Public Consultation

on the review of the EU copyright rules

Centrum Cyfrowe Projekt: Polska

SUBMISSION

Name:

Centrum Cyfrowe, Fundacja Projekt: Polska, ul. Andersa 29, Warszawa, Poland,

http://www.centrumcyfrowe.pl

Centrum Cyfrowe Projekt:Polska works towards social change and enhancing citizens' participation through the use of digital technologies and open, cooperative models based on sharing knowledge and other resources. The basis for all of our work and projects is the idea of openness which means the availability of resources and promoting models of cooperation based on them. We are an institutional partner of Creative Commons Poland, founding member of the Communia Association, founding member of the Polish Coalition for Open Education and member of the Copyright for Creativity coalition.

Transparency Register ID: 642554310101-34

TYPE OF RESPONDENT:

- € **End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student**) OR Representative of end users/consumers**

  → for the purposes of this questionnaire normally referred to in questions as **"end users/consumers"**

- € **Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**

  → for the purposes of this questionnaire normally referred to in questions as **"institutional users"**

€ **Other** (Please explain): Public interest, non-governmental organisation

II. Rights and the functioning of the Single Market

A. Why is it not possible to access many online content services from anywhere in Europe?

Polish consumers for many years had restricted access to on-line music as compared to consumers in other EU member states. The three biggest global streaming services: Deezer, Spotify and WiMP are present in Poland only for couple of years. Also iTunes only recently opened its sales to Polish users.

The Polish case demonstrates how difficult it is to gain legal access to on-line content for consumers based in countries with smaller revenue-generating potential for on-line businesses. The costs of licensing are creating a significant barrier to entry for such businesses. Any potential revenue will not compensate the costs of the licensing process.

With respect to accessing on-line music a proposed directive on collective rights management[1] may bring a change but the issue remains with respect to other content, especially audiovisual works. The surveys (conducted both by the Ministry of Culture and independent research institutes) show that Polish consumers mostly watch movies and TV series on-line, usually from unauthorized sources.

B. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?

As already noted the directive on collective rights management may bring some changes for the better with respect to licensing of musical works. Further work to unable easy licensing of other

[1] Proposal for a Directive of the European Parliament and of the Council of 11 July 2012 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

types of works is needed. Also doubts remain with respect to the functioning of the European Licensing Passport as proposed in the directive. As Centrum Cyfrowe notes in its submission to the consultations on the proposal for the directive on collective rights management[2] the mechanism of the ELP is not clear on its face and the Commission has failed to demonstrate its advantages over well-established Extended Collective Licensing schemes. It remains to be seen how the ELP will function across the EU. In the meantime there is a need to harmonize the member states licensing and collective management policies with respect to all types of works and subject matters of related rights.

However in the process the Commission should not overlook those, who should be in the center of attention of the collective management system – the authors and artists. In the Digital Era the European collective management system should be built in a way that will also take the works of individual Internet users into account. Any proposal should include a mechanism that will allow such users-creators' actual participation in the system and ability to acquire financial gains from such on-line creativity. We write more on the issus in item… below.

C. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?

[The definition of the rights involved in digital transmissions]

1. The act of "making available"

Making available right is a big "unknown". It is hard to understand how it differs from the right of communication to the public and when it takes place.

This view is confirmed by the "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society"[3], prepared by Belgian law firm De Wolf & Partners at the request of the European Commission (the "Study").

---

[2] Centrum Cyfrowe Projekt: Polska (2012), The statement of the Centrum Cyfrowe Projekt:Polska on the Proposal for a directive of the European Commision on collective management of copyright and related rights, URL: https://centrumcyfrowe.pl/the-statement-of-the-centrum-cyfrowe-projektpolska-on-the-proposal-for-a-directive-of-the-european-commision-on-collective-management-of-copyright-and-related-rights/

[3] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive"). De Wolf & Partners. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

The Study[4] notes that:

"*The absence of a definition of the making available right creates some legal uncertainty as to the territorial reach of the online accessibility of protected subject matter. Different elements of this complex act could be considered relevant to establish the application of the national right of making available to the public: the availability on a server or the transmission to a Member State, even accessibility of the work has not explicitly been ruled out as a relevant element for the making available right. Consequently if all Member States are free to determine which element of the complex act is relevant to establish an act of making available, then each could subject this constitutive part to the prior authorisation of the author (and to the corresponding payment of a licence fee).*"

We believe that he country of origin approach should be introduced as it has already been tested with respect to broadcasts in the Satellite and Cable Directive.

2. Two acts involved in a signle act of exploitation

Each act of transmission in digital networks entails (in the current state of technology and law) several reproductions. This means that there are two rights that apply to digital transmissions: the reproduction right and the making available right. This may complicate the licensing of works for online use notably when the two rights are held by different persons/entities.

The issue is even more complex than in the Commission's introduction above. The two rights apply to the act of uploading and to the act of downloading and both those acts are usually performed by different entities requiring different licenses. This is absurd and unnecessary. Such multiplication of rights overly complicates digital uses and dissemination of works.

We believe that there is room for legislation to achieve the "bundling of rights".

3. Linking and browsing

The provision of a hyperlink leading to a work or other subject matter protected by copyright should under no circumstances be subject to the authorisation of the right-holder. Hyperlinking is a modern referencing tool communicating the online addresses of works, not the works themselves. Hyperlinking is also at the heart of both publishing on the Web and using Web content. Any uncertainty to the legality of such action, or legal barriers to free use of hyperlinks,

[4] Triaille, J-P., et. al. (2013). Ibid. p. 176-177.

will cause prohibitive transaction costs for all Web-based activity.

Unfortunately the recent Court of Justice ruling in the Svensson case[5] is not that clear. The court did not rule that hyperlinking falls outside the copyright protection. It considered it communication to the public but the additional factor is to assess whether it entails any "new" public. In the case of hyperlinks to already available works there is no such "new" public. Such reasoning creates new uncertainties with respect of legality of hyperlinking.

Hyperlinks are reference to data and they merely lead Internet users from one page to another. Centrum Cyfrowe believes that it should be make clear that hyperlinking falls outside of the copyright protection. We would like to point to the opinion of the European Copyright Society in the Svensson case[6], which concludes that hyperlinking is not covered by copyright protection because it is outside the scope of the right of communication enshrined in Article 3 of the InfoSoc Directive.

Likewise the viewing of a Web page should not require any authorization from the rightholder.

The viewing of a Web page is covered by the citizens' fundamental right to information. It is nothing more than the right to read. Posing such a question is asking whether the Internet is legal.[7]

4. Download to own digital content

The question posed by the Commission relates to the permissibility of the second-hand sale of downloaded files.

The question misses the issue. In the digital word when a person buys a work she always buys a digital copy of that work that cannot be compared to a paper copy. The digital copy may be shared with family and friends multiple times and it does not wear down. Internet makes clear

---

[5] Court of Justice of the European Union. (2014, 13 Feb). Judgment of the Court (Fourth Chamber). 13 February 2014. In Case C-466/12. Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=29226

[6] European Copyright Society. (2013, February). *Opinion on the Reference to the CJEU in Case C-466/12 Svenssson*. Available at, http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf.

[7] Angelopoulos, C. (2013, 8 July). UK Supreme Court Asks CJEU Whether the Internet is Legal. Kluwer Copyright Blog. Available at, http://kluwercopyrightblog.com/2013/07/08/uk-supreme-court-asks-cjeu-whether-the-internet-is-legal/

the distinction made by economists between private and public goods. The latter are in constant supply and cannot be exhausted. Thus a more complex solution than the exhaustion of rights in one copy of the work should be applied.

Centrum Cyfrowe shares the view of La Quadrature du Net that "*if the second-hand resale of files were allowed, it would lead to several harmful developments. Any system of resale would use DRM systems which ignore the basic rights of individuals to the cultural content they own. Moreover, music industry giants […] are already positioning themselves for this market opportunity in such a way that would reinforce, using patents and other means, their vertical integration and lock users into their systems.*"[8]

D. Registration of works and other subject matter – is it a good idea?

As the Commission notes registration is not often discussed in relation to copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[9]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. We believe the EU could provide strong incentives for the ownership of works to be better and more fully documented at the EU level. It could for instance require that collecting societies do not enforce rights which are not documented in a public database[10]. It could also limit the availability of remedies when works are not registered, such as certain enforcement remedies, take downs notifications or the protection of TPM.

The advantages of a registration system are noted by WIPO in a Copyright Registration and Documentation study.[11]

---

8 https://www.laquadrature.net/files/La_Quadrature_du_Net_s_response_to_the_European_Commission_s_consultation_on_copyright_reform.pdf

9 For example, it does not affect "domestic" works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country.

10 As is the case in the USA.

11 WIPO. (n.d.). Copyright Registration and Documentation. Available at, http://www.wipo.int/copyright/en/activities/copyright_registration/

E. How to improve the use and interoperability of identifiers

In its capacity of the Polish partner of Creative Commons Centrum Cyfrowe deeply believes in identifiers as a great tool for tracking works on-line.

From that perspective we believe that the European Union should ensure that:

1) identifiers as well as rights ownership and permission databases are based on open standards, available to all content creators and able to be read by all market participants free of charge, as well as ensuring they are publicly accessible via machine readable interfaces; and

2) identifiers as well as rights ownership and permission databases are interoperable across all of Europe (and beyond).

F. Term of protection – is it appropriate?

The current terms of protection are excessive.

Centrum Cyfrowe is a founding member of Communia Association and fully supports Communia Association Public Domain Manifesto which in its relevant part states that :
"The term of copyright protection should bereduced. The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility of our shared knowledge and culture. Moreover, it increases the occurrence of orphan works, works that are neither under the control of their authors nor part of the Public Domain, and in either case cannot be used. Thus, for new works the duration of copyright protection should be reduced to a more reasonable term".
We believe that such reasonable term should be no more than 25 years from the first publication.
In this context it is ironic that inventors would need to undergo lengthy and costly proceedings to file a patent application and in the end they are granted 25 years of exclusive patent rights while authors may do nothing and claim exclusive rights until their deaths and 70 years thereafter to the benefit their heirs.
As the case of the US shows shorter term of protection (prior to so called Sonny Bono Act, the term of protection was 50 years) combined with the registration requirement (present until the 1970s) saved the US 20th century works from falling into "20th century black hole" that exists with respect to European works.

III. Limitations and exceptions in the Single Market

There is a need for clarity with respect to exceptions and limitations. As the Internet knows no boundaries, also the L&Es should have no territorial restrictions or differences.

Studies conducted in various countries show that consumers are disoriented when asked about the limits of copyrights. A survey conducted in the UK shows that over 70 % of users *are never quite sure what is legal and illegal under current copyright law*.[12]

The same applies to Polish consumers. A survey conducted in 2013 by our organization[13] finds that they are equally as the UK consumers confused when it comes to legality of their actions. The table below shows selected respondents' opinions with respect to a few actions that are legal under the Polish Copyright Act (they fall into relevant exceptions from copyright).

ACTION	**RESPONSES**	
	Believed to be legal	Believed to be illegal
John copied a CD and gave the copy to his colleague at work (*private use/copying exception*)	20,9%	64,9%
Agnes copied an entire book that she borrowed from a library (*private copying exception*)	35,3%	46,9%

[12] Consumer Focus. (2011, March). Consumer Focus Response to Independent Review of IP and Growth. Part 2 – The Copyright Framework: Innovation and Growth through Fair Use, Licensing Solutions and Appropriate Enforcement. p. 15. Available at, http://www.consumerfocus.org.uk/files/2009/06/Response-to-independent-review-of-IP-and-Growth-Part-2-fair-use-licensing-solutions-and-appropriate-enforcement.pdf.pdf.

[13] Danielewicz, M, Tarkowski, A. "Copyright Law in Transition. On Social Norms related to Content Usage" p. 6

Teresa, a school teacher, screened a movie about World War II in her classroom (*teaching exception*)	25,8%	51,2%

The surprising outcome of the survey is that people usually assume that copyright is more restrictive than it actually is. People consider many acts illegal under the copyright but still they commit them - and in reality do not commit a crime. This leads us to question any strategy of further restricting the copyright with the view of making it effective.

On the contrary, more clarity and flexibility should be allowed - in particular, with regard to online uses of digital content, including transformative uses. Today, ubiquituous use of the Internet and other digital communication technologies in Europe is radically different from the state of affairs at the beginning of the XXth century, when the current exceptions and limitations regime in Europe has been defined. In the Internet era, the "exception by exception" reasoning adopted by the Directive should not be applied any more. We believe that this is the time to seriously consider the suggestion put forward in the Study and "*to look at different uses some categories of users (libraries or educational institutions) or some objectives (access to knowledge and education) would be privileged to undertake under the limitations to copyright. […] the space of non-infringing uses could be defined by their objective and some general conditions, including a more open requirement that the use does not exceed what is necessary for its objective. […] It could make our system more fit for its purpose and more understandable for users and owners alike*."[14]

We do not advocate for the introduction of a general open norm of "fair use" into the European acquis. Rather we are of the opinion that key exceptions relating to fundamental rights (information, communication, education, research) should be drafted following the above mentioned recommendations and based on a revised current list of exceptions. Then they should be made mandatory for all member states. Additionally, a fair amount of flexibility should be left to national courts to be able to adapt the existing limitations and possibly create new ones - similar to those that already exist - in order to keep up with the progress of technology.

[14] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive"). De Wolf & Partners. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf, p. 403

We believe that a specific exceptions allowing for non-commercial file-sharing and transformative uses should be introduced with its objective in mind to serve the fundamental rights of access to information and communication. Both of exceptions would make legal activities that are today common, and at the same time fall into a "grey zone" of uncertainty with regard to their legal status.

It is also necessary to ensure that access to works and usage rights under relevant limitations and exceptions are not contractually restricted or limited by TPMs. The law should expressly prohibit such legal or technical restrictions.

Special care should be given to the clear and precise formulation of any exceptions and limitations. In the absence of clear guidance in the law, the temptation is big for rightholders to determine the extent of lawful uses exclusively through contractual arrangements, which restrict the acts normally allowed under the statutory exceptions and limitations.[15]

We should also note that the Polish exceptions and limitations are broad and fairly flexible as compared with other member states' copyright regimes. For example, the teaching exception does extend to all uses of all kind of works and the private use exception allows for all kinds of private use of works communicated to the public.

While we strongly support the notion of the EU copyright reform , we will oppose any proposals that could lead to restrictions on the rights of Polish citizens as set forth in the Polish Copyright Act.

A. Access to content in libraries and archives

In 2012, Centrum Cyfrowe in partnership with eIFL conducted a research project with the aim to propose amendments to the Polish Copyright Act that would be favourable to libraries, which function in the new digital environment[16]. During a series of workshops librarians pointed out to the major problems faced by libraries in the 21st century. Those include:

- Licensing agreements prevent exercise of the libraries' rights as per relevant exceptions.
- Libraries cannot digitize its collections and put them on-line due to licensing issues while hard

[15] Guibault, L. (2010). Why Cherry-Picking Never Leads to Harmonisation. The Case of the Limitations on Copyright under Directive 2001/29/EC. JIPITEC, 1(2). pp. 55-66. p.65. Available at, http://www.jipitec.eu/issues/jipitec-1-2-2010/2603/JIPITEC%202%20-%20Guibault-Cherrypicking.pdf.pdf.

[16] Siewicz, K, Legal Analysis of the Copyright Rules regarding Libraries, Centrum Cyfrowe Projekt:Polska http://centrumcyfrowe.pl/czytelnia/przepisy-dla-bibliotek/ [in Polish]

copies due to their poor conditions cannot be lent to the public.

- Current exception limiting access to collections for scientific or research purposes to dedicated terminals on the premises of libraries is outdated.
- There are significant doubts whether e-lending is permitted.
- Permissibility of inter-library e-loans
- E-book titles available for sale to the public are not available to libraries for acquisition and access;
- If they are available they are available sometime after publication and not at the time of publication;
- Publishers do not deliver e-books and other electronic materials in interoperable formats or deliver the materials protected by restrictive TPMs.

The above problems are shared by libraries and archives across the EU. They are also partially applicable to other cultural heritage institutions such as museums and publicly accessible galleries. We believe that these issues need to be addressed in the current revision of the copyright system.

Mass digitisation

We address the mass digitization issue separately as this is the major concern of Polish libraries and museums. Centrum Cyfrowe has assisted a Polish regional institution (*Małopolski Instytut Kultury)* in its large scale digitisation project involving collections of 35 museums of *Małopolsk*a region in Poland (http://muzea.malopolska.pl/en/). We also advised the National Art Gallery *Zacheta* in its project *Open Zacheta* (http://www.otwartazacheta.pl/?lang=eng). In addition, Centrum Cyfrowe carried out the digitization of the archives of a regional office for protection of monuments.

The main conclusion derived from those projects is that mass digitisation of collections (resulting in making them available on-line) requires a comprehensive approach that cannot be based on the principles of diligent search and licensing. Those are overly burdensome and time-consuming requirements.

Both the Orphan Works Directive and the 2011 Memorandum of Understanding on out of commerce works are insufficient to address the copyright issues arising from mass digitisation projects. In Poland there is yet no project inspired by the MoU and the Orphan Works Directive

has not been implemented.

However, it has already been raised by Centrum Cyfrowe's partner institutions that the diligent search requirement of the Orphan Works Directive involves substantial investments of time and money that the institutions cannot handle. Thus it makes the directive unusable in mass-digitisation projects such as the one involving digitisation of the collection of the Polish National Library. For instance, among other items, the collection contains a large number of copies of Polish press from the time of the Nazi occupation of Poland that was sponsored and published by the occupants[17]. The editors and authors were deemed collaborators by the Polish Underground State Government (Government in Exile). Obviously they are not eager to come forward in the National Library's search and claim rights in the articles they then wrote. There are fair chances however, that they nevertheless cannot be ignored under the diligent search requirement, and that they are still alive, living abroad often as far as New Zealand or Australia. This example has been put forward by the Polish National Library as the best illustration of difficulties relating to diligent searches.

The inadequacies of both the Orphan Works Directive as well as the MoU may be addressed, as outlined above in the general remarks on the L&Es, by an introduction of **an objective driven exception** for cultural heritage institutions that would allow them to realize their mission of preservation and dissemination of cultural works. If such a move would prove too radical we recommend an extension of the scope of the exception created by Article 5(2)(c) of the Directive to cover all types of reproduction and an extension of the exception defined in Article 5(3)(n) of the Directive to allow for a remote on-line access to digitized library collections.

There is also a need for a new exception covering e-lending, since it is currently unclear whether e-lending is permissible under Directive 2006/115/EC on lending and rental rights.

B. Teaching[18]

The current exception for teaching in the EU law is written in a rather broad and open way, but none of the EU countries have implemented it as broadly as allowed by the Directive.

For example, according to the Polish implementation of the Directive, there is no legal certainty as regards the use of works for teaching purposes in any manner except for authorised physical

---

17 In Polish: "gadzinówki".

18 Please note that the submission of Centrum Cyfrowe in this section on teaching and the following section on research mirrors the submission of C4C Coalition, as Centrum Cyfrowe was the leading contributor of the part in the Coalition's submission.

copies on-site. In other words, on-line access is open to question, given the limitation of use that falls under exception to on-site terminals, which applies also to schools. Therefore, many educational institutions do not engage in any activities except for traditional on-site teaching, or they seek explicit licenses. At the same time, many teachers who want to make their classes more attractive and to prepare their students to the use of ICT, operate in a grey area (and are often not aware of rights that they have under educational exceptions, as proven by our research).

If implemented broadly into the national laws the exception allows for use of any copyrighted material, including text, film, and multimedia for illustration of teaching in classrooms and also in online courses. It should also allow for using copyrighted works in teaching compilations, analogue or digital. Such uses should not require a license. Compensation is not required but allowed and compensation schemes should be based on actual and proven economic harm. Because of the narrow implementations of the broad exception provided in the Directive, permitted use of works in education differs between Member States. This presents special difficulties for the providers of online courses (such as MOOCs) that can be accessed by citizens of various Member States and any other cross boarder educational initiatives.

The issue not only concerns the types of uses permissible under specific Member States' educational exceptions but also the applicable law aspect, as highlighted in our answer regarding the 'act of making available' and its consequences in terms of the definition of the applicable law.

There is thus a need to seek harmonised solutions, if not at international then at least at EU level, in order to create a real single market, without the current fragmentation we experience. Otherwise legal uncertainty will govern on both sides, with the absurd results we see today: the educational institutions will continue to seek licenses for uses that do not need to be licensed (and maybe they will be refused) and the rightholders will be reluctant to grant license for online uses.

The end result is what we face today, i.e. an uncertain climate for public policy for education, as core matters are left to market forces (in the form of unreasonable prices and conditions, prohibition to use material online, technical protection measures and restrictive licensing conditions in general).[19] Existing mechanisms that are meant to faciliate use of content for

[19] Papadopoulou, M. D. (2010). Copyright Limitations and Exceptions in an E-Education Environment. European Journal of Law and Technology, 1(2). Available at, http://ejlt.org/article/view/38/56.

teaching purposes mainly involve extensive collective licensing or agreements with publishers at national level. For example, universities in Spain pay to collecting societies a flat fee of 5 euro per student to allow reproduction and online uses of works for teaching purposes.

In France, the works are licensed under special agreements with collecting societies and in Finlandworks are licensed under collective licensing schemes. These mechanisms often create legal uncertainty for educational institutions, which always run the risk of not reaching an agreement necessary for some important usage right. They also further fragment the allowed uses of works for educational purposes across Member States. Furthermore, educational institutions sometimes end up seeking licenses for uses that do not require to be licensed, and on the other hand, certain rightholders prohibit certain permitted uses by employing technical protection measures (TPMs) or imposing restrictive contractual clauses.

To solve the problems we believe a legislative solution at the EU level is needed.

The exception needs to be made fully mandatory, to ensure educators in all Member States can benefit from it to its full extent.

It should also be made explicitly possible for anyone to make works available on-line for educational purposes without restriction to on-site terminals, both in original form, as well as in the form of an adaptation or compilation, both in analogue and digital form. In this manner, the exception should be technologically neutral and cover both traditional, face-to-face, in classroom education, as well as online education.

Moreover, the educational exception should explicitly cover all acts of exploitation of all types of works for illustration of teaching, including text, film, and multimedia for illustration of teaching in classrooms as well as in distance learning (including transformative uses for teaching purposes). It should not be limited to any types of institution but rather defined by its purpose: teaching. The same is true as regards the source of financing: the exception should apply regardless of the source of financing of an educational institution – public or private – as long as the purpose is non-commercial.

The no license and no compensation model also seems the most appropriate one. Under this model, the uses for illustration of teaching should not require the consent (license) nor any remuneration to rightholders. Should fair compensation however be required, notably due to the application of the three-step test if there is evidence of actual harm, and in a cross-border context (*e.g.* e-learning) then the ‘country of origin’ principle should apply, and the educational

institution located in the country where the uploading of the educational materials takes place should pay a fair remuneration, which should in turn be fairly distributed. This is similar to the country of origin principle in the Satellite and Cable Directive (93/83/EEC), which has been functioning for close to a decade and has induced a substantial body of case law.

Moreover, there is also need for education and wide dissemination of information about the scope of the existing and any future exceptions. Centrum Cyfrowe conducted a series of workshops for the Polish educators (school and academia teachers) on the issue of the current educational exception.[20] The school teachers involved demonstrated hardly no knowledge of the existence of the educational exception. For instance they were afraid of the legal consequences of showing movies in classrooms, even though this is a clearly allowed under the Polish teaching exception.

This corroborates the findings of the Hargreaves report[21], which noted that:

"Many university academics – along with teachers elsewhere in the education sector – are uncertain what copyright permits for themselves and their students. Administrators spend substantial sums of public money to entitle academics and research students to access works which have often been produced at public expense by academics and research students in the first place. (…) *Senior figures and institutions in the university sector have told the Review of the urgent need reform copyright to realise opportunities, and to make it clear what researchers and educators are allowed to do."*

C. Research

Currently research activities are covered by the same exception as educational uses. It is therefore a broad provision. The type of research institution is not relevant: it may be publicly funded or private as long as the research itself is non-commercial.

Contrary to the educational exception, the exception for research is not restrictively adopted in national laws. However, the main problems with accessing and using scientific materials are mainly practical. The exception allows for their use for research purposes, but they are usually protected by restrictive licenses or technical protection measures (TPMs) – or simply only

[20] Siewicz,, K. „Analysis of Copyright Rules Relating to Education", Centrum Cyfrowe Projekt Polska, at: http://centrumcyfrowe.pl/czytelnia/przepisy-dla-oswiaty/ [in Polish]

[21] Hargreaves, I. (2011, May). Digital Opportunity: A Review of Intellectual Property and Growth. p. 41. Available at, http://www.ipo.gov.uk/ipreview-finalreport.pdf.

published in hard copies and not accessible. For example, licenses require that works are made available using certain networks or software only. Also, text and data mining (TDM) is often explicitly prohibited in licenses, or allowed only to a limited extent.

The main problems are the lack of access to scientific material due to prohibitive licensing and/or technical protection measures (TPMs).

A twin track approach seems most appropriate.

On the one hand, a legislative track should be pursued whereby a specific exception for research should be introduced, that is both mandatory and with a clear scope. Indeed, the current 'voluntary' approach to the list of exceptions leads to legal uncertainty and abuse by some rightholders.

Once again, the approach should be purpose-driven, *i.e.* the exception should not apply to particular beneficiaries but be defined by its purpose: conducting research. It should extend to works, subject matters of related rights, computer programs and databases. The uses allowed for research should not be limited by way of illustration and should cover a wide range of possibilities in order to enable unrestricted digital research. Scientists should be free to subject any article published or made available online to data mining, extractions, variations or other digital manipulations provided they give proper attribution. The exception should cover commercial and non-commercial activities. If deemed necessary, uses for the purpose of commercial research could be subject to fair compensation but the levies should be low and well administered. However, under this option, guidelines on the meaning of commercial should be provided by EU legislation.

As should be the case for all exceptions and limitations, it should be clearly stated by in the legislation that contractual or technical (TPM) overrides of this exception are prohibited.

C4C reminds the European Commission that the legislative approach outlined above has been proposed and substantiated by the Max Planck Institute for Intellectual Property, Competition and Tax Law in its response to the 'Green Paper Copyright in the Knowledge Economy' consultations in 2008[22] and further defined and supported by Reichman and Okediji.[23]

---

[22] Hilty, R. M., et al. (2008). European Commission – Green Paper: Copyright in the Knowledge Economy – Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law. Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-05. Available at, http://www.ip.mpg.de/files/pdf1/Comments-GreenPaperCopyrigthKnowledgeEconomy4.pdf.

Apart from this legislative solution, the access problems could also in part be solved by promoting and implementing open access principles. As recommended by the Commission itself[24], the results of publicly funded research project should be published in open access models. The Commission should further promote and encourage open access models, notably in its Horizon 2020 research framework programme.

Finally, there is also a need to promote among researchers and publishers data awareness and a culture of sharing. This could notably be done by establishing mechanisms and processes to recognise and reward and even require good data sharing practices.

D. Disabilities

At present, persons with disabilities – in particular the visually impaired, deaf , dyslexic and other print disabled persons – in the EU and globally, only have access to a very small fraction of the reading material published each year.

This situation is especially limited with regards to the cross border shipment or exchange of accessible formats for persons with disabilities given that Member States and International law up until now does not allow the legal cross border exchange of reading content among institutions and organisations that serve the cultural and academic needs of persons with disabilities.

The ratification and effective implementation by the EU and its Member States of the World Intellectual Property Organisation (WIPO) Marrakech Treaty[25] could overcome much of this problem for visually impaired persons, but these exceptions and limitations to copyright should also be extended to person with other disabilities.

---

[23] Reichman, J. H., & Okediji, R. L. (2009, 5 April). Empowering Digitally Integrated Scientific Research: The Pivotal Role of Copyright Law's Limitations and Exceptions. Available at, http://policydialogue.org/files/events/Reichman_Okediji_Empowering_Digitally_Integrated_Scientific_Research.pdf.

[24] European Commission. (2012, 17 July). Commission Recommendation of 17.7.2012 on Access to and Preservation of Scientific Information (C(2012) 4890 final). Brussels, Belgium. Available at, http://ec.europa.eu/research/science-society/document_library/pdf_06/recommendation-access-and-preservation-scientific-information_en.pdf.

[25] WIPO. (2013). Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013. Available at, http://www.wipo.int/treaties/en/text.jsp?file_id=301016.

E. Text and data mining

Centrum Cyfrowe participated in Working Group 4 concerning TDM within "Licenses for Europe" and was among those stakeholders who withdrew from the process protesting against licensing solutions offered by publishers and enhanced by the Commission. 60 organizations signed an open letter to the Commission arguing that no additional licence should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced.[26]

Centrum Cyfrowe believes that is not clear whether in fact TDM activities may trigger any copyright protection. It can be argued that TDM merely involves extracting from existing materials new information or data, which fall outside of the scope of the subject matter of copyright.

That could be true if TDM would not require copying of the explored materials. Thus clearly being subject to authorization of a rightholder. We believe that any reproductions for the purposes of TDM could be covered by the broad research exception as the exception allows for all kind of uses of works for the purpose of non-commercial research

In order to clarify the issues a specific exception allowing the copying of content for the purpose of text and data mining is necessary. It should also be explicitly stated in the law that technical protection measures (TPMs) and contracts should not override such an exception. Finally, such an exception should not distinguish between commercial and non-commercial purposes as, for research institutions, this would prevent knowledge transfer and such a differentiation would be contrary to the public interest.

F. User-generated content

Many Poles remember a video remix of Euro 2012 football [soccer] games created by an Internet user, nicknamed Madas. Madas created the short (just over one minute long) movie entitled "The Game for Everything" prior to Poland-Czech Republic game during Euro 2012[27]. The movie's aim was (as Madas later told the press) to cheer up Polish football fans and give them hope. If the Polish team had won they could have stayed in play. Thousands of people

[26] The text of the letter is available at: http://www.libereurope.eu/news/licences-for-europe-a-stakeholder-dialogue-text-and-data-mining-for-scientific-research-purpose

[27] The movie has been reinstated to youtube after euro 2012: http://www.youtube.com/watch?v=imZmLNbb-lE

watched the movie on youtube and praised Madas for it but only for one day. Thereafter it was blocked at the request of the Polish public broadcasters who claimed that the movie infringed their exclusive rights to broadcasts. Warsaw Film School offered a scholarship to Madas to cover the fees of a three-year film editing course. The dean of the school commented to the press: "*We think that if someone creates a movie like that, that can move people and that thousands of people watch it, then he is very talented and has all the skills that film creators should have*"[28].

The above story serves as a perfect example of social value and importance of on-line creativity. It also proves how easily it is blocked by exclusive rights. Moreover it shows that any differentiation between creativity of a "real artist" and an Internet user is unjustified. The content created by them can have the same creative and social values.

We therefore consider on-line creativity as such. As majority of on-line works is created with the use of other works or their fragments (remixes, mash-ups) from the copyright view point we need to concentrate on the adaptation right and its scope. The adaptation right is not subject matter of the Directive and has not been harmonized thus allowing for much flexibility to member states to regulate transformative uses.[29]

Therefore treatment of a transformative use will depend on the copyright rules of a given member state. In Poland the copyright makes a distinction between a work that is merely inspired by an original work and an adaptation. Copyright in inspired works belongs to their authors and may be exercised without any permissions from authors of original works. In contract, exercise of economic rights in an adaptation requires the permission (license) of an author of the original while the moral rights to the adaptation vest in its author. In other words, under the Polish law, adaptions are unrestricted as long as an author keeps them in a drawer. As shown by the introductory case, such rules are of no help to Internet creativity.

As noted in item II above a broad exception should be proposed to allow for non-commercial adaptations and their sharing on-line.

---

[28] The interview with the dean of Warsaw Film School is available in Polish at: http://wiadomosci.gazeta.pl/wiadomosci/1,114873,11945435,_Mecz_o_wszystko___Madas__zglos_sie__Dostales_stypendium.html

[29] See also Hugenholtz, B., Senftleben, M. "Fair Use in Europe. In Search of Flexibilities", IViR, Amsterdam 2011

IV. Private copying and reprography

In Poland private copying levies are imposed on blank media, recording equipment, photocopying machines, MP3 players, computer hard drives. They are also charged as a percentage of revenues from the photocopying shops. The collective management organizations argue that the list should be expanded to include digital cameras and smartphones.

The consumers have no awareness that the levies are being charged and affect the prizes of many electronic goods. For the reason of boosting consumers awareness in this respect it is advisable to show the amount of levies charged on the invoices and receipts. The levies are charged by a few collective management organizations which are having difficulties with adequate re-distribution to entitled rigthholder. The financial reports of the Polish CMOs show that at the end of the year 2012 the collected amount of close to 1 billion Polish zlotys have still not been re-distributed.

We strongly oppose introduction of any other levies given the current, flawed system of their re-distribution to authors. Any such legislative move should be based on economic evidence and analysis that the circulation, including digital coping of content, for private uses causes actual harm to the rightholders.

The evidence to that end is still missing. On contrary surveys show that making content available for non-commercial uses on-line may enhances sales in the real world. For instance Centrum Cyfrowe's research "*Circulation of Culture. On Social Circulation of Content*" shows that people who download music or movies from the Internet are also the largest group of customers of record stores and cinemas.[30]

Even if any loss to the rigthsholders is evidenced it still should be assessed if it would make sense in recovering this loss through levies, having in mind the bureaucracy of the system and administrative costs charged by the CMOs.

V. Fair remuneration of authors and performers

Authors and performers are entitled to fair remuneration for commercial uses of their works. As

[30] Filiciak, M. Hofmokl, J. Tarkowski A. "Circulation of Culture. On Social Circulation of Content," available in English at http://obiegikultury.centrumcyfrowe.pl/en/

noted, there should be made no distinction between works created/adapted with the use of on-line content and re-posted on-line ("on-line creativity") and any other works as long as they fall under the scope of copyright protection.

On-line creativity should be treated equally with entertainment industry based ("professional") creativity in business models that are employed to calculate and re-distribute revenues generated by on-line use of works (such as google ID). Works of individuals cannot be treated in a discriminatory manner in such models.

Centrum Cyfrowe has remained skeptical with respect to many proposed legislative solutions regarding Internet flat rate fees or other levies that would be aimed at compensating the authors and artists' losses incurred due to free circulation and sharing of their works on-line.[31]

There is a need to undertake a thorough analysis of the economics underlying the creation and dissemination of culture prior to introduction of any such compensation schemes. Currently it is often wrongly assumed that every use of work should be remunerated in order to satisfy creators' interests. It is also unclear in what extend any harm suffered by authors whose works are non-commercially used on-line is not already being compensated within the current levies scheme.

VI. Respect for rights

We believe that respect for rights is not created by enforcement, but by establishing rules that are perceived as fair and balanced by as many people as possible. The reasoning that the more restrictive the rules the more respect they invoke is flawed. This is clearly proven in Centrum Cyfrowe's research "Copyright in Transition" that states: "*The comparison of perceptions of what is legal and illegal with the status quo reveals that most respondents believe* ***the law to be more restrictive than it actually is.*** *Our respondents have more frequently assessed actions in given scenarios as prohibited – while they are in fact legal – than the other way round. Copyright is not breached due to insufficient knowledge of what's allowed.*

[31] Compare: Fisher, T. Promises to Keep. Technology, Law and the Future of Entertainment, Stanford University Press, 2004, chapter 6 "An Alternative Compensation System" available at: http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf. Agrain, P. "Sharing. Culture and Economy in the Internet Age", Amsterdam University Press, 2012 also at: http://www.oapen.org/search?identifier=409602;keyword=Aigrain

Copyright is breached in spite of the conviction that many everyday practices are illegal (and an exaggerated conviction, at that)."[32]

The focus should be on adapting the rules to the digital era and not on strengthening enforcement, which is already misused. So called "copyright trolling" has spread out also in Poland taking a modified form. In recent days we observe a flurry of legal notices coming from a law firm to schools and libraries alleging an infringing use of a photo/portrait of the Nobel Prize in Literature winner: Czesław Miłosz in schools' presentations and on libraries' educational Websites. The notices contain threats of filing court actions if the targeted institutions fail to pay excessive license fees (multiplied three times for an intentional infringement) and damages for infringement of moral right of an author of the portraits. It is hard not to wonder whether the photographer could intentionally be targeting public institutions as they are usually dominated by bureaucratic procedures, risk-avert and ready to pay what they asked for in order to avoid court action. In consequence, their unintentional infringement of copyright, committed in the public interest, provides additional source of income for a little known photographer.

Needless to say that such practices should not be legitimized by copyright rules.

Centrum Cyfrowe has submitted its response in the second phase of IPRED consultations[33]. In our general remarks we noted that from the view point of consumers there is no need to strengthen the enforcement of IPRs. On contrary there is a need to minimize the sanctions with respect to certain digital uses of content.

We postulate: (a) abolition of criminal and civil sanctions for content sharing and transformative uses made by individuals on non-commercial scale, (b) providing for mechanism enabling exercise of rights granted by exceptions and limitations to copyright, especially rules allowing for circumventions of TMPs and ban on contractual clause limiting permitted uses, (c) banning any filtering of content by Internet service providers.

The above does not mean that we oppose all sanctions. Centrum Cyfrowe has already expressed its opinion that only intentional infringements committed on commercial scale should be penalized.

VII. A single EU Copyright Title

[32] Danielewicz, M., Tarkowski, A., „Copyright in Transition..". p. 5

[33] http://centrumcyfrowe.pl/wp-content/uploads/2013/03/CC_KonsultacjewsIPRED_v2.pdf [in Polish]

Fully harmonized and transparent rules will benefit citizens and businesses of the EU. However, given the attachment of member states to their national copyright traditions, a full harmonization may prove very difficult and time-consuming. The recent case of a regulation on the measures relating to personal data protection may serve as a disgraceful example of an attempt at full harmonization, in an area with hardly no legal tradition as compared with authors' rights.

VIII. Other issues

In a longer timeframe European Union should take steps on the global level in order to instigate international discussion leading to a revision of the current system based on property rights. In the digital era there are plenty of alternatives to the current model of exclusive intellectual property rights (IPRs). Economic incentives for creativity and innovation may come from public and private grants, crowd-funding but as important are social incentives such as the ability to share, collaborate, and social recognition of your work.[34]

Confusing intellectual property rights with the property rights is common in our societies and leads to conclusions that block creativity. With respect to the protection of works of authorship, people believe that "[intellectual] **property is property**". Consequently, they believe that copyrights should be held in perpetuity by author's heirs. They also believe copyright should be absolute as to exclude any uses without author's express permission, even uses for the purpose of parody or pastiche[35]. Moreover over 60% of respondents do not understand that copyright protects an intangible work. They associate the protection with a material embodiment of such work and not a work itself.

In the digital era the ownership of the content becomes meaningless. People do not focus on ownership of music or videos, they want to listen to them, watch them, communicate and share with others. In the era of streaming, VoD, catch-up TV it is time to look at the alternatives to the IPRs and start thinking of a way to free creativity from the property restraints.

---

[34] For more see: Gliscinski, K. „Intellectual Discord Rights. On the globalisation of rights relating to intangible goods" [in Polish] available at http://conasuwiera.pl/wp-content/uploads/2012/09/Gliscinski-Prawa-niezgody-intelektualnej.pdf

[35] Danielewicz,M, Tarkowski, A "Copyright Law in Transition. On Social Norms related to Content Usage" Centrum Cyfrowe Projekt: Polska, 2013, p. 5, English version at http://ngoteka.pl/bitstream/handle/item/203/Copyright%20Law%20in%20Transition_report%20summary.pdf?sequence=1