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Re: Green Paper Response.

Dear Reader,

The ScriptumLibre Foundation (Stichting Vrijschrift in Dutch) is happy that the conflict between copyright and access to works for research, science, and education has the attention off the Commission, and likes to thank the Commission for the opportunity to present its views in this consultation round.

Current Copyright is Excessive

Before turning to the specific answers of the consultation, we would like to remind the commission that the primary purpose of copyright law to promote general prosperity by promoting the progress of science and art. In an ideal world, no conflict between copyright and access for research, science, and education would exist, as the prime motivator for introduction of copyright is exactly to promote the latter. Unfortunately opportunistic lobbying by rent-seeking rights-holders has destroyed the balance between the private and public interests in copyright legislation.

We believe that many of problems indicated in this questionnaire are caused by an excess of exclusive rights granted by copyright, and would be eliminated if copyright legislation would be rationally re-designed to maximize the prosperity of all citizens.

We realize this is outside the scope of the consultation, but we would like to stress that on strictly economic grounds, a copyright duration in the order of 5 to 20 years after publication would be sufficient to achieve the purpose of copyright law, without introducing many of the problems caused by the current long terms. For this reason strongly promote the reduction of copyright to 20 years after publication which would render most of the issues discussed moot. [Reference 2]

However, given the current political climate, we realize that such a drastic move is unrealistic.

Clear empirical evidence for the fact that excessive protection actually

damages the public interest is provided by the EU's Database Directive. This shows that the market for databases in the EU is just a fraction of that in the US, in spite of the legal protections provided within the EU, and the lack of similar protections for databases in the US. [Reference 3]

Many innovations possible under U.S. copyright law, such as Google's Search Index, would have been impossible to develop in the European Context. The answer is clear: **to achieve its ambitious Lisbon Agenda, the Commission needs to turn to *less* exclusive rights instead of more.**

Ghost works

In this context, we would also like bring to the attention of the Commission the concepts of *Ghost works*. Ghost works are creative works that never have see the light of day, due to the workings of copyright, or works that are made, but never published, for the same reason. This is due to the restrictions placed on derivative works, and is a huge disincentive for creating creative or useful works, that reuse more than a minute fraction of other works. It is hard to estimate the damage done by this phenomena, but we believe it is an order of magnitude larger than the Orphan work issue.

Typical examples are translations of literary or educational works to lesser-used languages, where current copyright holders have little incentive to license that use, as the returns will be minimal; documentary makers that accidentally show fractions of copyrighted works (such as a television set playing in the background), where copyright holders have an interest in suppressing such documentaries. Poetry turned into songs, novels inspiring movies, the list goes on endlessly.

A good example of this mechanism can be observed around the Harry Potter novels. Its author and publisher have been highly aggressive in asserting their copyrights—going as far as forbidding readers to actually read a book they bought, although before its designated release date—in suppressing all kinds of fan-fiction and related works, such as an encyclopedia of characters. We do not deny the creative contribution those novels brought to our culture, but would like to point out that many of the concepts used are derived from a long-standing tradition of magic and witch-craft stories. This tradition is both a source, and a necessary context for these stories, as without such a context, the effects of the Harry Potter novels would be much less appealing to the public. Why then, should an author be given the right to exclude his own works from that same tradition for over a century?

Current copyright legislation is out-of-tune with cultural reality, in which authors, artists, and musicians, are inspired by each other and build on each others works. To revitalize culture, we need to give Ghost works a chance to live. [Reference 6].

General Proposals

Until such time a complete overhaul and rationalization of copyright law can be achieved politically, we propose a number of measures to reduce the damage caused by the current system.

Introduce an Open-Ended Fair-Use Exception

Instead of the current limited list of exceptions to exclusive rights, we promote the much more open-ended concept of 'fair use' as it operates in the US. This would considerably reduce the complexity of legislation, without, in any way, harming the interests of rights-holders. It would help considerably to reduce the issues of Orphan and Ghost works.

This fair use concept should be a prescribed part of all E.U. copyright laws, and should follow the same four-part test as is common to establish fair use in the US, as encoded in section 107 of the 1976 Copyright Act, that is:

- purpose and character of the use
- nature of the copyrighted work
- amount and significance of the portion used in relation to the entire work
- impact of the use upon the potential market for or value of the copyrighted work

The determination of the exact boundaries of the fair use exception lies, necessarily, with the courts, which should be instructed to take the primary purpose of copyright as leading principle. See also [Reference 1].

We believe that the concept of fair use should be made an obligatory part of copyright legislations in the EU. Furthermore, the EU should ban the contractual exclusion of fair-use rights as related to consumer products. That is, when a consumer buys a media product, any clause attempting to restrict his fair use rights in EULA's, general conditions, and the like should be unenforceable.

Complete Harmonization of EU Copyright Legislation

The harmonization of copyright within the EU is far from completed. We believe this can best be achieved by prescribing, by directive, a unified European Copyright law, introducing a level playing field for all parties within the EU, and abolishing all the restrictions currently imposed by copyright on the internal market.

An easy way to achieve this is to abolish all currently existing restrictions on intra-community trade of objects controlled by copyright legislation. This includes copyrighted work, works copyrighted in one member state but not in another, objects falling under a national exception in one country, or objects (such as blank media and recording devices) subject to various national levies.

That is, if a product has been legally produced and made available in one country of the EU, it can, under the same rules and conditions, be made

available in all countries of the EU.

Effectively Resolve the Issue of Orphan works

The Commission, in its Green Paper defines orphan works as copyright works for which no copyright holder can be located or contacted.

We would like to make the Commission aware of a further type of orphan works (lets call them doubly orphaned works), for which it is impossible even to determine the copyright status at all. We propose the commission to make it easy to determine the copyright status of work, for example, by authorizing national libraries to issue "no sign of live less than 70 years ago certificates", that fully authorize use of such a work for once and for all. Such certificates should be cheap and issued quickly.

In general, we are highly critical of the various statutes to resolve the problem of orphan works as they are implemented in the US or Canada. These are merely token laws that do not effectively solve the issue at hand. Instead of opening up ways to use orphan works, they introduce unnecessary high barriers, and are not being used much in practice. [Reference 5]

The Answers

All our responses should be read with the philosophy in mind that the law-maker should not pretend to know or even want to know beforehand all details and possible usage-scenarios.

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions

Answer: This question bewilders us, as copyright law provides the foundation on which contracts can be based, not the other way round. It is turning things upside-down to suggest that exceptions can be arranged by contract, because, by nature, such contractual agreements would no longer be exceptions to copyright, but fall within the scope of exclusive rights.

Again, in our opinion, copyright legislation should properly balance the interests of the public and that of publishers, recognizing that the prime purpose of copyright is to promote the availability of works to the public, and in no way is intended as a corporate welfare system, or to be means to maximize publisher profits. Copyright should serve the public at large, not the private interests of publishers.

(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

Answer: Yes, but leave it to right holders to decide on the right way to exploit their own exclusive rights, with of course the remark that in our vision the scope of those rights is more limited.

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

Answer: No, a generic 'fair use' provision, of which the contours are to be determined in practical use work better.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

(5) If so, which ones?

Answer: The fair use provision should be made mandatory. Besides that, we urge for the introduction of an effective 'use-it-or-loose-it' clause, and want a mandatory ban on technical restrictions on use (not being restrictions on distribution). In this respect we think about DRM and license restrictions affecting consumer products. A notorious example is the practice of disable the skipping of commercials in DVD titles aimed at children. In current legislation, bypassing such restrictions might be construed to be a violation of anti-circumvention provisions, which is outrageous. Finally, given the large disparity of power between publishers and individual consumers, the EU should ban the contractual exclusion of fair-use rights as related to consumer products.

Libraries and Archives

(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

Answer: Such an exception should be independent of the activities of publishers, as we cannot rely on the voluntary cooperation of publishers, that, by their very nature, interests different from that of copyright legislation. Publishers primarily want to make profit, the public needs to guaranty access to and dissemination of knowledge. Copyright law needs to balance those interests.

(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

Answer: This should a free choice of such institutions. Care needs to be taken that such contractual arrangement do not lead to further restrictions of the exceptions on exclusive rights granted under copyright legislation.

(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with

respect to:

(a) Format shifting;

(b) The number of copies that can be made under the exception;

(c) The scanning of entire collections held by libraries;

Answer: We believe that a 'fair use' exception works better in practice, without the need of the lawgiver to get into the fine details. Scanning entire collections of works for internal use is, in our opinion, fair use.

(9) Should the law be clarified with respect to whether the scanning of works held in
libraries for the purpose of making their content searchable on the Internet goes
beyond the scope of current exceptions to copyright?

Answer: Yes, this should be clearly classified as 'fair use'.

(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

Answer. Yes, an effective arrangement for orphan works is necessary until such time copyright terms can be reduced to more rational durations. Note our remark above that we distinguish between two types of orphan works:

A. Works of which copyright is possibly expired, but of which the copyright status cannot be established.

For such works, anyone should be able to obtain, at minimal cost, a statement from any European national library that no information concerning the copyright status is available, which will indemnify them permanently against any case of copyright infringement regarding that work.

Ideally, such statements should be as easy to obtain as a free query against a central catalog or WorldCat currently is, and can be worded:

> “No information is available that demonstrate that this work is still covered by a copyright, as all of the following hold true:
> - We have no evidence any of the authors where alive less than seventy years ago.
> - We have no evidence that this work was published less than seventy years ago.”

B. Works of which copyright is not expired, but of which the copyright holder cannot be located.

Although currently a few countries (for example Canada) implement legislation to deal with this, we believe such legislation is mainly a lip-service to the purpose of copyright law without much practical use. Empirical studies show that such facilities are hardly, if ever, used [Reference 4]

Instead, as before, anyone should be able to obtain, at a minimal cost, a statement from any European national library that no information concerning the copyright holder is on record, which will indemnify them against any case of copyright infringement regarding that work until such information comes available, and with reasonable facilities to enable investments relying on such an indemnification. It can be worded:

> "No information regarding the current copyright holder or current active exploitation of this work is available."

Right holders, of course, should have similar easy to use facilities to update such information. Note that what we propose does not place registration obligations on right holders, nor does it harm them financially, as this only concerns works not actively being marketed.

Parties relying on this exemption could be required to set aside royalties based on reasonable market rates for such use for a few years. However, such royalties should not go to any collecting agency, which have an abysmal record [Reference 5] in dealing with such funds, but only to right holders once they are identified.

Furthermore, to prevent abuse of copyright, it should be prohibited to falsely claim copyright on works on which such copyrights do not exists as "Infringement of the Public Domain", with remedies equivalent to those available against copyright infringement. Copyright statements on works that mix public domain materials with original content should clearly avoid extending claims on those public domain materials.

(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

Answer. No opinion, either way can lead to the desired effect.

(12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

Answer. See our general remarks above. We need uniform copyright legislation in the EU. The Commission should propose a model law in a new directive, which should integrated without any alteration in national law. Especially cases where copyright terms exceeds the EU standard of 70 years after death, as exist in France and Spain, should be curbed.

Access for Disabled persons

(13) Should people with a disability enter into licensing schemes with the publishers in

**order to increase their access to works? If so, what types of licensing would be
most suitable? Are there already licensing schemes in place to increase access to
works for the disabled people?**

Answer: Such obligations on Publishers should not be needed, that is, all assisting technology that are needed for this should fall under 'fair use', and legal protection for technical measures (such as DRM) disabling such tools should be abolished.

(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?

Answer. Such a provision is not necessary if the following proposal is adopted: A general prohibition on measures that make it impossible or difficult to convert to such a format on purpose is appropriate (We think of a prohibition of certain DRM practices.)

(15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?

Answer: Yes, any disability that affects access to information should not be further worsened by legislation.

(16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?

Answer: Dyslexia, physical handicaps, etc. Their should no fixed list of disabilities specified in the law.

(17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?

Answer: Yes, this is clearly within the boundaries of our definition of 'fair use'.

(18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?

Answer: The Database Directive needs to be abolished, for reasons cited above. If this is not possible, the same 'fair use' concept should be made applicable to databases. [Reference 3]

Education and Research

(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

Answer: This should be left to the discretion of the scientific community. However they should not be compelled to enter agreements where 'fair use' is in its place.

(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Answer: Yes. Many kinds of distance learning are, for a good deal, within our proposed reach of 'fair use'.

(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Answer: Yes, this is clearly within our definition of 'Fair use' as well.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

Answer: No, this kind of precision is not desirable, as it leads to complex legislation, and cannot deal with unforeseen uses in the future.

(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Answer: Yes, both are within the concept 'fair use', and should be recognized as such.

User-created Content

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

Answer: No, again, the concept of 'fair use' should preempt the need for detailed guidelines, with the note that many forms of re-use in works created by end-users are, in our opinion, within the limits of 'fair use', such as:

- Family videos in which toddlers dance on certain copyrighted music.

- Pictures on which works appear.
- Occasional appearance of copyright works in the background.

(25) Should an exception for user-created content be introduced into the Directive?

Answer: No, unless a general concept of 'fair use' proves to be unachievable.

Concluding Remarks

We are always happy to explain our opinions in detail, and to provide further information on request.

With kind Regards,

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ScriptumLibre (Stichting Vrijschrift.org) is a foundation under Dutch law. ScriptumLibre creates awareness about the economic and social meaning of free knowledge and culture for our society. ScriptumLibre fulfills both a protecting and promoting role. Internationally ScriptumLibre works together with the Foundation for a Free Information Infrastructure, the Free Software Foundation Europe, Project Gutenberg and a lot of other organizations.

References

The following sources can be consulted as background to our position as outlined in our submission

1. *Fair Use*. The following web page gives on introduction of the US concept of “fair use”, and also leads to the relevant sections in US law: http://www.universityofcalifornia.edu/copyright/fairuse.html

2. *Forever Minus a Day? Some Theory and Empirics of Optimal Copyright* by Rufus Pollock, Cambridge University (UK) is a theoretical study into the optimal length of copyright from an economical point of view. This studies arrives at copyright terms between 5 and 15 years as economical optimal: www.rufuspollock.org/economics/papers/optimal_copyright.pdf

3. *DG Internal Market page on the Database Directive evaluation*. A DG Internal Market sponsored study on the effectiveness of the Database Directive. This study found that granting increased rights to database owners had not achieved its policy aims of increasing EU competitiveness against the US, in fact the reverse: http://ec.europa.eu/internal_market/copyright/prot-databases/prot-databases_en.htm

4. *Orphan Works*. Official information on the Canadian solution to Orphan works: http://www.cb-cda.gc.ca/unlocatable/index-e.html

An overview of the licenses issued so far (just 228 in 18 years! Curiously, many of these concern architectural plans): http://www.cb-cda.gc.ca/unlocatable/licences-e.html

An overview of its history and effects by Mario Bouchard, General Counsel, Copyright Board of Canada: http://www.mileproject.eu/asset_arena/document/RD/IPR_CEPIC_JUNE_2008_ORPHAN_WORKS_BOUCHARD.PPT

A critical remark of the Copyright Board granting a license for the use of a funny variant of "The Princess and the Frog", Which is taken as a parable for the law in question: http://www.copyrightwatch.ca/?p=51

The US Copyright Office report on Orphan works: http://www.copyright.gov/orphan/orphan-report-full.pdf

5. *Collecting Societies.* A quick search will reveal a lot of issues with collecting societies, and the havock they wreak. Just a small sample of relevant links (in Dutch):

News item indicating BUMA/STEMRA is not paying enough to authors: http://tweakers.net/nieuws/41450/buma-stemra-betaalt-te-weinig-aan-auteurs.html

Sampling methods of dutch collecting society BUMA/STEMRA disadvantage Christian musicians: http://www.refdag.nl/artikel/1355407/Buma+kijkt+kritisch+naar+uitbetaling+christenmusicus.html

Restaurant business association Horeca Nederland complaining about monopolistic abuse by collection societies: http://www.horeca.org/smartsite.dws?id=37480

6. *Seen Any Ghost Works Lately?* by Karl Fogel, who introduced the concept of a Ghost work. http://www.questioncopyright.org/ghost_works.