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To: **Internal Market and Services DG,**
Unit D1 - Copyright
markt-copyright-consultation@ec.europa.eu

Subject: **Public Consultation on the review of the EU copyright rules**

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Dear Sir, Madam,

we are grateful for the opportunity afforded by this consultation to provide input on the future of Europe's copyright rules. FSFE is a charitable non-profit organisation dedicated to promoting freedom in the information society.

We are focusing our input mainly on questions related to matters of software. We remain available to support the Commission's work on copyright reform in the future.

With kind regards,

Hugo Roy
Free Software Foundation Europe

Register ID: 33882407107-76

Organisation: Free Software Foundation Europe e.V.

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**

11. **Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?**

    No

Hyperlinks are core to the web. If hyperlinking were made subject to the authorisation of any rightholder, then basically any kind of web publishing would be potentially withheld to the authorisation of many rightholders.

In practice, it would mean that:

1. web publishers would have to identify which hyperlinks merely point to works that are copyrightable subject matter;
2. web publishers would have to identify the rightholder and how to contact them; which is nothing trivial for online pages;
3. and finally web publishers would have to wait for the rightholder's authorisation.

Such a provision would constitute a great burden on freedom of speech to which the Web has been instrumental. The reasonably foreseeable outcomes of such a provision would be either:

- massive inability to apply the provision for web publishers, resulting in massive presumably infringing content; or
- massive avoidance of hyperlinking, resulting in less usable web pages and a lost opportunity to point the public to relevant works.

The prerogatives of the copyright holder over their work **should not** extend to comprise making a hyperlink. Regular hyperlinks should never be considered direct use of a copyrighted work. Indeed, a regular hyperlink does not reproduce, transmit, nor make available in any way a work. Rather, hyperlinks only point to already identifiable resources.

In that regard, the EUCJ ruling "Svensson" C-466/12 is worrisome and the right of making available should be clarified to exclude the use of regular hyperlinks from its scope. Making some hyperlinking practices subject to the authorisation of rightholders only complicates their use, causes chilling effects on freedom of expression, sets up the unenforceable rules and leads to further alienation of copyright law for the general public. Links to illegally communicated works should be rather solved under theories of accessory liability or wrongful omission as they account for flexible circumstances that might occur.

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13. **[In particular if you are an end user/consumer:] Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?**

Yes

Digital restrictions management (DRM) prevents the consumer to truly own the digital files they have purchased. Not only are consumers often unable to resell digital files, DRM often prevents them from being able to simply use the files they have purchased for legitimate and lawful purposes. Incidentally, consumers who have bought digital files cannot choose which software or device to use, causing issues regarding interoperability and competition.

In practice, digital restrictions management enables publishers, software and hardware vendors to impose on the consumer any kind of restrictions they see fit. Thus, DRM equates to giving publishers **more power to restrict use of a work than they are legally entitled to** under copyright law, over how the digital version of their works are used by the public.

In addition to technical restrictions, consumers are often bound by the terms of use and licensing that govern the acquisition of digital files. These terms deceive consumers who believe they have *bought* the files and illustrate that consumers *do not own* the digital content they acquire in the same way they would own equivalent physical goods. For example, James Joseph O'Donnell, a classical scholar and University Professor at Georgetown University, has lost access to e-books he had acquire from Google Books because of the digital restrictions management and region-control that Google exercise on their platform.[1]

People with disabilities are often barred from media use because DRM prevents them from converting content to media formats that help them in spite of their disabilities. For example, book publishers protested against the possibility that some e-book reader might electronically convert text into speech. Without such text-to-speech features, blind people will simply not be able to read books they have purchased.

Recommendations

Digital works covered by copyright should, when acquired by consumers, be clearly labelled if they are restricted by DRM mechanisms.

80. **Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.**

Digital restrictions management (DRM) is an illegitimate form of control exercised by content providers and device manufacturers over personal computing.

The Directive 2001/29/EC introduced anti-circumvention provisions that prevent users of personal computers to take back control of their computing. These anti-circumvention provisions should be simply abrogated.

Copyright subject matter covers original works of expression. Technical restrictions such as DRM

1 *Cross a border, loose your ebooks*, Aug 17, 2013, BoingBoing, http://boingboing.net/2013/08/17/cross-a-border-lose-your-eboo.html

should not therefore be granted special protection through copyright law because such protection is ill-fitted and disproportionate.

In practice, anti-circumvention provisions also create issues in terms of software interoperability and competition. Digital restrictions management enable illegitimate vendor lock-in that prevents competition. For instance, the French association Videolan who publish the VLC free software media player has been facing important legal uncertainty regarding the ability to play “Blu-Ray media” on which Sony has a DRM.[2] This situation illustrates the illegitimate barrier to Free Software that DRM constitutes: in this case, copyright law is misused by software vendors in order to prevent competition and create lock-in for customers.

Recommendations

Anti-circumvention provisions should be abrogated.

2 *VLC : la Hadopi n'a pas la clef pour ouvrir la porte du Blu-ray*, PC Inpact, 08/04/2013, https://www.pcinpact.com/news/78893-vlc-hadopi-na-pas-clef-pour-ouvrir-porte-blu-ray.htm

22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

Yes

Exceptions to software copyright for reverse-engineering and decompilation purposes should not be weakened, but strengthened.

Circumvention of digital restrictions management (DRM) should be considered outside the scope of protection provided by copyright law, or alternatively an exception for circumvention of DRM for legitimate purposes should be made mandatory in all EU member States. Moreover, circumvention of DRM should not bear compensation to the protected content rightholder, nor to the DRM mechanism owner.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

Yes

Exceptions and limitations to copyright should benefit from greater legal certainty.

In this regard, the Three-step test should be reasonably interpreted as an obligation **for the legislator** rather than as a means towards weakening exceptions to copyright that the law provides for as seen in some court cases in Europe[3].

Recommendations

- Exceptions to software copyright for reverse-engineering and decompilation purposes should be strengthened to benefit interoperability and innovation.
- Exceptions to anti-DRM circumvention provisions should be strengthened for interoperability and other legitimate purposes.
- Existing exceptions and limitations to copyright should benefit from greater legal certainty by making explicit that the Three-Step test is an obligation to the legislator, not a a legal reasoning to be used in courts in order to weaken established exceptions and limitations.

3 In *arrêt Mulholland Drive* the French Cour de cassation followed a misguided interpretation of the Three-step test that reduced the exception for private copy to a trickle. (Chambre de cassation, civ. 1re, Arrêt n° 549 du 28 février 2006, 05-15.824, 05-16.002)

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d. How to improve the use and interoperability of identifiers

There is no shortage of databases of rights and works information, but they largely lack interoperability - even between databases carrying information about the same type of works. We believe that the true benefit of such databases can only be realised with open standards and public APIs for registering, requesting and modifying information in such databases. We further believe that such interoperability would enable works information to be carried not only in a single database but distributed across multiple databases operated independently of one another: some might be maintained by rights holders themselves, other databases by non-profit organisations or business entities. This would create a network of interoperable databases that support the creator and user of creative works with the flexibility they need to maintain information about works. As we go about our lives online, we create works that are potentially covered by copyright many times every day - hundreds of times, if counting every email we send, picture we take, story we share. Registering this in a single database becomes highly impractical. We believe the role of the EU to ensure and enforce interoperability between such databases and ensuring that the public has equal access to information within them using open standards.

Persistent identifiers are a requirement for ensuring the full benefits of a network of databases are realised. As has been shown in studies by the International Press and Telecommunications Council (IPTC) though, a more pressing issue than the adoption of identifiers is to enable the retention of such identifiers. Such identifiers already exist today, but they are routinely stripped from works as they are shared online. We therefore believe that the role of the EU is not so much in the promoting adoption of identifiers but working with industry and the community to ensure that such identifiers are retained through all stages of creating, curating and using a work.

Recommendations

> The role of the EU should be to work with industry and with the community to ensure that identifiers are retained through all stages of publishing, curating and using a work.