

Public Consultation on Content Online in the Single Market

Comment by

Natali Helberger, Institute for Information Law (IViR), University of Amsterdam

Question No. 4: Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

There is little doubt that digitization revolutionizes the way digital content is created, distributed and marketed in the Single Market. Less commonly accepted is that a central element to the revolution is the changing role of the consumer in digital content markets. On the one hand, digitisation stimulates new, active uses and interaction of consumers with digital content. On the other hand, digitisation changes the relationship between consumers and rightholders, notably how copyrighted material is offered to the consumer and how rightholders control and monitor what a consumer does with such material. The position of users of digital content who want to benefit from the extended usage possibilities, and the position of commercial providers of digital content who have a strong economic interest in remaining in control over the use and distribution of digital content, are conflicting. Copyright law is faced with the challenge to reconcile both positions, and so to stimulate creativity, innovation, distribution of culture and knowledge, and a flourishing European knowledge economy.

An important objective of existing European initiatives regarding online content is to stimulate a flourishing content industry and to create a safe and reliable environment for businesses. The position of consumers, and questions of whether their interests are served adequately have received far less elaborate attention so far. It should be noted that taking into account consumer interests is not only a matter of morality and social thinking. It is also pre-condition for the functioning of the knowledge economy and the economic success of many electronic services and products. Consumers become increasingly active participants in, and drivers behind the "knowledge-based" society. In the end, it is the acceptance of consumers of new services or products that decides over the state of competition and innovation in digital markets.

The wish to encourage the content industry to invest in digital markets has led to a general overhaul of copyright law with the goal to make copyrights 'digital-proof' and to provide a more extensive legal basis to control the copying and the distribution of electronic content. The European Copyright Directive has resulted in a further expansion of exclusive rights and the present wording of the controversial provisions that protect technological protection measures. Expanding the possibilities to exercise exclusive control has come with a number of unintended side effects for the realisation of public interests. One side effect of the expansion of copyright is that traditionally legitimate consumptive uses (reading, listening, watching, playing on different devices, etc), social

uses (sharing with family, close friends, making copies for each other) or creative uses (mixing a tape, placing a work in a different context) are subjected to extensive control by right holders in the digital environment. The situation has created considerable uncertainty among all stakeholders over which uses are still legitimate, and whether the way copyright is exercised will impede the realisation of the benefits and opportunities from digital technologies, and from innovation in general.

Another side-effect of expanded exclusive rights but also of the way in which such rights are exercised is the increase in the costs for consumers and others than rightsholders to become "producers", innovators" or "active users" themselves. This might lead to situations where instead of promoting competition, innovation, creativity and experiment, existing legislation concentrates entirely on protecting "old", traditional products and distribution ways instead of also encouraging new ones. The controversies over e.g. search engines, deep linking or p2p technologies can be *also* seen in this context.

Finally, there are various side effects of the proliferation of technological protection measures that have not been foreseen by the drafters of the provisions that protect such technologies, or at least those side effects have not been addressed. There is evidence that the way some content control technologies are employed raise serious concerns regarding the accessibility and availability of content (technical access issues, access to content intermediaries, social exclusion), fair contracting and the protection of important consumer interests (such as privacy, personal autonomy, protection of property, security of hard- and software) – making them unacceptable for consumers and damaging trust into, and the image of the content industry in general.

It is probably too early to make suggestions for an optimal balance between control and autonomous use of digital content. The European Commission could stimulate research in questions that are likely part of the solution:

- Will the market be able to identify and to sanction overly restrictive exercise of exclusive rights? Under what conditions?
- Is existing competition law and consumer protection law adequate and sufficient to create an environment in which consumers can "vote with their purse" how much control and restrictions they are willing to accept?
- What is the position of the consumer under the *acquis communautaire* in copyright law?
- Are there lessons to be learned from the rules that safeguard public interests regarding the accessibility and availability of services in the broadcasting world (that is broadcasting and telecommunications law)?