way to bring cultural works to everyone while paying the authors.

And stronger protection of "right holders" (which today more often serve as gatekeepers than waybuilders) could backfire quite badly and harm the cultural development of Europe (even today musicians complain, that they only get a very minor share of the money people pay for their works).

And since the cost of spreading a cultural work to people is almost zero (with technologies developed in filesharing communities, even the bandwidth cost drops to almost zero, since

every participant contributes some bandwidth for spreading the work), so there is no real reason, why someone who has only 15€ to spare each month should enjoy far fewer cultural works than someone who earns 10.000€ a month.

In earlier times, if a poor person spent 15€ on a book, more than 10€ were needed to pay for producing the book. That was a natural restriction on the number of works he could enjoy. 5€ went to the author he liked best (if the author was very lucky), because he could only pay for at most one book. He couldn't afford to read works from other authors.

Today that same person could read 15 books and pay 5€ to the 3 authors she/he likes best, and the author of the first book would gain just as much money, two others would get money (who wouldn't have gotten money otherwise), and the remaining 12 authors wouldn't lose anything compared to the high-production-cost alternative.

And this clearly shows a glaring error in ever increasing the "protection" of monopolies: Someone who has 15€ to spend on cultural works doesn't get more money to spend if he can't read works for free. So the main question is, how to get the people to give the money they have available to the authors while giving them as much access to cultural works as possible. And since for example in Germany about 50% of the citizens have too little money to pay any relevant amount of taxes, this thought is valid for about 50% of the people in Germany.

Adapting copyright laws to the current times has to take into account how copyright laws benefit the society. Copyright monopoly rights are being granted by the state (since we're living in a democracy that means: by all citizens) to individuals for the benefit of all citizens. So the goal of any copyright change should be to benefit all citizens.

It's the interest of society, that as many people as possible can enjoy as many cultural works as possible.

Criminalizing most citizens doesn't come close to that goal. And restricting what people can do with works they purchased (DRM), doesn't achieve that, either. Both only protect the middlemen, but neither the authors (or their income from which DRM is effectively financed), nor the citizens. DRM makes spreading cultural works *more expensive*, so it harms authors as well as citizens. It adds a needless control structure which sucks away money that should go to the authors.

And people like Howard Taylor (the creator of the free webcomic <http://schlockmercenary.com>) and all the free software programmers out there who make a living with their programming show that many citizens today are mature enough to pay for the things they enjoy, even though there is no gatekeeper forcing them to.

So please leave the "we need more protection" track. What we need is more money for more authors and more cultural works for citizens.

Cementing the current power-structures in creative business despite the changing technological environment doesn't achieve that.

When considering, how a single-market (a market accessible to everyone in the same way) affects the creation and spreading of creative works, the focus should instead be on comparing the different possible approaches how to strengthen the creation and spreading of cultural works and to see which balance between these ways is most efficient. This requires rethinking the support which copyright law gives to the different revenue sources of authors (flat payments on copying devices, income from direct sales, money from middlemen, money from "additional value products" like signed copies, direct donations by fans so they keep producing, and many more) and as such adjusting the balance between state-granted monopoly rights for authors, state granted monopoly exploitation rights for middlemen and fair use rights of citizens to make it fit for the current technological and social situation.

There's one more interesting fact on that topic I want to spotlight: The german group for spreading the money from flat payments on printers and photocopies "VG-Wort"[1] now pays Webloggers with money from flat payments, because they acknowledge, that these create a considerable share of currently consumed cultural works. Since most webloggers work without direct payments, this is a major change for the commercial viability of creating works which are freely available to everyone with an internet connection, regardless of the financial situation.

At the same time, projects like Creative Commons[2] show, that for a major share of authors of creative works it is most important that noone can misrepresent their content as the creation of someone else, while "forbidding people to pass on the work without making money from it" isn't very interesting (and isn't even useful financially for lesser known authors, because it stops people from spreading the word about the author).

So the first question to be answered is not "how can we ensure that the copyright protection holds in the light of current technology", but "which balance of monopoly protection, fair use rights and direct state-support of authors (like the sponsoring of theaters in germany) is most efficient in achieving the goal to enable as many citizens as possible to have access to as many cultural works as possible in the changed technological environment". Detailed questions about monopoly protection schemes and such (and which of them benefit our society today) only make sense once this basic question has been answered for the current situation.

And "Copyright is the basis for creativity" isn't an answer to that question, because it
a) is clearly wrong. People created at all times, while copyright law is only a few hundred years old, and
b) doesn't answer, how copyright law benefits European citizens - and how that benefit changes with digitization where every act of viewing is in fact a copy.

Best wishes,
Arne Babenhauserheide

[1]: <http://vg-wort.de>

[2]: <http://creativecommons.org> "Electronically mark what rights you want to grant people to use your work."

PS: Some additional notes:

- on differing content and goals: The content of the article shows a nice overview of problems of the current licensing system between companies, while the 'Strategy for "Creative Content Online"' talks of goals (DRM, filesharing prevention) which aren't more than brushed by the content.

- on the focus of the paper: Important topics like user/created content are only named but missing the simple point, that most of these works are simply illegal today. Companies can clear their licensing with each other - they don't necessarily need new rights for that. But most citizens can't. They can't just sit together and decide to only buy media licensed under specific terms, because the companies can almost completely control the supply. Ordinary citizens are the ones who need clearer laws. And in a democracy, they are the ones for whom laws should be made.

- on "financial incentives for creatives": As psychological studies show[3], creativity is best fostered by giving creatives enough money to live a comforting live, but the hunt for as much money as possible can stifle creativity instead of strengthening it. So strengthening a single-minded market-driven revenue model for a state-given monopoly doesn't help create creative works of higher quality.

[3]: <http://www.gnu.org/philosophy/motivation.html>

- on the justification of copyright itself: You can also find related thoughts about the reasons for having certain kinds of copyright (in german) at <http://draketo.de/licht/politik/geistiges-eigentum-sinn-des-urheberrechtes-und-staatlich-garantierter-monopolrechte>

- on DRM systems: DRM-systems establish a control inside peoples computers which isn't in turn legitimated and controlled by the state. As such it takes the role of the police without being authorized by the state (which in turn is being authorized by the citizens). To force citizens to accept this additional foreign-control on their actions, middlemen abuse the monopolies granted by copyright law, because these give them the right to establish new rules on how their content may be consumed. That way the DRM restrictions are being established with powers granted by the state, though they aren't legitimated by democratic processes. They even undermine fair use rights. Also any DRM system breaks the premise, that people are free to act, as long as they are willing to face the legal consequences. While I am free to ignore speed limits when I'm on the way to the hospital because my daughter is bleeding to death on the backseat, but might lose my drivers license afterwards (what's a drivers license compared to the death of a daughter?), a DRM system would keep me from taking that decision and would force me to let my daughter die, because my car simply wouldn't drive faster than allowed. That way DRM systems break the premise of the responsible citizen, but since any democracy requires responsible citizens as its basic premise, this leads our whole legal system ad absurdum. So DRM shouldn't be supported by laws. Also fair use laws need to be protected against DRM restrictions. These restrictions are forced on people by using the monopoly granted by copyright law, and they keep people from exercising their fair use rights, granted by the same copyright laws.

- on "culture industry": A culture industry isn't useful for society by definition. It is only useful, if it helps getting more and more enjoyable cultural works to everyone (or at least the

vast majority of citizens - including those who earn only very little money). Only in that case is it warranted to give it any additional legal support.

- on "market as regulator": Using the "market" to regulate the behavior of the middlemen with the power of the consumers doesn't work, because copyrighted works are monopolies by law and the market only works without monopolies. Creative works can't directly compete against each other, because people have no way of getting an equivalent alternative since every creative work is unique.

- on forcing people to pay: Today almost noone is forced to pay for any digital goods, because almost everything is available for unpaid download somehow (sometimes illegally). That people still pay for the creative works they enjoy shows clearly, that most people *want to* pay authors for the goods they enjoy. That's something which is deeply engrained in our psyche: If someone gives us something, we want to give something back. Due to these two effects, it's quite clear that building bigger and bigger restrictions into legally bought content only harms the people who want to give the authors money. It would be far more useful to establish a system which enables people to securely and effortlessly give a few Euro to someone else - or even just a few cents. A "one click donation" which every EU citizen could use, could give authors of creative works far more support than any "harmonization of restriction management systems".

- on me: I am a stakeholder, as I am at the same time a music and book customer, a hobby free software programmer and a hobby writer who publishes under free licenses (on <http://draketo.de> and <http://1w6.org>). I learned about the music genre I enjoy the most (Filk) when I downloaded some tracks in a filesharing network many years ago and I now own more CDs of that genre than of any other genre - and every year I add three or four CDs to my collection. If there had been any effective fair-use-prevention-measure in place back then, I still wouldn't know my favorite kind of music and I still wouldn't buy more than one CD every two years or so.