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How can copyright policy foster market entry and innovation?

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Ladies and Gentlemen,

Working together for prosperity, jobs and growth is the central plank of what we call our Lisbon strategy to boost innovation and dynamism in Europe.

The copyright and knowledge-based economy unit is taking its role of promoting growth and employment in the European Union seriously. We have, therefore, adopted an ambitious reassessment of traditional policies in the field of copyright and related rights.

The policy so far ...

To create an Internal Market for goods and services that rely on copyright, the Commission adopted several directives harmonising the substantive law governing copyright at EU level. At present, copyright is governed by six sector-specific directives: 91/250 Computer Programs, 92/100 Rental/Lending Right, 93/83 Satellite and Cable, 93/98 Term of Protection, 96/09 Legal Protection of Databases and 2001/84 Artists Resale Right. Two more recent directives, the Information Society (2001/29) and Enforcement (2004/48) directives are horizontal measures that apply to all categories of copyright.

In creating an internal market for goods and services based on content protected by intellectual property rights, traditional internal market policy was essentially concerned with substantive aspects of intellectual property, such as the scope of these rights, the introduction of related rights (such as producers' or performers' rights) and the length of protection for creators and corporate right-holders (record labels and film producers). EU directives focused on substantive copyright and related rights because it was thought that harmonisation eliminates legal barriers that stifled free movement of protected goods or services across the Union. The entire legislative framework thus intends to ensure the proper dissemination of goods and services based on copyright and neighbouring rights across the European Union.

Yet, in today's global context, and in a climate of rapid technological change, internal market policy must focus more strongly on facilitating market entry and fostering innovation. Opening markets not only enables incumbent businesses to achieve economies and efficiencies of scale, it also leads to market entry by innovators.

Why this new focus on market entry?

The Information Society added a variety of innovative services which are provided electronically at a distance (right of communication to the public) or on specific request from the consumer (the right of "making available"). Electronic services are one of the key drivers for economic growth and future prosperity. These innovative electronic services require "new business models" to distribute valuable content digitally across national borders.

Copyright policy must therefore shift toward services and, in particular toward fostering market entry for innovative services, including services supplied across EU borders.

Harmonising legislation, such as the EU-wide introduction of the right to "make available" works or other subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them¹ has brought this development to the fore. The "making available" right, as it is known, is a right formulated with the Internet in mind. It is a right that is eminently suitable for cross-border exploitation and thus most closely reflects the potential of the online environment.

In 2001, the European Union adopted the EU Directive on the harmonisation of certain aspect of copyright and related rights in the information society (the "Information Society Directive")². The Information Society Directive harmonises a series of new exclusive rights that cover online distribution of musical works. The following exclusive rights that are implicated in the provision of protected works or other subject matter electronically at a distance:

- The exclusive right of reproduction as defined in Article 2 of the Information Society Directive covers all reproductions made in the process of online distribution. The right of reproduction is the right to reproduce the work by making intangible copies. Intangible copies include those made by digital means e.g. upload, download, transmission in a network or storage on hard disk. Certain temporary copies are, however, exempted from the reproduction right by virtue of Article 5(1) of the Copyright Directive.

1 Article 3 of Directive 2001/29/EC, OJ L 167, p. 10.

2 Directive 2001/29/EEC, OJ L 167, p. 10.

- The exclusive right of communication to the public set out in Article 3 of the Information Society Directive covers all communications of authors' works to members of the public not present at the place where the communication originates.
- The right of equitable remuneration for certain other categories of right-holder as set out in Article 8 of Directive 92/100 on rental right and lending right and on certain rights related to copyright. The exclusive right of communication to the public and the right of equitable remuneration cover the communication to the public of musical works and other subject matter by: (1) webcasting (which includes Internet radio, simulcasting, and "near-on-demand" services³) whether musical works are communicated via personal computers or to mobile telephones⁴.
- The exclusive right of making available that covers "on-demand" services⁵ which is accorded to authors, performers and record producers.

But focusing on market entry requires looking beyond harmonising laws...

Due to the technical accessibility of an online service throughout the European territories, innovative content providers require multi-territorial licenses as a way of insurance against copyright infringement action in the different jurisdictions in which the services may be accessed.

Ensuring that optimal conditions exist for the proper management of the "making available" right will ensure its smooth transition into the market place. The market segment in which this right will operate is the growing market in interactive and on demand services with an array of options for the users which are provided electronically at a distance.

But do we have optimal conditions for the proper management of the "making available" right and all the other rights associated with online delivery? Take the example of online music licensing. A potential provider of a new online service will face the following situation:

3 A webcast is similar to a broadcast television program but designed for internet transmission. A simulcast is a "simultaneous broadcast", and refers to programs or events broadcast across more than one medium at the same time.

4 There are estimates that 50% of mobile content revenues will be from music. Source: IFPI Digital Music Report 2005. Music services provided to mobile telephones also includes the market for ring-tones and real-tones.

5 The Copyright Directive grants neighbouring rights holders no exclusive right with respect to not fully interactive services such as webcasting or simulcasting. These rights are covered by national rules on neighbouring rights. This includes music included in video on demand online services whereby films, television programs are downloaded on demand against or without payment.

- There are many right-holders and rights that are involved in a single transaction in the electronic provision of music. A separate licence has to be sought from a different collective rights manager i.e. an authors' society, record producer's society and performing rights society for any single transaction.
- A licence granted by a collecting society for one form of exploitation does not mean that any other form of exploitation is authorised and so a separate licence has to be negotiated for each form of exploitation;
- The above implies that management of online exploitation of musical works is complicated by the fact that: (1) a multitude of rights (e.g., communication to the public, reproduction and making available) that (2) belong to a multitude of right-holders (e.g., authors, composers, publishers, record producers and performers) need to be cleared.

In these conditions, clearance is not easy. For example, rights of authors are administered collectively by authors' societies on behalf of the authors, composers and publishers of musical works. Authors, composers and editors hold the rights in the composition of the lyrics/music. In the online environment authors' rights comprise:

- The right of reproduction i.e. the right to reproduce the work by making intangible copies. Intangible copies include those made by digital means e.g. upload, download, transmission in a network or storage on hard disk;
- The right to communicate the work to the public including "making available" to the public i.e. transmission of the work by playing recorded music via a simulcast or a webcast or making the work available by allowing for its downloading.

In most Member States, a single society administers the reproduction, public performance and making available rights on a territorial basis. In some Member States, the right of reproduction and the rights of communication to the public are administered by separate societies – again, on a territorial basis.

Rights of performers, and record producers (record labels) are related rights and remunerate the producers' and the performing artists for use of a sound recording. Such use includes making physical and intangible copies, broadcasting, but now also includes the use related to Internet activity such as subscription-based "streaming" or "webcasting". The rights include the following:

- The right of performers to reproduce the fixation of a performance; communicate to the public⁶ including the right to make the work available. These rights in their performances (not related to the composition) are administered collectively by collective rights management societies representing performers;
- The right of record producers to reproduce; communicate to the public including the right to make available the sound recordings. These rights of record producers are administered by separate societies representing record producers that hold the rights in the sound recordings themselves.

Therefore, the way in which copyright and related rights are commercially exploited across Europe remains very heterogeneous and licensing has mostly been undertaken on a territory-by-territory basis.

With the advent of the Internet, this state of affairs has revealed itself to be a barrier to the introduction of many innovative interactive and on demand services across the EU. Digital technology is fast rendering the old territorial system of managing intellectual property obsolete. We are all aware that new digital services mean easier delivery than in the analogue era. This includes easier delivery of services across the EU. However, under the current system, content destined for the entire continent's consumption may be subjected to clearance 25 times through 25 different national authorities. For online operators this constitutes a considerable administrative burden and in some Member States online licences are not even available.

Better management is necessary

Due to the technical accessibility of an online service throughout the European territories, innovative content providers require multi-territorial licenses as a way of insurance against copyright infringement action in the different jurisdictions in which the services may be accessed. Ensuring that optimal conditions exist for the proper management of the "making available" right will ensure its smooth transition into the market place. The market segment in which this right will operate is the growing market in interactive and on demand services with an array of options for the users which are provided electronically at a distance.

Better management of existing intellectual property rights on a Europe-wide level is therefore essential for fostering market entry, that is to say promoting new goods and services that are based on intellectual property rights.

⁶ Record producers have a right to equitable remuneration only. See Article 8(2) of Council Directive 92/100/EEC on rental and lending right and on certain rights related to copyright in the field of intellectual property.

For example, harmonisation at the rule-making level and even the recent introduction of the "making available" right governing interactive electronic transmission cannot overcome the fact that intellectual property rights are still administered on a national basis. This has precluded the economies of scale in managing and clearing these rights – benefits that are usually associated with the Internal Market.

Fostering market entry of new IP-based goods and services is essential for a broad variety of industries: music, film, scholarly or scientific publishing software, databases, broadcasting and a host of new digital services available across the entire EU on the Internet all rely on IP-protected content. More and more, intellectual property rights need to be managed and licensed at EU level.

In 2005 we therefore reviewed how copyright and related rights are being commercially exploited across the EU. We especially looked at how the new "making available" right was licensed. This new emphasis on economic efficiency requires, to a certain extent, a shift – you could say a paradigm shift – in our thinking. We need to think less about harmonising substantive provisions of laws and more about how intellectual property rights are exploited commercially across the IM.

We went to stakeholders for their opinions in July 2005.⁷ This exercise revealed that the current management of intellectual property – within defined territories that usually are national borders – is a source of considerable inefficiency. And it also hinders the entry of new Internet-based services that rely on IP-protected content.

This is why the European Commission, on 18 October 2005, adopted a recommendation on the management of online rights.⁸ The recommendation puts forward measures for improving the EU-wide licensing of copyright for a variety of innovative online services. Improvements are necessary because innovative Internet-based services such as "webcasting" or on "on-demand" music downloads need an IP license that covers their activities throughout the EU. The absence of EU-wide copyright licenses has been one factor that made market entry for new online service providers difficult.

But this new policy also focuses on striking the right balance between rewarding creators and market entry. In lowering the cost of access to protected content, it will not compromise right-holders' income.

7 http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm#20051012

8 http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm#20051012

Better management of rights across the EU does not lead to a "race to the bottom" with respect to the standard of IP protection for creators. As Commissioner Charlie McCreevy said on adoption of the Recommendation on EU-wide online licensing:

"I want to foster a climate where EU-wide licenses are more readily available for legitimate online music service providers. These licenses will make it easier for new European-based online services to take off. I believe that this recommendation strikes the right balance between ease of licensing and maintaining the value of copyright protected works so that content is not available on the cheap."

First experience with the Recommendation

First experience with the Recommendation shows that EU-wide licensing actually works. The first EU-wide license was conceived just three months after the Recommendation was adopted.

On January 23, 2006, EMI Music Publishing announced having entered into a Heads of Agreement with the MCPS-PRS Alliance (the UK Collection Society) and GEMA (the German Collection Society), with the aim of offering to license the rights in EMI MP's Anglo-American songs under a single license across Europe for Mobile and On Line Digital uses. According to EMI Publishing:

"this ground breaking move will allow businesses, for the first time, to obtain a single unified license for the entirety of Europe, encompassing all rights necessary, to enable them to undertake their services without the need to contract on a territory by territory and Society by Society basis. The objective of this innovative agreement, when finalized, is to speed the expansion of existing mobile and On Line Digital services and encourage the development of new services. The result will be greater choice for consumers and increased opportunity for EMI MP's songwriters to benefit from the legitimate use of their songs."

This initiative is the first to follow the Recommendation. But the Recommendation is not only an option for Anglo-Saxon repertoire. On January 20, 2006 the UK society (PRS) has formed a joint venture with the Spanish society (SGAE) that creates a platform for future joint EU-wide licensing of the Anglo-Hispanic repertoire.

In light of the above, we see EU-wide online licensing as an opportunity toward promoting many different cultures and their repertoires across the EU. We hope that the creative community perceives these new online licenses as an opportunity and not as a threat.

Conclusion

The 2005 Recommendation on EU-wide online licensing and the cross-border collective management of copyright across the EU is one of the main examples of the above-mentioned paradigm shift away from harmonising rights toward improving the way how these rights are exploited commercially across Europe. This approach should reduce the cost of having access to content that is protected under IP rules without reducing income for Europe's creators.

The focus on fostering market entry for interactive and on demand services will influence the way in which the Commission approaches copyright policy in the future. In order to foster innovation and market entry, policy makers must create a framework in which entrepreneurship, new business models and risk-taking are rewarded. Policy regarding intellectual property should facilitate and not hinder the development and dissemination of new interactive and on demand services.

It is therefore essential that obtaining works that are protected by these intellectual property rights are affordable and easy to obtain for new market entrants and innovative service providers, while at the same time giving creators an economic incentive to make their work available online.

In order to achieve efficiency and market entry the Commission will focus on the management of intellectual property rights and engage in regular evaluation of the existing harmonised rights.

The Recommendation on the management of online rights represent our first attempt to refocus Internal market policy more strongly toward facilitating market entry and fostering service innovation. Let me draw the first, and necessarily preliminary, conclusions from this exercise:

- The current body of substantive EU level rules on intellectual property appear sufficiently flexible and open to models for licensing Community-wide “on demand” and interactive transmission of material protected by copyright and related rights.
- A new policy based on impact studies, evaluation reports and “soft law” policy recommendations appears, at this stage, to be the most promising tool for fostering new business models specifically designed for the digital environment.