



Doc. 12101

7 January 2010

Rethinking creative rights for the Internet age

Report

Committee on Culture, Science and Education

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Summary

The extraordinary development of the digital society has significantly perturbed the protection of creative rights. The international instruments on which such protection is based do not seem capable of adapting to the Internet era. Technological advances clearly point to the need to rethink the mechanisms for implementing creative rights.

The Committee on Culture, Science and Education feels that the Council of Europe should launch a wide consultation to redefine the model which would harmonise the rights of creators with the right of access to information, the right to privacy and the right to freedom of expression.

A. Draft recommendation

1. The Parliamentary Assembly notes that the extraordinary development of the digital society is significantly upsetting the balance between the copyrights of authors of intellectual works, investors and the general public, and raises questions and issues as to the functioning of democracy, the protection of human rights, and the viability of the rule of law.
2. The possibility of sharing written documents, music, photos and films, and the plans for electronic libraries are examples of this development. The consequences are manifold. The drastic decline in sales of musical and cinematographic works is a reality and the same tendency could be seen in publishing with the advent of electronic libraries. Moreover, some governments are considering enacting laws to allow for the surveillance of digital exchanges between individuals.
3. The international instruments for the protection of copyright no longer seem capable of guaranteeing creators and investors a fair return on their respective activities while ensuring the public's access to information and respect for privacy. On one hand, the very survival of the creative profession is at stake; on the other, there is a danger of the emergence of police states controlling all information exchanged by their citizens.
4. "Pirate Parties" are springing up throughout Europe and worldwide, rebelling against all state control over Internet communication in the interests of safeguarding privacy and the right to information and of sharing free of charge music, films and other products of artistic, scientific or literary creation. The Swedish Pirate Party has a member in the European Parliament, and the German Pirate Party, until the recent elections, had a member in the Bundestag.
5. There would not appear to be any threat to the public's right of access to information and no justification for the provision of music, films and literary or scientific works free of cost. The Assembly considers that unrestricted and free access to information by no means presupposes cost-free access to the products of artistic, scientific or literary creation. The relevant exceptions in the spheres of education and research would appear to be properly safeguarded.
6. It is incumbent on the public authorities to work towards restoring the balance between the rights of the various players in the process of intellectual creation while guaranteeing respect for privacy. The Council of Europe, whose fundamental values are precisely democracy, human rights and the rule of law, has a duty to be involved in assessing foreseeable developments and in framing the standards required at European level.
7. The Committee of Ministers of the Council of Europe has stated its position through its Recommendation Rec(2001)7 on measures to protect copyright and neighbouring rights and combat piracy, especially in the digital environment. The Assembly focused on two questions related to these matters in its Recommendations 1586 (2002) on the digital divide and education and 1833 (2008) on promoting the teaching of European literature. The European Union considered the question in several directives from 1991 to 2006. But at this stage no satisfactory solution has yet been proposed.
8. Consequently, the Assembly recommends that the Committee of Ministers:
 - 8.1 initiate a future-oriented study on copyright in the digital environment and give thought to the changes required to guarantee a flexible legal apparatus, enabling copyright law to adapt more easily to technical, economic and social changes;
 - 8.2 initiate reflection on the system of exceptions and limitations by opening a transparent public debate, enabling each interested group to express its point of view in order to identify the exceptions and limitations essential for freedom of expression and information in a democratic society and ensure that these are fully effective, as well as identifying the exceptions and limitations which are merely incidental to this objective and propose a differentiated approach;
 - 8.3 assist and encourage contractual initiatives to provide improved access to works and their content, particularly in the fields of education and research, and verify their effectiveness and implementation by means of empirical studies;
 - 8.4 initiate reflection on the legal status of certain Internet stakeholders (access providers, content-sharing platforms, search engines) with regard to copyright;

8.5. explore the possibility of introducing compulsory collective management systems, especially where exclusive rights are very difficult to enforce and could have adverse effects on access to information (for example, in the case of “orphan” works, which are still covered by copyright but whose owners cannot be identified or located);

8.6. facilitate and propose a framework for interdisciplinary work (economic, philosophical, sociological, historical, and psychological) on copyright.

B. Explanatory memorandum, by Mr Arnaut, rapporteur

Introduction

1. This report is based on one written by Dr Christophe Geiger, Associate Professor, Director General and Director of the Research Department, Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg. Dr Geiger's report sought to analyse the links between two rights presented as competing with each other, namely copyright and the right of access to information, and emphasises the need to take them into account in the new digital environment. To these two rights should be added the right to privacy and the right to freedom of expression, which are threatened by certain proposed measures to combat "piracy" on the Internet.

2. In preparing this report, the committee organised a hearing with representatives of associations of authors and a representative of Google in December 2008. In September 2009 it held an exchange of views on this matter with members of the Nordic Council's Committee on Culture and Education. The information obtained at these two meetings has also been incorporated into this report.

3. Copyright, buffeted on all sides by new technology, is currently in turmoil. It is believed that 95% of music downloaded from the Internet is done so illegally. The music publishing market was halved between 2003 and 2007 and the new interactive forms of operating (Web 2.0) accentuate the problem and the disregard of copyright, which is increasingly viewed by the general public as an anachronistic curb, not only on the universal dissemination of knowledge, but also on data exchange between individuals. While the musical creation professions are under threat, the music publishing professions are on the way to extinction. The planned digital libraries pose the same type of problems for copyright in the field of writing.

4. Two attitudes towards this situation have emerged: the first, which might be termed a "Big Brother" approach, suggests that those violating copyright law should have their Internet access blocked and that hard disks on laptops should be examined at airports and searched for illegal material; the second is the "pirate" approach, which advocates total freedom of data exchange on the Internet. Although copyright has shown a remarkable ability to adapt to new developments in the past, it is by no means certain that this will continue to be the case in the future. Technological advances clearly point to the need to rethink the mechanisms for implementing copyright.

5. Accordingly, we must begin by reiterating a number of basic principles of copyright law and carry out a brief historical survey. A study will then need to be carried out of how the advent of the information society has changed the existing balances. This will be followed by a brief overview of recent developments in the legal provisions currently in force. This in turn will lead us to consider both the necessary changes to those provisions in order to ensure better access to information, and various initiatives that are either under way or planned, with a view to reconciling all the interests involved.

I. Copyright law as the result of reconciling diverging interests

6. First of all, it should be pointed out that copyright law relates not only to the rights of authors but refers to a much more complex legal situation. Since its inception, copyright law has attempted to reconcile the claims of the various players who are the originators and beneficiaries of works, that is to say the author/creator, consumers and commercial operators. It is essential for copyright legislation to balance these different interests. While the position of these players may vary according to the national legislation concerned, there can be no doubt about the need to strike a fair balance between the various claims. However, it is not easy to do this, especially as the interests of the different players vary considerably and, depending on the situation, may even clash.

7. For example, authors will have an interest in benefiting from the fruits of their labours by receiving payment for exploitation of their work. However, at the creative stage they will also have an interest in accessing existing works in order to build on them and use them as inspiration for their own work. This is particularly obvious when the author claims to be producing a scientific work, since access to existing works will provide a guarantee of the professionalism of their own work. At the same time, operators will want to recoup their investment in the production of a work. Nonetheless, when they produce a work that incorporates elements already protected by copyright it will be in their interest not to be excessively obstructed by existing monopolies. Finally, consumers will want to be able to have easy and affordable access to works for information and entertainment purposes.

8. However, it will also be in their interest for payment to be made to creators so that new works continue to be created and produced. These examples illustrate the complexity of the interests involved and the need for a balanced approach that takes account of needs and requirements with regard to both protection and access.

II. The right of access to information and copyright, converging in terms of both the rationale and the underlying principles

9. Copyright has its roots in the Enlightenment. The philosophers of the 18th century called for the recognition of an author's intellectual property rights in order to guarantee the fruits of their labour, with the higher aim of ensuring cultural and social development. As society needed to regenerate itself, question its values and be entertained, creators needed to be guaranteed a free space in which they could create works without having to compromise themselves vis-à-vis the authorities. The idea of charging for permission to replicate, or of financially remunerating authors for reproducing their works, was intended to guarantee their financial and intellectual independence. Instead of having to flatter the powerful to receive payment, they could "free themselves" from their patrons for the greater good of the community, which in this way was enriched by the abundance of independent works created. Far from being a selfish right, copyright was clearly conceived as one imbued with an important social function that was to a large extent its *raison d'être*. Since its inception, therefore, it has maintained close links to freedom of expression and to its corollary, the right of access to information.

10. This principle of striking a balance between the different interests involved is reflected in the very essence of copyright. In principle, copyright does not prevent access to information. An exclusive right is in fact subject to a number of limitations, the main or subsidiary aim of which is to ensure free access to information. There is first and foremost the distinction between form and idea: copyright covers the form, not the substance of a work, so different authors can write a book on the same subject and use the same information, and only the way they shape that information is protected, not the content. Moreover, the form will be protected only if it contains a certain amount of creativity, when it is original. For example, the enumeration of historical events in a table will certainly have a form but will probably not possess the necessary originality to be protected. Next, the form is protected only for a specific period, after which it falls into the public domain. Lastly, the various copyright laws set out a number of cases where form can be used to grant access to information (these cases involve exceptions and limitations, especially for teaching or research purposes, for libraries, quotations, press reviews, news reports and for certain cases of private copying when the aim is to obtain information, etc.).

11. However, this balance has been shaken by technological developments and their legal and technical consequences.

III. New technologies upsetting the copyright balance: the need to redefine the rules to ensure that the various interests involved are taken into account

12. The new information technologies have fundamentally affected copyright law: networks have made it difficult to control the way works are used. Technological progress has facilitated the reproduction and mass distribution of creative works, thus permitting the establishment in some cases of genuine parallel economies based on counterfeiting (a phenomenon sometimes improperly and legally questionably referred to as "piracy"). On the other hand, some non-commercial uses, such as "peer-to-peer" exchanges of digital files, have grown to such an extent that they are competing with the normal exploitation of works and challenging established commercial models.

13. At the same time, this development has been accompanied by the penetration of the new technologies into the community. The importance of the Internet in the daily life of citizens is constantly growing, and members of the public nowadays use it for entertainment, as well as for information or even training (in particular, the issue of distance learning and access to knowledge through digital libraries is taking on a whole new dimension thanks to the possibilities offered by networks). Alongside recognition of the dangers that the new technologies may pose for the protection of copyrights, there is also a general awareness that these technologies offer the possibility of broad and simple access to information and that they could play a leading role in the fields of education, research and culture in general.

14. The Council of Europe is particularly interested in this, and the political declaration by the ministers of the states participating in the first Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik on 28 and 29 May 2009, stated that "growing numbers of people rely on the Internet as an essential tool for everyday activities (communication, information, knowledge, commercial transactions, leisure), ultimately improving their quality of life and well-being. People therefore

expect Internet services to be accessible and affordable, secure, reliable and ongoing. Access to these services also concerns the enjoyment of human rights and fundamental freedoms, as well as the exercise of democratic citizenship”.

15. In the same spirit, on 10 June 2009 the French Constitutional Council enshrined a genuine “right to the Internet” based on freedom of expression as set out in Article 11 of the French Declaration of the Rights of Man and of the Citizen which reads as follows: “in the current state of online public media and in view of the importance of these services for participation in democratic life and the expression of ideas and opinions, this right presupposes the freedom to access these services.” The Constitutional Council specifies, however, that this right is not absolute and must be reconciled with other rights and freedoms of the same status such as copyright, as protected by the right of ownership, which is governed by Articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen. This shows that the delicate balance between protection and access has clearly been called into question and the “digital revolution” has made it necessary to reassess and adapt the underlying balances.

16. In its resolution of 10 April 2008 on cultural industries in Europe (2007/2153(INI)), the European Parliament called on the Commission “to recognise that, as a result of the Internet, traditional ways of using cultural products and services have completely changed and that it is essential to ensure unimpeded access to online cultural content and to the diversity of cultural expressions, over and above that which is driven by industrial and commercial logic, ensuring moreover, fair remuneration for all categories of right holders”.

17. Many initiatives have been taken to this end. First of all, at international level the first step was to strengthen right-holders’ rights, adapt property rights to the digital environment and provide legal protection for technical measures to protect works by means of the treaties of the World Intellectual Property Organization (WIPO) of 20 December 1996. Given the impossibility of ensuring compliance with copyright rules on networks, right-holders have pinned great hopes on technical measures, which have in turn been protected against being circumvented. A solution was adopted at community level with Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

18. However, no real reflection on the exceptions and limitations to copyright was initiated to coincide with these efforts to strengthen exclusive rights. Community harmonisation in the field of limitations and exceptions has in fact been a failure, with the aforementioned directive of 22 May 2001 merely providing an exhaustive and (with one exception) optional list, from which national legislators could pick the exceptions and limitations that suited them, with the additional possibility of adopting a more restrictive wording. The European Commission itself commented in a reflection paper dated 22 October 2009 that this situation was far from satisfactory (“Creative Content in a European Digital Single Market: Challenges for the Future”, reflection document of DG INFSO and DG MARKT, 22 October 2009). The systems introduced to guarantee the effectiveness of the limits to copyright in the light of the technical means available have often been very complicated, poorly harmonised and difficult to implement. Finally, the directive provided for the possibility of derogating from the exceptions and limitations by contract in an “access on demand” context, thus enabling doubt to be cast on their actual benefit in the digital environment.

19. Exceptions and limitations are one of the means available to national and European Union legislators to ensure the “balance of interests” and, in particular, to guarantee that collective needs are taken into account in the legislative provisions. Some of these exceptions and limitations in the provisions enshrine the right of access to information. Accordingly, their lack of effectiveness, the absence of harmonisation and the fact that they have been called into question as a result of recent developments in copyright law may be seen as establishing “one-way” legislation, that is to say legislation of operators’ rights without sufficiently reflecting the interests of their creators and the community. Moreover, an increasing number of academics have stressed that in recent amendments to the rules on this subject not enough account is taken of freedom of expression and the public’s right to information.

20. In response, on 16 July 2008 the European Commission adopted a Green Paper on “Copyright in the Knowledge Economy”, in order to “foster a debate on how knowledge for research, science and education can best be disseminated in the online environment. The Green Paper aims to set out a number of issues connected with the role of copyright in the ‘knowledge economy’ and intends to launch a consultation on these issues”. The Commission believes that it is the exceptions and limitations that ensure the dissemination of knowledge within copyright law and which are the key to the balance to be sought by European Union legislation. The first conclusions of this consultation were in fact the subject of a communication by the European Commission on 19 October 2009, in which it announced the instigation of preparatory work for a possible revision of the legislative framework.

21. However, the issue of exceptions and limitations in the digital environment is now also being discussed at international level, as WIPO has at last included this topic on the agenda of its Standing Committee on Copyright and Related Rights (SCCR) and begun discussions to study various proposals for a treaty in this field. Accordingly, this is now a global issue. WIPO points out first of all that “in order to maintain an appropriate balance between the interests of right-holders and users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorisation of the right-holder and with or without payment of compensation”.

22. It goes on to say that “due to the development of new technologies and the ever-increasing worldwide use of the Internet, it has been considered that the above balance between various stakeholders’ interests needs to be recalibrated”. At a meeting in late May 2009, discussions centred on the proposed treaty on exceptions to copyright for the visually impaired. However, the discussions are to be pursued in a broader context. The conclusions of the chair of the standing committee state that “the committee reconfirmed its commitment to work on the outstanding issues of the limitations and exceptions ..., taking into account development-related concerns and the need to establish timely and practical result-oriented solutions.

23. Likewise, the WIPO standing committee reaffirmed its commitment to continue without delay its work in a global and inclusive approach, including the multifaceted issues affecting access by the blind, visually impaired and other reading-disabled persons to protected works”. WIPO also intends to draw up a questionnaire on “limitations and exceptions for educational activities, activities of libraries and archives, provisions for disabled persons, as well as the implications of digital technology in the field of copyright, including as they relate to social, cultural and religious limitations and exceptions” and to maintain the issue on the agenda of its forthcoming meetings.

24. Exceptions are an important issue but they do not address the substance of the question and therefore cannot settle the matter definitively. Those who take an interest in politics are well aware that regulations which cannot be enforced are poor regulations and this matter will not be settled by focusing on the copyright aspect alone. The solution also depends to a large extent on what is termed Internet governance. The Internet Governance Forum, convened by the United Nations following the World Summit on the Information Society held in Tunis in 2005, met for the fourth time in Sharm el Sheikh from 15 to 18 November 2009. It is being closely followed by the Council of Europe in general and the Parliamentary Assembly in particular (we were represented by our colleague Andrew McIntosh).

25. These questions are also being discussed in other forums, for example the secret negotiations associated with the ACTA (Anti-counterfeiting Trade Agreement) treaty, the sixth round of which was held in Seoul from 4 to 6 November 2009, and the next is scheduled to be held in Mexico in January 2010. According to the media, this agreement is aimed, amongst other things, at making Internet service providers responsible for the exchanges between their subscribers.

26. In our view, it is essential to ensure that human rights are upheld: both the rights of authors to appropriate remuneration and the rights of citizens to respect for their privacy. We must firmly reject what is already happening at several airports in the United States, namely examination of mobile telephones and laptops, MP3 players and other electronic equipment, in search of illegal material.

IV. Rethinking the legal framework

27. In copyright law it is essential to guarantee a fair balance between the different interests involved. This report is clearly not the place for a detailed description of what the architecture of tomorrow’s copyright law might look like, since that would go well beyond its scope. The issues to be resolved are highly complicated and the responses to them are still being studied. Moreover, they will depend to a large extent on future technical and social developments and on the ability of right-holders and the various players concerned to establish systems allowing for effective and proportionate access to information and to the knowledge contained in works. However, we will try to outline below a number of elements that could serve as a basis for adapting legislation at both national and supra-national level.

28. While there can be no doubt that those involved in the creation of artistic works are entitled to appropriate remuneration, this by no means implies that decades later their descendents should continue to derive income from those works. It might be helpful to begin by considering whether copyright should be negotiated or inherited. Moreover, there does not appear to be any justification for restricting the right to privacy or the right to information on the pretext of enforcing copyright.

29. In this regard, the European Commission’s Green Paper on “Copyright in the Knowledge Economy” identifies a number of exceptions and limitations that have a particular impact on knowledge dissemination

and proposes launching a discussion on whether or not they should be extended in the era of digital dissemination. There is also a need to discuss ways of guaranteeing the adaptability of exceptions and limitations to new technical and social circumstances and to consider the case for introducing more flexibility in the present system. Ways should then be examined of guaranteeing the practical benefit of these limitations in the light of contractual arrangements and technical measures. Finally, it is crucial to ensure that creators receive fair and equitable remuneration. Granting access to information on no account means that the access should be free of charge.

30. In order to analyse the development of exceptions and limitations to copyright, it is clearly necessary to distinguish between those that allow access to information and those that do not. This differentiated approach would appear to be the preferred approach of the European Commission in its recent reflection document of 22 October 2009: "In general, a rather more nuanced approach to exceptions and limitations might be in order in the medium term. There are 'public interest' exceptions for research and teaching or for access to works in favour of persons with a disability on the one hand, and there are the 'consumer' exceptions, such as private copying, on the other hand. ... Future policy should make a clear distinction and proposals should clearly state which exceptions should be harmonised and made mandatory in scope as a matter of priority and the precise goals pursued in doing so".

31. Not all the exceptions and limitations have the same justification and importance for the development of the knowledge society. The limitations that warrant particular attention include exceptions for libraries and archives, teaching and research purposes, news reports, press reviews, quotations and, more incidentally, people with disabilities, as well as private copying when this allows access to information and is not already covered by one of the exceptions already mentioned. The Green Paper also proposes studying the possibility of introducing an exception for use for creative purposes. In this connection, see also the European Commission's reflection document which states that "serious considerations should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purposes".

32. These legitimate uses in relation to effective access to information must be clearly separated from other uses of works that are mainly for consumption purposes. A user who downloads Britney Spears' latest hit from the Internet is not seeking to obtain information but simply wants to listen to the music free of charge without having to buy the CD. To claim the contrary would clearly be an abuse of the right to information and discredit the argument. This dimension needs to be included in the discussions on the future of the "private copying" exception (downloading a work from an illicit source could be excluded from such an exception).

33. At all events, in order to offset the economic prejudice suffered by right-holders because of private digital copying it would appear necessary to revise, standardise and increase the amounts awarded in respect of "private copying" exceptions, including such media as computer hard disks and other digital data storage hardware facilitating copying, and a harmonised legal framework needs to be put forward to deal with the issue of file exchanges on the Internet. This does not necessarily involve a solution based on criminal law.

34. In this regard, a particularly severe decision was taken by the Stockholm District Court on 17 April 2009 concerning the Swedish file-swapping platform The Pirate Bay, four representatives of which were sentenced to one-year prison sentences and fined €2.7 million in damages for complicity in forgery, having provided the means for committing the main offence (illegal downloading). This decision is, however, being appealed against, and we must wait and see whether the outcome is confirmed at appeal.

35. The idea of a "graduated response" in terms of sanctions, as was initially envisaged in France by the bill preceding the passing of the Law on Copyright and Related Rights in the Information Society of 1 August 2006, could probably have benefited from further thought in terms of its mode of implementation and its consistency with the rest of the legislative mechanism. The unauthorised reproduction and public communication of a work for personal purposes by means of "peer-to-peer" software was made a petty offence rather than a criminal one (as in the case of forgery), resulting in a lighter criminal sanction. This provision does not appear in the final text of the law because it was rejected by the French Constitutional Council on 27 July 2006, which held that the specific nature of peer-to-peer exchange networks did not justify the differentiated treatment laid down in the provision in question with regard to infringement of copyright and related rights by other means, and that it was therefore contrary to the principle of equality before criminal law.

36. On the other hand, nor can we excessively restrict, on the grounds of wishing to avoid "criminalising" Internet users, such fundamental rights as the freedoms of expression and communication or the right to privacy and protection of personal data, which must also be taken into account. The European Parliament resolution of 10 April 2008, calls on the European Commission and the member states "to recognise that the

Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the member states to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access". Amendment 138 to the "Telecom Package", adopted by the European Parliament on 6 May 2009, requires member states to obtain a prior court order before suspending access to the Internet.

37. This was clearly the view of the French Constitutional Council in its recent decision on the law of 12 June 2009 promoting dissemination and creation via Internet, which authorised an administrative authority (the High Authority for the Dissemination of Works and Protection of Rights on the Internet – HADOPI) to interrupt Internet access in the event of illegal downloading. The Constitutional Council considered that such infringement of the freedom of communication must be strictly regulated and was improper if effected by an administrative authority rather than the courts. Following this decision, a second law on criminal law protection of literary and artistic property on the Internet ("HADOPI 2") was passed and promulgated after virtually unanimous validation by the French Constitutional Council on 28 October 2009. This law provides for a simplified court procedure for obtaining an interruption of Internet access (via a court order). The option explored by French legislation therefore lay outside the field of copyright exceptions and limitations. However, if this is to be the preferred approach in the future, a clear distinction must be drawn between those exceptions and limitations that are crucially important for the development of the knowledge society and those that are not.

38. The other possibility which should also be explored with a view to facilitating access to certain works is less radical than that of limitations and exceptions to copyright, because it concerns only the exercise, rather than the existence of the exclusive right, is that of compulsory collective management. In this case, access can be guaranteed by the fact that the users know that they can obtain the requisite authorisation from one single point of contact, namely a collecting society. A number of European Union directives sometimes authorise or indeed impose the use of compulsory collective management. This is the case of the Council Directive 93/83/EEC of 27 September 1993 on cable retransmission, and also the Council Directive 92/100/EEC of 19 November 1992, which provides for the collective management of rentals; the directive of 27 September 2001 makes the same provisions in respect of resale rights.

39. In France, the right of reproduction by reprography is also the subject of compulsory collective management. In this case, exclusive rights are implemented, which strengthens the collecting society's hand in negotiations. This possibility warrants further study. This option was expressly considered in France for "orphan" works (works still covered by copyright but whose owners cannot be identified or located) in a report on this subject to the Higher Council for Literary and Artistic Property (CSPLA), and has also been studied as a means of "legalising" peer-to-peer exchanges via the Internet by submitting the file upload protocol (subject to authorisation from the right-holder) to a compulsory collective management system.

V. Contractual initiatives and the other access possibilities under discussion

40. Any initiative aimed at reviewing the existing statutory framework to guarantee better access to works and to the information they contain, especially for teaching and research purposes, must obviously take account of any present contractual arrangements between the stakeholders concerned. Since regulation makes no sense if the parties manage to agree on establishing satisfactory means of access, it is necessary to be aware of initiatives in progress and model licences drawn up by means of consultation among the relevant protagonists, enabling citizens to access information on acceptable terms and conditions. However, the effectiveness of such agreements must also be examined closely since the existence of arrangements that allow for on-demand access does not necessarily mean that that access is possible on satisfactory terms and conditions. It will accordingly be necessary to verify that the cost of the service offered is not unreasonable or that the conditions of access are not too restrictive. Apart from considering the arrangements between the stakeholders concerned, it is important to look at practices that are becoming established in the scientific community, especially the online availability of so-called "open content" works that use free licence mechanisms, such as the "Creative Commons" model.

41. There are a number of initiatives in this context. This is not the place to produce a full inventory, rather we shall simply mention a few examples. With regard to the digitisation of orphan works, the European "ARROW" project (Accessible Registries of Rights Information and Orphan Works towards Europeana) has been set up to develop a database that makes it easier to search for right-holders. A European legal initiative to authorise the digitisation of orphan works may therefore seem premature.

42. The European Commission recently decided that orphan works would be the subject of an impact assessment, which “will explore a variety of approaches to facilitate the digitisation and dissemination of orphan works. Possible approaches include, *inter alia*, a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, an exception to the 2001 directive, or guidance on cross-border mutual recognition of orphan works”. In addition, the European Commission has set up a High Level Expert Group on Digital Libraries (whose terms of reference were renewed by a European Commission decision of 25 March 2009). This brings together the main players concerned and aims to promote mechanisms drawn up on a voluntary basis. The effectiveness of the solutions that have been (or will be) developed in this connection need to be examined. In Europe, there is also the “Europeana” digital library project to digitise a large number of public domain and copyright-protected works in agreement with right-holders.

43. Finally, mention needs to be made of the agreement signed by Google in October 2008 with a number of publishers belonging to the Association of American Publishers to allow the full digitisation by Google of numerous works (especially orphan works and books that are out of print) in order to make them accessible online, in whole or in part. However, this very complicated agreement relates only to the United States and its legality was to have been considered by an American court (the United States District Court for the Southern District of New York) on 7 October 2009, but the date was postponed in agreement between the parties after the American Department of Justice expressed a number of reservations about the legal validity of the agreement. The fact that many points in the agreement contravene current legislation in many European countries, particularly the provisions in the copyright field, does not mean that there will be no impact in Europe since European right-holders will be affected if they hold copyright over works digitised by Google to be accessible in the United States. The agreement also allows a number of authors in the United States to withdraw from the agreement retroactively if they so wish (via an opt-out clause).

44. A close watch will therefore have to be kept on these developments. While users can no doubt look forward to better access and research opportunities as a result of this digitisation initiative and the fact that library archives are made available online, such an agreement does pose a number of problems, especially in the context of competition law, since a single search engine (a private player) will possess all the digital sources of libraries and archives (most of which are public institutions). As was rightly pointed out by Professor Annette Kur, President of ATRIP, at the hearing in December 2008, “if certain search engines become sole source-databases for library stocks and/or other sources of information and knowledge, this may lead to serious distortions on the market for informational products and services, potentially resulting in misuse of dominant positions, most notably in excess pricing. For this reason, the developments in this field must be subject to adequate control, in particular by the competition authorities”. Such a dominant position could entail risks of abuse, and continued vigilance will be required. See, in this connection, the background information memorandum on the “Google Books” agreement, submitted to the Council of the European Union by the German Delegation on 20 May 2009: “The German Delegation would like to raise member states’ awareness of the risks associated with this activity and draw their attention to the fact that Google’s actions ... could have an impact on the concentration of media ownership and on cultural diversity in general, and especially in the European Union. ... The Commission is requested to take the matter up and examine the Google Books project as well as the impact of the settlement sought in the USA from the point of view of copyright law, law on restrictive practices and cultural policy and, where appropriate, to introduce new measures to protect right holders”.

Conclusion

45. In discussing the future of copyright in Europe, therefore, we have to stress the need to strike a fair balance between appropriate remuneration for the work of creation, respect for privacy, freedom of expression and access to information. At the first Council of Europe Conference of Ministers responsible for Media and New Communication Services in Reykjavik, Iceland, on 28 and 29 May 2009, the government representatives, after reasserting “the importance of copyright protection”, underlined “the need to explore further, in close co-operation with relevant stakeholders, issues deriving from the use of copyrighted material or the exploitation of user-generated content by media-like services to protect and promote the freedom of expression and information”.

46. The Council of Europe is the only pan-European institution and it has a duty to seek to help restore the balance between the copyrights of authors of intellectual works, investors and the general public, and find solutions to the problems and questions posed by the imbalance with respect to the functioning of democracy, the protection of human rights, and the viability of the rule of law. The Assembly should therefore recommend that the Committee of Ministers ensure that the Organisation is adequately equipped to contribute decisively to the clarification of the above questions, which have a bearing on its fundamental values.

47. Amongst other things, it could initiate a future-oriented study on copyright in the digital environment and give thought to the changes required to guarantee a flexible legal apparatus, enabling copyright law to adapt more easily to technical, economic and social changes; initiate reflection on the system of exceptions and limitations by opening a transparent public debate, enabling each interested group to express its point of view; assist and encourage contractual initiatives to provide improved access to works and their information content, particularly in the fields of education and research, and verify their effectiveness and implementation by means of empirical studies; identify the exceptions and limitations essential for the freedom of expression and information in a democratic society and ensure that these are fully effective, as well as identifying the exceptions and limitations which are merely incidental to this objective, and propose a differentiated approach; introduce compulsory collective management systems, especially where exclusive rights are very difficult to enforce and could have adverse effects on access to information (for example, in the case of orphan works) and, in general, facilitate and propose a framework for interdisciplinary work (economic, philosophical, sociological, historical, and psychological) on copyright.

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Reporting committee: Committee on Culture, Science and Education

Reference to committee: Doc. 11272, Reference 3360 of 25 June 2007

Draft recommendation adopted by the committee on 8 December 2009 with 5 abstentions

Members of the committee: Mrs Anne **Brasseur**, (Chairperson), Mr Detlef Dzembitzki (1st Vice-Chairperson), Mr Mehmet **Tekelioğlu** (2nd Vice-Chairperson), Mrs Miroslava **Němcová**, (3rd Vice-Chairperson), Mr Florin Serghei Anghel, Mr Lokman Ayva, Mr Walter **Bartoš**, Mrs Deborah Bergamini, Mrs Oksana Bilozir, Mrs Guðfinna S. Bjarnadóttir, Mrs Rossana Boldi, Mr Petru Călian (alternate: Mrs Mihaela **Stoica**), Mr Joan Cartes Ivern, Lord **Chidgey**, Mr Miklós, Csapody, Mrs Lena **Dąbkowska-Cichocka**, Mr Joseph Debono Grech, Mr Daniel Ducarme, Mrs Anke Eymer, Mr Gianni **Farina**, Mrs Blanca **Fernández-Capel Baños** (alternate: Mr Gabino **Puche Rodriguez-Acosta**), Mrs Emelina **Fernández Soriano**, Mr Axel Fischer, Mr Gvozden Srečko **Flego**, Mr Dario **Franceschini**, Mr José Freire Antunes (alternate: Mr José Luís **Arnaut**), Mr Martin Graf, Ms Sylvi Graham, Mr Oliver Heald, Mr Rafael Huseynov, Mr Fazail İbrahimli, Mr Mogens Jensen, Mr Morgan Johansson, Mrs Francine John-Calame, Mr Jón Jónsson, Ms Flora Kadriu, Mrs Liana Kanelli, Mr Jan **Kaźmierczak**, Ms Cecilia Keaveney, Mrs Svetlana Khorkina, Mr Serhii Kivalov, Mr Anatoliy **Korobeynikov**, Ms Elvira Kovács, Mr József Kozma, Mr Jean-Pierre Kucheida, Mr Ertuğrul **Kumcuoğlu**, Ms Dalia Kuodytė, Mr Markku **Laukkanen**, Mr René van der Linden, Mrs Milica **Marković**, Mrs Muriel Marland-Militello, Mr Andrew **McIntosh**, Mrs Maria Manuela de **Melo**, Mrs Assunta Meloni, Mr Paskal Milo, Ms Christine **Muttonen**, Mr Tomislav Nikolić, Ms Anna Ntalara, Mr Edward **O'Hara**, Mr Kent Olsson, Mrs Antigoni Papadopoulos, Mr Petar Petrov, Mrs Zatuhi **Postanjan**, Mrs Adoración Quesada Bravo, Mr Frédéric Reiss, Mrs Mailis Reps, Mrs Andreja **Rihter**, Mr Nicolae Robu, Mrs Tatiana Rosova, Mrs Anta Rugāte, Mr Leander Schädler, Mr André Schneider, Mr Predrag Sekulić, Mr Yury Solonin, Mr Christophe Steiner, Mrs Doris Stump, Mr Valeriy **Sudarenkov**, Mr Petro Symonenko, Mr Guiorgui Targamadzé, Mr Latchezar **Toshev**, Mr Hugo Vandenberghe, Mr Klaas De Vries, Mr Piotr **Wach**, Mr Wolfgang Wodarg

NB: the names of the members who took part in the meeting are printed in **bold**

Secretariat of the committee: Mr Ary, Mr Dossow, Mr Fuchs