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Copyright Reform for Growth and Jobs

Interactive policy brief Issue 13/2013

Modernising the European Copyright Framework



By Ian Hargreaves and Bernt Hugenholtz

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Copyright law is struggling to adapt to the dynamic impact of digital technologies.¹ The economic consequences of this failure to adjust, though yet to be fully and reliably quantified, are significant and growing.

The litany of problems is familiar. Businesses complain about the difficulties of securing multi-territorial licences in Europe; scientific and medical researchers say copyright is getting in the way of their work by impeding text and data mining; cultural organisations do not know how to clear their archives for digital public use; consumers are often blocked from easy access to content and services that ought to be readily available to them; creative industries lament the impact on their businesses from online rights violations; authors complain they are not getting paid; some users grumble coverage is too broad and enforcement remedies excessive; the courts are in a tangle, with judges calling for greater clarity. Meanwhile, content-company lobbyists are locked in a three-way regulatory stalemate with technology firms and telecommunications companies.

The bottom line is clear no matter where you sit in this debate: copyright law in the European Union has lost touch with the digital economy of today and tomorrow. A mechanism put in place to promote creation by ensuring fair rewards for creators is becoming, in important respects, a hindrance to deeper development of Europe's digital economy, a stain on the online experience of many consumers and an impediment to promoting the innovation Europe so desperately needs.²

This policy brief has two parts. In part one, which begins on the next page, we look at the economic arguments for reforming copyright. In part two, which begins on page 6, we present a menu of possible options to policymakers. These proposals

1. This policy brief was launched at a High-Level Roundtable on Copyright Reform for Growth and Jobs, where many of these ideas were discussed. The authors would like to thank Paul Hofheinz, Tamas Kenessey and Ann Mettler. Any errors of fact or judgment are the authors' sole responsibility.

2. See also [Ian Hargreaves and Paul Hofheinz \(eds.\), Lilian Edwards, Reto Hilty, Bernt Hugenholtz, Paul Klimpel, Till Kreutzer, Jeff Lynn, Cédric Manara, Nico Perez and Michel Vivant. Intellectual Property and Innovation: A Framework for 21st Century Growth and Jobs](#) (Brussels: Lisbon Council, 2012)

'Copyright law has lost touch with the digital economy of today and tomorrow.'

do not comprise an integrated slate of equally important and interdependent recommendations; rather they are a list of ideas, all of them well canvassed in debates in recent years, and which have a part to play in addressing today's problems. The history of the copyright-policy debate suggests that reformers need to take the opportunities that are open while not losing sight of the strategic objective: the need to put in place a copyright framework which successfully encourages the development of new businesses and services, and rewards creators of all types for their creativity and innovation as well.

Put simply, copyright needs to focus upon its central purpose of ensuring fair and reliable financial returns to authors and rights holders. That requires a well regulated, open marketplace in which the reasonable expectations of buyers and sellers are met, so that new products and services can be successfully developed and bought and sold within an increasingly unified European digital marketplace and a global marketplace beyond that.

There is a strong case for pursuing a holistic reform of copyright law in the EU, but there is also a case for pursuing smaller reforms, which meet the needs of the economy for more vigorous levels of innovation and productivity growth. We will explore both options in this policy brief.

The Why of Reform: Making Copyright Fit for Purpose in the Digital Age

Despite the evident stakes, there is a shortage of reliable data that directly addresses the relationship between copyright reform and economic growth. Forecasting the relationship between specific acts of reform and quantified economic outcomes is, therefore, an assumptions-based exercise. There have, however, been a number of reports which clearly show the significant scale advantages for Europe of developing its digital economy, and there is a clear line of logic in suggesting that a more flexible copyright regime, better adapted to digital circumstances, would add to these net economic benefits. For example:

- The European Commission has shown that overall employment in creative industries increased by 3.5% a year on average in the period 2000-2007, compared to an average 1% a year of growth in the EU economy as a whole. Most of the new jobs in the EU created in that time were in the knowledge-based industries where employment increased by 24%. For the EU economy as a whole, the figure was under 6%.³
- Europe's digital economy is "expected to grow seven times faster than the overall EU gross domestic product in coming years," the Commission adds.⁴
- The digital single market, if completed, would have an economic value to Europe comparable to that of the internal market itself, according to a study from the European Policy Centre and Copenhagen Economics.⁵

3

[European Commission, A Single Market for Intellectual Property Rights: Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe, COM\(2011\) 287 final \(Brussels: European Commission, 2011\).](#)
The figures cited in the European Commission communication are from [Ian Brinkley and Neil Lee, The Knowledge Economy in Europe: Report Prepared for the 2007 EU Spring Council \(London: Work Foundation, 2007\).](#)

4

[European Commission, Copyright: Commission Urges Industry to Deliver Innovative Solutions for Greater Access to Online Content, IP/12/1394 \(Brussels: European Commission, 2012\).](#)

5

[European Policy Centre and Copenhagen Economics, The Economic Impact of a European Digital Single Market \(Brussels: European Policy Centre, 2010\).](#)

'History suggests reformers need to take the opportunities that are open.'

- A series of relatively modest reforms to intellectual property law (including patent reform as well as copyright) could add between 0.4% and 0.6% to UK GDP, according to a 2011 impact assessment in the UK review of intellectual property, innovation and growth.⁶ A subsequent impact assessment of those copyright reforms adopted by the UK Government, reviewed and validated by the independent UK Regulatory Policy Committee, suggested that these measures “could contribute over £500 million [or €616 million at the exchange rate then current] in net present value terms to the UK economy over 10 years on a conservative view, with likely additional benefits of around £290 million [or €357.7 million] each year.”⁷
- Singapore’s 2005 adoption of a “fair use” copyright regime simultaneously stimulated that country’s technology and Internet-services sectors, while leaving unaltered the economic output of content-publishing companies, indicating an evident net economic benefit from the reforms, according to a recent study.⁸

The claims of specific studies may be subject to challenge, but it is impossible to dispute that the effects of digital technologies are being strongly felt throughout the economy, and that copyright is today a critical regulatory issue for the Internet, which relies upon mass, routine copying to function. Research has shown that much of the innovation and productivity growth in advanced economies comes from the smaller, technology-rich firms which characterise the new, Internet-based service economy.⁹ For example, many businesses hoping to launch new services based upon data analytics – an area which some say will be the next great driver of productivity and jobs – will first need to contend with complicated copyright law, which can add years of complexity and legal wrangling.¹⁰

In December 2012, the European Commission vowed “to ensure that copyright stays fit for purpose in this new digital context” after a key orientation debate convened by President Barroso.¹¹ To this end, the Commission said it would “work for a modern copyright framework that guarantees effective recognition and remuneration of rights holders in order to provide sustainable incentives for creativity, cultural diversity and innovation; opens up greater access and a wider choice of legal offers to end users; allows new business models to emerge; and contributes to combating illegal offers and piracy.”

As practical steps, the Commission offered two parallel tracks of action. The first, already underway, is a “stakeholder dialogue” to address six issues: cross-border portability of content; user-generated content; data and text mining; private copy levies; access to audio-visual works and cultural heritage.¹² A second track of work is to arise from a series of market studies, impact assessment and legal drafting work “with a view to a decision in 2014 whether to table legislative reform proposals.” Four points of focus are named for this track of work: mitigating the effects of territoriality in the internal market; levels of harmonisation and limits/exceptions to copyright; “how best to reduce the fragmentation of the EU copyright market” and how to improve the legitimacy of enforcement.

How does this emerging European approach to reform look in a global context?

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[Ian Hargreaves, *Digital Opportunity: An Independent Review of Intellectual Property and Growth* \(London: Intellectual Property Office, 2011\).](#)

7
[HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying Copyright Law* \(London: Intellectual Property Office, 2012\).](#)

8
[Roya Ghafele and Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* \(Munich: MPRA, 2012\).](#)

9
[Nesta, *The Vital Six Percent: How High-Growth Innovative Businesses Generate Prosperity and Jobs* \(London: Nesta, 2009\).](#) See also [Ann Mettler and Anthony D. Williams, *Wired for Growth and Innovation: How Digital Technologies are Reshaping Small- and Medium-Sized Businesses and Empowering Entrepreneurs* \(Brussels: Lisbon Council, 2012\).](#)

10
[James Manyika et. al., *Big Data: The Next Frontier for Innovation, Competition and Productivity* \(San Francisco: McKinsey Global Institute, 2011\).](#)

11
European Commission, *op. cit.*

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Particular emphasis will be placed upon “the potential and limits of innovative licensing and technological solutions in making EU copyright law and practice fit for the digital age.”

'There is a strong case for pursuing reforms which meet the needs of the EU economy.'

13 [Licences for Europe Stakeholder Dialogue, Text and Data Mining for Scientific Research Purposes Workshop, Letter to Commissioners Barnier, Geoghegan-Quinn, Kroes and Vassillou, 26 February 2013.](#)

14 The United States boasts a much higher proportion of the world's leading ICT firms than the EU (52% versus 17%) and the US firms are likely to be younger and enjoy stronger growth prospects, according to a study from the think tank Bruegel. See [Reinhilde Veughelers, New ICT Sectors: Platforms for European Growth \(Brussels: Bruegel, 2012\).](#)

15 [David Cameron, East End Tech City Speech, 04 November 2010.](#)

16 [Hargreaves, Digital Opportunity, op. cit..](#)

17 The US debate seemed largely unsettled in 2012, when President Obama rebuffed a major legislative initiative designed to strengthen the protection of rights holders, following a black-out of the Internet led by Wikipedia and others in protest at the SOPA (Stop Online Piracy Act) and its sister PIPA (Protect IP Act). This political development had a European echo in the campaign which resulted in the European Parliament voting to block ACTA (the Anti-Counterfeiting Trade Agreement).

The answer is it looks rather cautious, given the continued pace of technological change and the increasing indications that other countries are ready to pursue more rapid and more radical reform. History also suggests that Europe will struggle to achieve the political momentum needed to deliver even the modest and piecemeal change of the type currently under discussion.

Already, there have been expressions of frustration in the stakeholder meetings convened as part of this process. A pan-European group of researchers argued in a public letter that the Commission's preferred approach to text and data mining appeared to be based entirely upon revised licensing procedures rather than the shift in legal framework researchers believe is necessary for Europe to be competitive in the many business activities which involve exploitation of big data.¹³ There is a wider suspicion in some quarters that the Commission sees improved licensing procedures as an alternative to what is really needed: a balanced mix of improved licensing, modified business models and a re-shaped legislative framework.

Many have also compared the situation in Europe with the very different IP regime in the US, the EU's main trading partner.¹⁴ The US has a single, unified product market; companies don't need to sort out 27 sets of copyright laws – or seek 27 sets of copyright permission – when they do business across the country. Secondly, the US "fair use" doctrine – which allows organisations to use copyright material so long as the use is deemed "fair," while leaving the courts to define what "fair" is – affords a well-established and flexible system which has proven the backbone of a healthy Internet-economy ecosystem in the US, partly by putting rights holders and innovators on an equal footing. One way or the other, the business ecology of the US has in the Internet era generated a uniquely rich flow of business success. US firms dominate not only the world of Internet platforms, with the likes of Google, Amazon and Facebook, but also the provision of devices and the curation of apps markets, with the likes of Apple. Controversially, Google has even claimed that without the US fair use doctrine, it would not have been able to succeed as a company.¹⁵

In recent years, several technologically ambitious small countries, including Israel, Singapore and South Korea, have adopted a version of the fair use system – and it is gaining support across Europe, in Ireland, the Netherlands and a number of the newer accession countries. The most recent UK review of intellectual property issues (the "Hargreaves review") was tasked by Prime Minister Cameron with examining whether and how the attributes of a fair use approach might be achieved in the UK.¹⁶ The review rejected adoption of the fair use approach as technically too difficult in the EU legal context at this stage. Instead, the review advocated reforms consistent with a European list-based "fair dealing" approach to copyright exceptions, with the aim of securing specific benefits of flexibility comparable with those afforded by fair use.

But the US is not sitting still. The US last overhauled its copyright law in 1998 with the Digital Millennium Copyright Act, but today important regulators there are gearing up for a further round of reforms.¹⁷ "The law is showing the strain of its age and requires your attention," Maria Pallante, US register of copyrights, told a

'The digital single market could have an economic value comparable to the internal market.'

hearing in the US House of Representatives Committee on the Judiciary in March.¹⁸ "As many have noted, authors do not have effective protections, good faith businesses do not have clear roadmaps, courts do not have sufficient direction, and consumers and other private citizens are increasingly frustrated. The issues are numerous, complex and interrelated and they affect every part of the copyright ecosystem, including the public at large." Ms Pallante observed that "a major portion of the current copyright statute was enacted in 1976 ... and was drafted to address analogue issues and to bring the US into better harmony with international standards, namely the Berne Convention." A new law should establish "a forward thinking framework for the benefit of both culture and commerce alike," she added. This new law will need to be clearer and to afford more flexible outcomes, she said, adding, "if one needs an army of lawyers to understand the basic precepts of the law, then it is time for new law."

It is too early to judge how much support Ms Pallante's views will garner in the US. But the EU would be rash to assume that regulatory frameworks on other continents will remain fixed while it debates modest reforms at home. The legal framework of copyright in the EU was largely shaped 12 years ago, when the Information Society Directive was adopted.¹⁹ The directive's rules were based on a 20th century vision of the Internet – without broadband, without platforms, without search engines, without streaming and without peer-to-peer file sharing. That framework is now at breaking point, as millions of normally law-abiding citizens have no qualms about downloading illegal content or engaging in file sharing. At the same time, the Court of Justice of the EU has become very active in filling gaps left by out-dated laws. But this opens a new question: do policymakers really want copyright law in the EU shaped in Luxembourg courts rather than through the legislative process in Brussels and Strasbourg?

The danger is that Europe's copyright framework increasingly becomes a regime which meets no-one's needs and expectations. If that happens – or if, as some suggest, it has already happened – perhaps there is an opportunity to mobilise stakeholders from opposing camps around the following six pillars of reform:²⁰

- I. A legal framework which makes sense to consumers and citizens and which therefore encourages and enables people to respect the law.
- II. An approach to competition in digital markets which focuses upon consumer welfare, achieved through the working of open and contestable markets.
- III. A primary ambition to support business innovation rather than aiming mainly to protect existing business models in the interest of contributing to the maximum extent possible to the growth of European productivity, economic output and jobs.
- IV. A regime that both underpins and is part of a digital single market, without which Europe's digital economy will continue to underperform relative to North America and, increasingly, Asia and other territories.

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[Maria A. Pallante, "The Register's Call for Updates to US Copyright Law," *Statement of Maria A. Pallante, Register of Copyrights of the United States to the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, US House of Representatives*, 20 March 2013.](#)

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[European Commission, *Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Official Journal L 167 22/06/2001 P. 0010-0019.](#)

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These principles address copyright's economic function. But to emphasise this perspective is not to deny the importance of non-commercial cultural and educational concerns. "By staying offline, Europe's culture risks sliding into oblivion," writes Paul Klimpel, a German lawyer whose work has included directing *Deutsche Kinemathek*, a major German archive of film and television in Berlin. Dr Klimpel notes in passing that there is one European century – the 20th – that is virtually non-existent online because complicated copyright rules have made the works from that century too difficult to digitise, and therefore largely unavailable to an entire generation online. His view is shared by many archive keepers, who point to the devastating impact on cultural outputs resulting from gridlock in the approach to mass licensing of works whose authorship cannot be settled ("orphan works"). See [Paul Klimpel, "Preserving Europe's Cultural Heritage," in Hargreaves and Hofheinz \(eds.\), *op. cit.*](#)

'The effects of digital technologies are being strongly felt throughout the economy.'

- V. An approach to enforcement of the law which protects the interests of authors and rights holders, but only to the extent to which this is supported by economic impact analysis, recognising that copyright exists primarily to generate effective economic incentives for authors and other creators. Strong enforcement activity should be directed against those aiming to make commercial returns from business models based upon clearly illegal activities.
- VI. An adaptive legal framework which offers flexibility in the face of further technological change.

In the next section, we identify eight possible areas of reform. The first, the creation of a single copyright law for the whole of the EU, is the most ambitious and may be judged politically unrealistic. This is followed by seven more detailed proposals, which can be enacted within the current legal framework, or as part of a unified European copyright law. For each reform proposal, we set out: 1) a specific problem, 2) a reform that would address that problem, 3) an analysis of the reform's compatibility (or incompatibility) with international law (thereby indicating whether the reform can be enacted solely within the European context or would require treaty revisions at the international level), and 4) a realistic timeframe within which a reform of this type could be implemented based on existing laws, treaties and legislative procedures. There is, in addition, a wide, scholarly literature making the case for reform of copyright law in Europe (a selection is provided in the box on additional reading, which begins on page 15).

Eight Options for Reform: A Menu for Policymakers

Despite more than two decades of harmonisation in the EU, copyright in Europe remains in essence national law. Each member state still has its own law on copyright and neighbouring (related) rights that applies strictly within its own territory. This territorial fragmentation critically impedes the establishment of a fully functioning single market for creative content for two reasons. First, despite extensive harmonisation, copyright laws still vary from one member state to another. For example, the French law on literary property looks, feels and essentially is still very different from the copyright law in the UK or the law on authors' rights in Germany. This perpetuates legal uncertainty in cross-border transactions, harmonisation notwithstanding.

Second, making a work available online affects as many copyright laws as there are countries where the posted work can be accessed. With copyrights regularly "split up" between nationally operating rights holders and collective rights management organisations, territoriality severely complicates online licensing and entails massive transaction costs. Most likely the territorial nature of copyright within the EU has seriously inhibited the growth of the creative economy in the EU, as compared to the US where copyright holders and users have to deal with only a single (federal) copyright law.

While promoting multi-territorial licensing may alleviate these problems, a more ambitious solution – and a logical next step now that harmonisation is almost

'Copyright today is a critical regulatory issue for the Internet.'

complete – would be true *unification* of copyright by way of a European Copyright Law (Regulation) replacing national laws. Article 118 of the Treaty of the European Union, introduced by the Lisbon Reform Treaty, has created a specific competence for the European legislature to establish intellectual property rights with direct union-wide effect.²¹

21 [Treaty of Lisbon Amending the Treaty on the European Union and the Treaty establishing the European Community \(Brussels: European Union, 2007\).](#)

The advantages of unification are undeniable. A European Copyright Law would establish a truly unified legal framework, replacing a multitude of concurring, and sometimes conflicting, national copyright rules. A European Copyright Law would have immediate union-wide effect, thereby automatically creating a single market for copyrights and related rights, both online and offline.

22 *Op. cit.*, Directive 2001/29/EC.

A European Copyright Law would enhance legal security and transparency, for rights owners and users alike, and greatly reduce transaction costs in cross-border trade. Unification by regulation could also help to restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely permits limitations and exceptions.

A copyright unification initiative would admittedly be a project for the long term, possibly requiring 10 years or more. But this is no reason to postpone it. If the creative sector in the EU is to compete on an equal footing with competitors in the US and elsewhere, a unified copyright framework is required.

Meanwhile, we urge the European Commission and member states to examine more immediate opportunities for reform of the kind set out (by no means exhaustively) below.

I. Make limitations and exceptions more harmonised and flexible

Challenge

In a world of exponential technological change the need for more flexibility in EU copyright law, particularly as regards copyright limitations and exceptions, is self-evident. At the same time, EU law should be sufficiently predictable and harmonising, so as to offer rights holders and users across the EU enough legal security and a level playing field.

Copyright laws in the member states traditionally provide for “closed lists” of limitations and exceptions that precisely enumerate permitted uses. Often these rules are connected to specific states of technology, and therefore easily out-dated. EU law leaves member states little room to update limitations and exceptions in the light of new technological development. The 2001 Information Society Directive lists 21 limitations and exceptions that member states may provide (only one of which is mandatory), but does not allow any further exceptions beyond this list. For example, the list does not mention user-generated content or information location tools (search engines).²² On the other hand, the optional nature of the list has left limitations and exceptions largely unharmonised – with some member states implementing almost the entire list and others only a small number of exceptions. The directive is therefore both too “open” and too “closed.”

'Much innovation and productivity growth comes from smaller, technology-rich firms.'

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[James Boyle, "A Copyright Black Hole Swallows Our Culture," *Financial Times*, 06 September 2009.](#)

Proposal

Update and amend the Information Society Directive by making a core set of limitations and exceptions mandatory for all member states, while allowing member states flexibility in applying other limitations and exceptions depending on social-cultural circumstances, or in response to unforeseen technological change.

Mandatory limitations and exceptions would be those that reflect fundamental information rights and freedoms (e.g. for quotation, news reporting, parody, information location, research and data mining, user-generated content), and those that have an immediate impact on the workings of the single market (e.g. private copying and archiving). Some essential limitations and exceptions, such as the quotation right, could additionally be made "standard user licence-proof" by declaring them non-overridable by contract. Limitations and exceptions would normally provide for free uses, but in some instances would require remuneration, for instance where exclusive rights are not practically enforceable.

To avoid a flexible rule on limitations and exceptions from becoming too open-ended, the directive should ensure, as it already does, that all limitations and exceptions be subjected to the "three-step test:" 1) excepted uses shall apply only in certain special cases; 2) should not conflict with the normal exploitation of copyright works; and 3) not unreasonably prejudice the interests of authors and rights holders.

Compliance with international treaties

A more harmonising and more flexible approach to limitations and exceptions would be compatible with international treaties.

Both the Berne Convention and the TRIPs Agreement (WTO) leave contracting states discretion to shape limitations and exceptions according to their own needs, subject to the application of the "three-step test." An increasing number of WTO members, such as the US, Singapore and Israel, permit "fair use" – a much more open and flexible norm than the one proposed here.

Time frame

Amendment of the Information Society Directive could, in principle, be achieved by 2014-2015.

II. Shorten terms of protection to proportionate levels

Challenge

Current terms of copyright and neighbouring (related) rights in the EU are unwarranted and disproportionate, and impede economically valuable and culturally important digital (re)uses of "old" works.

"Librarians call it the 20th century black hole. The overwhelming force is not gravity but copyright law, sucking our collective culture into a vortex from which it can never escape," writes James Boyle in *Financial Times*.²³ Major parts of our European cultural heritage have been recently digitised at great public expense, but are not accessible online to the general public because of excessive terms

'[The European approach to reform] looks rather cautious.'

of copyright protection. In the EU, copyright expires 70 years after the death of the (last surviving) author of a work. For the neighbouring (related) rights of performing artists, broadcasting organisations and film producers the term is 50 years after publication; the 2011 Term Extension Directive has extended this term for phonorecords to 70 years. These very long terms entail that many millions of old works – sometimes created more than a century ago – are still in copyright, and therefore need to be licensed by cultural heritage institutions. The recent Orphan Works Directive requires “diligent searches” for the copyright owners of old works before these works can be reused. But for libraries and other cultural heritage institutions that collect and have digitised vast numbers of works, this is no viable solution.

Legal scholars and economists agree that these long terms of protection are disproportionate and unwarranted, and can be easily reduced without undermining copyright's economic, social and cultural functions. No author, artist or record company invests creativity or resources with a view to recoupment in 50 or 100 years. There are also no compelling social reasons for having the great-grandchildren of authors or artists benefit from the copyrights of their ancestors.

Proposal

Amend the Term Directive and reduce the terms of copyright and neighbouring rights to more reasonable time-spans.

Calculating the optimal term for copyright or related rights is difficult. But other rights of intellectual property are indicative. For example, the maximum term of protection for patented inventions is 20 years. Industrial designs enjoy protection for a maximum of 25 years. Database producers enjoy 15 years of database right under the 1996 Database Directive.

Compliance with international treaties

Term reduction to life plus 50 years for copyright works, and 50 years for neighbouring rights would be compatible with international treaties.

The Berne Convention and the TRIPs Agreement (WTO) require a minimum term of copyright protection of life plus 50 year. The TRIPs Agreement and the 1996 WIPO Performances and Phonograms Treaty both require minimum terms of 50 years for performers and phonogram producers. TRIPs requires a mere 20 years for broadcasting organisations.

Time frame

Amendment of the Term Directive could be achieved by 2014-2015.

Reduction of terms to the minimum standards of the TRIPs Agreement would not entail renegotiating the EU's main multilateral obligations. More significant copyright term reduction would require revision of the Berne Convention, which would be a project of the long term, but does not appear wholly infeasible, given the general discontent both in developed and developing nations as to the current copyright terms.

Copyright
Directive
Growth
Jobs

'The US "fair use" doctrine has proven the backbone of a healthy Internet-economy ecosystem.'

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[European Commission, Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, COM\(2012\) 372 final \(Brussels: European Commission, 2012\).](#)

III. Simplify online licensing across the EU

Challenge

The European Commission's on-going "Licences for Europe" initiative emphasizes the importance of developing efficient and innovative licensing solutions as a way to promote the growth of the creative economy in the EU. While a stakeholder dialogue may be useful, it cannot solve the structural regulatory impediments to offering innovative content-based services across the EU.

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[Council of the European Communities, Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission \(Brussels: European Union, 1993\).](#)

An overarching problem is the territorial nature of national copyright laws, which has resulted in copyrights in a single work being owned and managed by multiple rights holders and collecting societies in the member states. Territorial fragmentation requires users wishing to offer content-related services across Europe to secure licences from multiple rights holding entities across the EU, thereby exponentially raising transaction and enforcement costs for authors, rights holders and users. For example, whereas a content provider operating in the US would require only a single-country licence to offer a musical work online, in the EU the same provider would need licences for 27 (soon 28) member states. This clearly puts content providers in the EU at a competitive disadvantage.

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[Hargreaves, Digital Opportunity, op. cit.](#)

Licensing new digital uses of "old" (pre-existing) content raises additional issues. Making available to the public digitised archives containing large numbers of old works inevitably requires some form of collective licensing. But in the absence of reliable copyright ownership data (metadata) concerning old works, collective licences will be incomplete and unreliable, and digital archives will remain underexploited.

Proposal

Facilitate pan-European licensing by a) removing territorial restrictions to multi-territorial licensing, b) providing regulatory incentives for setting up databases of copyright metadata, and c) permitting extended collective licensing.

- a) The European Commission's current proposal for a directive on collective rights management seeks to promote multi-territorial licensing through a "passport system" that would offer incentives to a small number of (larger) collective rights management organisations to offer multi-territorial licences.²⁴ While the effectiveness of the proposed system is speculative at best, it would apply only to the music sector. The problems of multi-territorial licensing however appear everywhere in the creative economy, and demand more rigorous solutions. For example, the 1993 Satellite and Cable Directive's "country of uplink" rule could be extended to apply to content services offered online.²⁵ A content provider wishing to offer a service to multiple countries in the EU would then need a licence only from the member state where the provider is operating or duly established.
- b) Various EU-funded projects aim at creating databases of reliable metadata on copyright works. In the UK, the Hargreaves review recommended that governments support creation of a digital copyright exchange (now renamed "the Copyright Hub) designed to facilitate cheaper, faster and more widespread licensing of "long tail" rights to small-scale rights users.²⁶ EU law could provide regulatory incentives to make metadata publicly available, for example by requiring that collective rights management organisations permit public access to their

'The business ecology of the US has generated a uniquely rich flow of business success.'

metadata. Another such incentive could be to make the legal protection of digital rights management conditional upon making metadata available to a designated entity. Yet another would be a formal requirement for all rights holders to submit copyright metadata to this entity. Note that in the digital environment such formal requirements would hardly be burdensome, and could probably be automatically fulfilled.

- c) The Nordic countries' and several other member states' national law allows collective licences to be extended to rights holders that are not members of, or represented by, the collective rights management organisation offering the licence. This mechanism of *extended collective licensing* (ECL) is particularly suitable for solving the licensing problems related to mass digitisation projects. Whether the Information Society Directive presently allows such ECLs is, however, somewhat uncertain. This should be clarified in a revised directive.

Compliance with international treaties

International treaties do not deal specifically with (collective) licensing, so compliance is generally unproblematic.

The Berne Convention prohibits formal requirements, but only if the enjoyment or exercise of copyright is subjected to formalities. This does not preclude administrative requirements external to copyright, such as systems of legal deposit. The Berne Convention also does not rule out subjecting legal protection of digital rights management to formal requirements. A more ambitious initiative aimed at the actual (re)introduction of substantive copyright formalities would, however, require renegotiating the Berne Convention.

Time frame

Measures a) through c) could all be put in place as part of a revision of the Information Society Directive, which could be achieved by 2014-2015.

Introduction of copyright formalities requiring revision of the Berne Convention would of course be a project for the long term.

IV. Recalibrate the reproduction right

Challenge

The Information Society Directive harmonises the two main economic rights: the rights of reproduction and of communication to the public. Both rights are defined in very broad terms and therefore tend to overlap in the digital environment for these rights. This has led to legal insecurity for rights holders and users, and has made copyright clearance for digital uses even more cumbersome and less transparent.

The problem of overlapping rights is exacerbated by the fact that reproduction rights and communication rights are often managed by different collective rights management organisations. As a result content providers, such as digital broadcasters or online content providers, are compelled to accept multiple licences for what are effectively unitary acts of usage. The existing limitation on transient and incidental copying only partly removes this overlap.



'US regulators are gearing up for a further round of [copyright] reforms.'

Proposal

Revise the Information Society Directive to align better the right of reproduction with the right of communication to the public.

Given that the right of making available was especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced. This could be achieved by replacing the currently technical notion of reproduction by a more normative interpretation that factors in the economic impact of a digital reproduction. If a technical copy has no economic significance, it should not count as reproduction. Part of this solution could be integrating the current exception for transient copying into the definition of the reproduction right.

Compliance with international treaties

Recalibration of the reproduction right is in compliance with international treaties. While the international copyright treaties (in particular the Berne Convention) do require contracting states to provide for a right of reproduction, the treaties do not define reproduction, leaving states a broad measure of discretion.

Time frame

Amendment of the Information Society Directive could be achieved by 2014-2015.

V. Simplify legal protection of digital rights management systems

Challenge

The Information Society Directive obliges member states to protect digital rights management (DRM) systems against acts of circumvention and facilitating circumvention. These rules are generally perceived as too complex, overprotective and are also widely ignored in practice.

When introduced in 2001 these rules were already controversial given their potential for impeding technological and scientific progress. The EU rules go much further than similar rules in the US and other countries by providing an absolute ban on acts of circumvention, even if done for legitimate purposes such as sampling a DRM-protected work for public library purchase, or in the context of encryption research. The EU rules are notoriously complex and opaque, and have been implemented by member states in diverse ways. On the ground the rules are generally ignored. For example, software devices that allow users to remove the content scrambling system on DVDs is widely available on the Internet and routinely applied – with rights owners rarely invoking anti-circumvention laws in court.

Proposal

Simplify the rules on protection of digital rights management systems in the Information Society Directive.

Anti-circumvention protection should apply at most in cases where circumvention is directly connected to copyright infringement. Circumvention should always be allowed where this is done for legitimate purposes.

'If one needs an army of lawyers to understand ... the law, then it is time for new law.'

Compliance with international treaties

Simplification of digital rights management system protection can be done in compliance with international treaty obligations.

The WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty (both of 1996) merely require adequate legal protection against circumvention – not against circumvention-enabling devices, and allow exceptions in line with copyright limitations and exceptions.

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[European Commission, DG Internal Market and Services Working Paper: First Evaluation of Directive 96/9/EC on the Legal Protection of Databases \(Brussels: European Commission, 2005\).](#)

Time frame

Amendment of the Information Society Directive could be achieved by 2014-2015.

VI. Downsize the database right

Challenge

The “sui generis” database right, a new form of intellectual property specifically aimed at protecting database producers that was introduced by the 1996 Database Directive, has caused havoc among producers and users of databases since its inception.

In its evaluation report of 2005, the European Commission gave the directive, and the new right, a scathing review.²⁷ According to the Commission, “from the outset, there have been problems associated with the ‘sui generis’ right: the scope of the right is unclear; granting protection to ‘non-original’ databases is perceived as locking up information, especially data and information that are in the public domain; and its failure to produce any measurable impact on European database production.” The need for reform of the Database Directive is even more urgent today, with data mining and Big Data analytics increasingly being obstructed by the database right.

Proposal

Reduce the scope of the database right by limiting it to commercial uses of databases, and expanding limitations and exceptions.

In its evaluation report, the Commission presented four policy options: 1) repealing the directive, 2) repealing the database right, 3) revising the database right, and 4) “do nothing.” Only the fourth option has as yet materialized. Apart from “doing nothing,” the most feasible option would be revising the database right, preferably by 1) reducing its scope to commercial extraction and reutilisation of data, and 2) expanding the (very short) list of limitations and exceptions to the database right, in particular to allow extraction and reutilisation for non-profit and commercial research purposes, and other fair uses. Limitations and exceptions to the database right should be mandatory for all member states.

Compliance with international treaties

The database right is not covered by any international treaty, so the EU has no international obligations to consider.

Time frame

Amendment of the Database Directive could be achieved by 2014-2015.

'The legal framework of copyright in the EU is based on a 20th century vision of the Internet.'

VII. Rebalance copyright enforcement remedies

Challenge

While a robust copyright regime naturally requires effective enforcement remedies, current EU rules on copyright enforcement are sometimes perceived as disproportionate or abusive. Injunctions against online intermediaries occasionally encroach on fundamental rights and freedoms, and are insufficiently harmonised.

With the widespread availability of broadband Internet in households everywhere in Europe, copyright infringement by way of (peer-to-peer) file sharing has taken on epidemic proportions. Despite increased, and on occasion draconian, civil and criminal enforcement, this mass-scale infringement has not disappeared, nor is it expected to subside in the foreseeable future. With content owners realising that “suing your customers” is not good for business, and providers of file sharing services elusive, the focus of copyright enforcement has shifted to online intermediaries, such as Internet access providers and content platforms. Whereas the 2000 E-Commerce Directive has created so-called “safe harbours” for these intermediaries, these immunities do not rule out injunctive relief. What form of injunctive relief is granted however is largely left to the national courts. This has led to legal uncertainty and disharmony between the member states. Courts in some member states allow far-reaching injunctions forcing intermediaries, for instance, to disclose personal subscriber data or block access to designated IP addresses or domains. Courts in other member states, by contrast, are more reluctant to grant injunctive relief against neutral intermediaries. The Court of Justice of the EU has declared the most egregious injunctions, such as a court order obliging wholesale filtering of incoming Internet traffic, incompatible with fundamental freedoms protected under the EU Charter of Fundamental Rights, but has left it to the member states to permit or prohibit court orders to disclose personal data of allegedly infringing subscribers. Clearly, there is a need for harmonisation of copyright remedies in accordance with the rules of the Charter.

More generally, EU copyright enforcement rules are often perceived as disproportionate. The current EU rule that attorney fees may be fully recovered by copyright owners prevailing in court proceedings, has made many defendants risk-averse and has opened the door for businesses based on copyright infringement blackmail (“copyright trolls”).

Proposal

Revise the Electronic Commerce Directive and the IP Enforcement Directive by a) harmonising the rules on injunctive relief against intermediaries in accordance with the EU Charter, b) relaxing the rule of recovery of attorney’s fees, and c) making abusive copyright enforcement strategies (troll behaviour) unlawful.

Compliance with international treaties

The proposed amendments are compatible with international treaty obligations, notably the TRIPs Agreement’s chapter on IP enforcement.

Time frame

Amendment of the Electronic Commerce Directive and the IP Enforcement Directive could be achieved by 2014-2015.

'No author, artist or record company invests creativity or resources with a view to recoupment in 50 or 100 years.'

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