KTH Computer Science and Communication

Creative Content in a European Digital Single Market
Comments – somewhat belated – on the Reflection Document , 22 October 2009.

From: KTH, The Royal Institute of Technology, Stockholm, Sweden
Via: The Department of Media Technology & Graphic Arts, School of Computer Science and Communication (CSC)
Author: Professor Roger Wallis (rogerw@kth.se)
Date: January 2010

Background – KTH's interest in the area of Creative Content and Digital Technology

The Royal Institute of Technology (KTH) Stockholm is a leading teaching and research university in the field of Technology, defined in the widest societal context. Our motto is "Science and Art". Apart from representing cutting-edge research in the field of digital computing, storage and transmission, KTH also collaborates closely with creative cultural institutions such as the Swedish Dance and Opera Conservatories, both located on its Campus. We also follow closely the development of consumer take-up of digital applications and the social/cultural and economic effects of these somewhat disruptive technologies on the media industries.
The focus of the "Reflections" paper is of considerable relevance, not least in our involvement in the EU-funded FP7 project "P2P Next". P2P Next is an on-going, four - year project dedicated to developing a state of the art platform for the efficient distribution of content over broadband networks. It is characterised by the following key concepts: ***open source, efficiency & quality, trust, personalised structure, user-centricity and participation.***
KTH is involved in P2P Next in two areas: developing cutting edge distribution technology and the analysis of relevant legal/regulatory environment covering distribution of digital content. The issues raised in the reflections document will be critical for the successful implementation of the P2P Next platform solution. Without clarification of the business uncertainties and difficulties concerning IPR issues, not least pan-European licensing of on-line content, the globally unique technological solutions we are developing could run the risk of delayed implementation. The latter possibility is hardly compatible with the daring goals of the Lisbon Agenda, the nearly completed i2010 programme, or future ICT policy priorities as proposed in the Visby Agenda from November 2009, and supported at the Council meeting on 7 December 2009.

Introduction – the purpose of Copyright and threats to this purpose

We agree that Copyright should in theory be the basis for creativity. But we also believe that this only occurs under two conditions, a) when copyright functions primarily as an economic incentive to create, rather than primarily a control function in the market and b) when copyright protection is not so rigid that it hinders new and improved innovations and entrepreneurship based on improving existing ideas or introducing radically different business models. Few if any innovations, even those using new technology, occur in a vacuum, without inspiration from existing solutions to perceived problems.

We can currently note a disturbing departure from both of these preconditions and several comments in the refection paper reflect this view. As the paper points out, many attempts by consumers to circumnavigate current restrictions should be seen as a reflection of a lack of attractive services. We believe that this view (including related and relevant approaches and solutions) is far more practical approach to maximising cultural creativity and consumer involvement in Europe than constant legal attempts to hinder large groups of consumers doing what they feel is reasonable.

Copyright trolls and thickets – market control

Problems have been noted in both the software and the media industries where a small number of dominant firms have amassed huge swathes of patents/copyrights. It becomes more profitable for these firms to utilise their rights to control what happens or does not happen in the market than to engage in promoting individual patents/rights. The terms “patent trolls” and “patent thickets” have been used to describe firms whose business idea is to amass patents without activating them via production but to wait until someone else promotes something similar. Revenues come via either suing the other party or charging a license fee.

A similar development can be see in the copyright area as a small number of global players become constantly more dominant in the market. In the music industry four record companies control around 75% of all registered sound recordings. Two of these (EMI/Universal) own two of the largest music publishers, where the same degree of concentration of ownership can be seen. By controlling different types of copyrights (sound recordings, music compositions) market power can be far greater than is apparent from measurements of mere market share. This problem is a challenge competition law and the institutions created to enforce it have not been able to deal with, mainly because of a lack of suitable analytical instruments to evaluate competition risks in the market.

Legal developments strengthening copyright but increasing risk

With the constant strengthening of copyright law in the digital arena, it has become far more adventurous and harder to start new distribution enterprises because of risk and uncertainty. This is especially so when a new activity encourages user-created content and interactivity (a basis for achieving goals of e-inclusion in society). In a consumer-

produced film or remix, even a weak background audio signal, which can be identified as a song controlled by a major copyright owner, can lead to either a take-down notice or demands for damages.
The extension of the period of protection for sound recordings (from 50 to 70 years) combined with the absence of a functioning orphans rights regime, will lead to even more uncertainty regarding the opening-up to the public of the millions of hours of archive materials held, often locked away, by broadcasters throughout Europe. It can also be argued that the majority of such audio-visual materials have already been paid for by the general public via license fees, or other forms of payment support.

The result of the above in both the music and film sector is that new services can only be started after signing comprehensive agreements with the major global music and film companies. This can involve everything from paying large down payments (Nokia "Comes with music" service) to giving away a share of equity in the new venture for a nominal sum (the Swedish music streaming service Spotify). It can even involve far reaching technical demands and restrictions such as the maximum length of buffering time in a streaming service for feature films.
Even established content users such as broadcasters with a long history of rights clearance via blanket licenses are presented with new complications in the digital rights clearance arena. The so-called "recommendation" from DG Internal Market in 2006/7 regarding on-line licensing of music was intended as a means to allow rights holders to move their affiliations more freely around Europe, and cut down the number of agreements any user with cross border activities needs to sign. An unexpected consequence of this was that the major music publishers decided to start their own European clearing-houses (together with a small number of establishing Collective Rights Management organisations). Since many such rights can be shared amongst more than one publisher this makes the whole licensing process more complex and inefficient. As one group of legal experts, Clintons put it:
"Rather than creating a "one stop shop", the result of these changes is something like a thirty-stop shop. An online company wishing to offer a music (or "music-related") service, even if only in the UK, must now negotiate with and obtain separate licences from all of these licensors (Clintons Media Newsletter, London January 14th 2009):

Uncertainty in the market – a threat to innovation.
Uncertainty is always a very serious hinder to development, particularly in times when a disruptive technology is threatening incumbents' traditional business models. Uncertainty can arise from both over-cautious and unclear regulation/legislation. Uncertainty is particularly serious when different legal regimes clash or are not in balance.

- The IPR regime has given rights holders far stronger modes of control than in the former analogue world.
- The Competition regime has not managed to analyse and possibly limit the continuous growth of a small number of global rights holders.

- E-Commerce legislation with its notion of limited conduit responsibility seems to have had less and less impact on court decisions. In the recent Pirate Bay case, the individual offenders (consumers down or uploading copyrighted materials) were not in the dock. Those aiding and abetting the crimes were. In a recent order from a Stockholm District Court, even a sub-supplier (the ISP Black Internet) was ordered not to sell services to The Pirate Bay. This has raised an important question among all those firms providing broadband services – an activity essential to one of the Commission's most prioritised goals for an i2015 policy programme – at what point is one aiding a crime and can be liable?

Lobbying and disinformation

Another current problem, in our opinion, is the large amount of disinformation spread primarily by lobbyists representing major copyright owners. The recording industry in Sweden, for instance, has frequently claimed that the "music sector" has lost 60% as a result of file sharing. Our own macro-economic studies in Sweden carried out by KTH researchers show this to be completely untrue ("*The Swedish music industry in graphs – economic development 2000-2008*", KTH 2009, enclosed as an appendix). The recording sector has seen a huge drop, but other parts of the music sector, notably the concert business have grown rapidly. Other more hidden incomes have also expanded and benefited record companies, thus providing some compensation for drops in CD sales (levies up from 3M€ in total 2003 to around 22M€ 2008, as well as income from public performances of recordings e.g. on radio/TV stations). Our study, which is attached, shows that overall music sector revenues in Sweden have stayed around the same in Sweden since 2000, despite economic problems. There has been a major shift of revenues from record producers, i.e. mainly the Big Majors, to artists and composers. There is no indication of a drop in creativity in terms of new productions of recorded music, or even films. The Swedish cinema industry had one of its best years ever in 2009, with domestic films enjoying many box office successes, despite the fact that academic research shows that those who download films illegally in all age groups buy more cinema tickets than their "legal" counterparts.

So the problem of encouraging creative content is not merely an issue of stopping "illegal file sharing", but of simplifying the processes needed to allow new innovations, especially social media involving consumer generated content, to get off the ground in a legally certain environment.

Current ICT policy priority discussions (post i2010) and the Reflections paper.

Many of the concerns voiced in the Reflections paper are mirrored in the EU policy priority debate for the ICT sector. The deliberations in connection with the Visby agenda

(November 2009) focused heavily on the issue of IPR reform and simplification of content licensing. Commissioner Reding spoke on Copyright and the single market for creative content. The latter is only vaguely identifiable at present. The concluding declaration called on the EU and Member States to "examine the Intellectual Property Rights system with a view to ensure robust solutions that are balanced and attractive to for users and rights holders alike", as well as encouraging the development of "open platforms for innovation and the development of services for public and commercial use".
The ensuing Council of Europe meeting, with the task of carrying forward recommendations to the Commission (17107/09) was not as specific regarding IPR reform – presumably because of some disagreement regarding the wording of this contentious challenge – but stakeholders were encouraged to take up new licensing systems such as "Creative Commons".

As pointed out in our introduction, the outcome of the IPR reform/pan-European licensing debate will be critical for the success of the P2P Next FP7 project in which KTH is heavily engaged. We envisage an efficient, high quality on-line delivery platform offering both producers and consumers of digital content the ability to meet and interact. This should be the perfect vehicle for releasing, at least, the millions of hours of fascinating and historically unique archive materials held by broadcasters around Europe. It could thereby allow interested consumers in different niche groups to actively participate in sharing, cataloguing, and increasing the value of our heritage. Both the BBC and Slovenian TV are partners in the project, with the EBU giving technical support. But we have already experienced problems at the trial stage, knowing which materials can be safely used in cross border living lab Internet experiments.

The P2P Next team have therefore looked closely at the proposed ICT priorities in the Visby declaration, analysing them in terms of relevance to our project (and vice versa, i.e. the relevance of our project for their fruition). The conclusions are to be found in the appendix entitled "P2P-Next contribution to proposed IT policy priorities (i2015)".

As regards IPR issues we conclude:

"The second wave of digital convergence is currently halted by the non-existence of a more efficient licensing system for content, removing as many as possible of the current uncertainties. Europe can lead this development by defining a common and fair practice for all member states to cover the needs from broadcasters to consumers as a single market. This would disrupt the current business models but as already demonstrated earlier in the case of the telecom business, it would enhance economic growth, create new business and employment than by protecting incumbent actors of the value chain protected by de-facto monopolies.

Fair rules for content is of key importance for P2P-Next project: involving the consumers creating their own content can challenge the current dominating role of content creators in a revolutionary way similar to web content 20 years ago – Europe should be the leader of this future.

We are well aware that this will require opening more than one "Pandora's Box". It will require innovative and sometimes daring initiatives from policy makers, including leading politicians and civil servants in member states, EC directorates (in enforced harmony), and members of the European Parliament.
Only then will be able to move more directly towards a competitive, knowledge-based society, where new technologies can truly release the creative abilities and talents of Europe's citizens."

Conclusions – comments on the various proposed alternative solutions

A "streamlined pan-European and/or multi-territory licensing system" must be a major, speedy priority. The same applies to the harmonization of legislation concerning copyright and rights holders. A pan European database covering metadata clarifying the status where possible of rights holder ownership issues must be established. We feel that development of such a data repository has been held back by a lack of transparency in the media industry, which should also be addressed.

Extended Collective Licensing as a route to a future one-stop shop solution?
The issue of a "one-stop shop" for clearing rights in Europe is a tricky one. Prior to the DG Internal market "recommendation" initiative, an argument was that a speedy introduction of a pan-European license would lead to a collapse of tariffs, with users doing deals in the member state with the lowest prices. A pan-European copyright license must be the ultimate goal in a single market, but a period of "phasing in" could be based on the "extended collective licensing" system developed in the Nordic countries. This has been particularly useful in Sweden for achieving a speedy clearing of cable re-transmission rights, allowing those desiring to develop a new bundled content offering a one-stop shop solution. Extended collective licensing gave rights holders a revenue "cake" to divide up and distribute. This involved them more or less "locking themselves in a room until they could agree", without any more state involvement. Problems have arisen later in the distribution chain with different rights holders applying very different distribution rules for their separate parts of "the cake". This problem could be exacerbated with the increased concentration of ownership of rights. A few dominant

rights holders can demand the major part of the cake, and far too little can end up going to smaller actors, SMEs who account for most of the creativity in the media business.

Some EU pressure will undoubtedly be required to force major content owners, who are currently engaged in starting their own company-specific licensing regimes, to go along with such an extended collective licensing solution. Similarly, those who do not collaborate with a new pan-European metadata base covering content identity/ownership should not be able to use copyright law to hinder the use of works they claim to control.

Many of the views expressed here are similar to the response from the statutory UK consumer organization, Consumer Focus. We strongly support their analysis, with one possible exception, the view on levies on recording carriers or storage devices. We do not believe such levies are a long-term solution to the issue of rights holder remuneration, but they can be a necessary tool for a limited period of time, whilst the uncertainties caused by disruptive digital technologies are clarified in a way that best encourages and provides an economic incentive for creativity.

<u>Alternative forms of remuneration – growing sums but little transparency regarding distribution to rights holders.</u>
We mentioned the issue of "levies" above in connection with comments on the UK Consumer Focus response. Levies can and do provide a form of compensation for losses of revenue caused by new technologies. But it is important that such levies do not merely function as a way of propping up old, not so creative business models, or of hindering new entrants trying to offer new solutions/applications/business models in the market. The growth of such levies, known as "private copying revenues" in Sweden has been impressive, up from around 3M€ in 2003 to almost 22M€ 2008. The music industry's share of this is about 7M€m divided equally between the composers and publishers CRM (STIM), the artists/performer organisation (SAMI, controlled by the musicians and actors' trade unions) and the IFPI (the local affiliate of the global record industry business body). The producer share goes to the IFPI which is more or less a body representing the 4 major record companies, even though there are two other record producer organisations (SOM representing medium-sized independents) and The Swedish Model (representing small record companies which often work very closely with new technology, Internet sites etc).
The problem is that these three recipient organisations use completely different rules for distributing copying levy revenue. STIM (music author/publishers) applies a complex set of parameters, including CD sales, on line sales, radio plays. SAMI (artists) bases distribution purely on radio plays. And the IFPI bases distribution on reported record sales of recordings registered with them – this can effectively exclude many smaller players from this revenue stream.
If the general public notes that it is contributing to a rapidly increasing source of copyright revenue, then a question will probably be asked more and more frequently:

does this really reward the right creators? If a large number of curious citizens do not get a satisfactory answer, the result will probably be a decrease of societal support for the copyright regime, which is hardly in line with the goals of the Reflections paper.

The EU via the Internal Market directorate (copyright division) and the Competition Directorate (in e.g. the RTL-CISAC case) has heavily scrutinised the activities of the monopoly music authors'/publishers' CRMs, organised in CISAC. The same scrutiny does not appear to have been applied to those representing other rights in the music sector, performers organisations and record producer organisations (=IFPI). This we believe is a weakness which has not served to speed up the shift towards easier pan-European licensing of digital content, or even the growth of European creative content. In the case of the record producers, organised in affiliates of the IFPI, this could be of particular significance. Many regard the IFPI as an international branch organisation involved primarily in legal issues and lobbying. IFPI national organisations, however, are becoming more and more like composers' or artists' Collective Rights Management organisations, as revenues grow from public performances and levies. But few if any of these affiliates provide any public information about either the size of these revenues or how they are distributed in detail. This lack of transparency is a serious threat to future respect for such compensation systems amongst the general public.

Consumers protecting their privacy – the growth of proxy IP number services
A final thought regarding alternative forms of remuneration. Tens of thousands of Swedes now pay around 5€ a month to hide their IP# identity (via proxy services). This is not primarily because they want to steal from creators; they just do not want private detectives from the media industry spying on their activities. Would it not be better if such payments could be funnelled to creators, whilst individual consumers could be given more freedom to down and upload content? It can also be postulated that the proxy IP leads to network inefficiencies compared to the energy demands in distributed collaborative computing that P2P file sharing activities represent.

The call for a more nuanced approach to exceptions …
The Reflection paper concludes with a note that a more nuanced approach to exceptions and limitations could be a profitable way forward in the medium term. We fully support this view. Even in the academic sector, new technologies for spreading and sharing scientific texts are often hindered by fears of uncertainty in the legal regime.

The leadership challenges resulting from policy priorities

The Visby Agenda - the conclusions from the November 2009 Visby ICT summit – lists as priority #1 the need for "a holistic, integrated and horizontal approach to ICT policy with a clear, visionary leadership".
The Council meeting of 7th December 2009, (17107/09) also reflects such a position.

Successful implementation of the ICT policy priorities being discussed will indeed require close collaboration across the different directorates of the European Commission. The Reflections document comprises a very healthy initiative, coming jointly from two directorates (Internal Market/InfoSoc Digital Society) both with an interest in and a certain responsibility for creative digital content. This collaboration should also be extended to include other relevant centres of expertise. DG Competition, for instance, has already been involved in issues concerning de-facto monopoly Collective Rights Management organisations, an example where market power could lead to abuse of the privileges offered by the IPR regime.

Enclosed as appendices:

P2P-Next Contribution to proposed IT policy priorities (i2015) – discussion paper form the FP7 P2P next project
The Swedish Music Industry in Graphs 2000-2008. KTH research study of revenue changes