



European Economic and Social Committee

INT/454
Copyright in the
Knowledge Economy

Brussels, 24 March 2009

OPINION

of the
European Economic and Social Committee
on the
Green paper - Copyright in the Knowledge Economy
COM(2008) 466 final

Rapporteur: **Mr Retureau**

On 16 July 2008 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Green paper - Copyright in the Knowledge Economy
COM(2008) 466 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 11 March 2009. The rapporteur was Mr Retureau.

At its 452nd plenary session, held on 24 and 25 March 2009 (meeting of 24 March), the European Economic and Social Committee adopted the following opinion by 173 votes to six with two abstentions.

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1. **Introduction**

- 1.1 The purpose of the Green Paper is to debate how knowledge in the fields of research, science and education can best be disseminated online and to find answers to certain problems relating to the role of copyright in the knowledge economy.
- 1.2 "Copyright" is understood to embrace both copyright and related rights, concepts which have evolved out of the classic definition of "literary and artistic property"¹. Copyright is protected by a number of international organisations and instruments, in particular the Berne Convention, and is governed by the WIPO² and the TRIPS agreement on the trade related aspects of intellectual property rights, within the framework of the WTO.
- 1.3 Comprising two parts, the Green Paper is concerned with the issue of exceptions to exclusive rights of holders of copyright and related rights; the second part dealing with specific issues related to the exceptions and limitations which are most relevant for the dissemination of knowledge and whether these exceptions should be adapted in the digital era.
- 1.4 The TRIPS agreements provide for a strict interpretation in terms of the exceptions and limitations in the field of copyright.

¹ Broadened to include new fields and items of intellectual creativity.

² World Intellectual Property Organisation.

- 1.5 In its review of the Single Market³, the Commission drew attention to the need to promote the free movement of knowledge and innovation. The Committee fully endorses this approach which is essential for the subsequent roll-out of the Lisbon Strategy.
- 1.6 Copyright and related rights are the subject of nine directives⁴. Authors of software applications are treated on the same basis as authors of literary and artistic works; however, both under the law and in practice, these rights are more limited than "traditional copyright."

2. **General issues**

- 2.1 In the Commission's view, the rationale behind the directive on the harmonisation of certain aspects of copyright and related rights in the information society has been to ensure a maximum level of protection for authors. It should continue to apply in a digital age involving the digitisation and instantaneous transmission of literary and artistic works, scientific and technical publications and works stored on software; however, the beneficiaries of rights believe that they earn little from making their works accessible online.
- 2.2 At present, the Community list of copyright exceptions comprises one mandatory exception and twenty optional exceptions; Member States being therefore free to decide whether or not they wish to implement the optional exceptions. The EESC believes that this represents a key obstacle to the genuine harmonisation of those exceptions which may be justified in a knowledge economy, via technological methods which are constantly changing in the digital age. However, since this list is exhaustive, it prevents the introduction of other exceptions by various Member States. Furthermore, through the application of the "three-step test" drawn up by the WTO and the WIPO, such limitations are subject to three conditions: they may apply only to certain special cases (e.g. visually impaired users), they may not be in conflict with the normal exploitation of the work and they may not unreasonably prejudice the legitimate interests of the right holder.
- 2.3 The Committee feels that these provisions contribute to a form of harmonisation; nonetheless, the use of an exhaustive list, which is optional, and which allows restrictions in the scope of exceptions, where applicable, entails a number of much more specific problems as regards implementing and monitoring compliance in the case of the online dissemination of works (especially via satellite).
- 2.4 A more categorical approach, which reflects the objectives of the knowledge society and those of the fight against all forms of discrimination, should be applied to the list, as the objective of harmonisation has not been achieved; too many exceptions still remain.
- 2.5 The principal economic interests involved are entertainment, certain forms of popular culture and games as opposed to knowledge in the strict sense of the term; however, that being said,

³ COM (2007) 724 final of 20.11.2007 – A single market for 21st century Europe.

⁴ Several address the issue of ad hoc rights, such as those enjoyed by authors of databases or designers of electronic circuits.

there is no need to establish too clear a dividing line between the various categories of content – with the obvious exception of content that is pornographic or dangerous for a young audience.

- 2.6 Such exceptions should apply to all types of disability which restrict users' full access to the internet and its multimedia content, to all levels of education, including life-long learning and universities of the third age, to public and university libraries and media collections, to patients in long-stay hospitals or undergoing rehabilitation, to prisoners, to private and public-sector researchers, under specific arrangements with libraries and specialist documentation centres. Beneficiaries of exceptions should have a right of appeal in cases where access is impossible or overly difficult; nonetheless, any extension in the scope of exceptions must be accompanied by new compensation arrangements for, as a minimum, original right holders⁵ as is the case for remuneration for private copy.
- 2.7 Such compensation should be collected by accredited collection bodies, responsible for the collection and distribution of such remuneration, in return for a fee, based on distribution criteria which may be modified according to the types of mandatory exceptions in place.
- 2.8 Consultation and negotiations should be launched between the representatives of the various stakeholders involved in the production and utilisation of works; however, the Committee believes that whilst, during the initial phase, the Commission could draft guidelines, it would be useful to follow this up by establishing minimum Community "standard licences" which could be adapted at national level by negotiation between the parties.
- 2.9 The EESC considers that the intermediary role of public and university libraries, and documentation and research centres, as well as the oversight provided by the collection bodies help ensure the satisfactory fulfilment of the criteria set out in the TRIPS agreements, which are arguably somewhat strict or interpreted in too restrictive a manner in that they do not make any reference to the needs of the knowledge society or to the explosion in the use of the internet particularly the areas of education, training and exchanges between scientists and researchers.
- 2.10 Numerous educational, scientific and technical works may already be accessed on the internet on the basis of "light" licences, such as GPL⁶ or "creative commons" for literary and artistic works. Such licences and the production of content useful for the knowledge society⁷ should be encouraged through public tenders or by giving support to institutions which produce

⁵ The authors as persons who have conceived or realised a work by themselves or via a third party.

⁶ General public licence, which principally applies to free software.

⁷ See the EESC opinion on *Cooperation and transfer of knowledge* CESE 330/2009.

scientific and technical content as well as software through the application of this type of licence⁸.

3. **Exceptions; specific problems**

- 3.1 The green paper focuses in particular on those exceptions to copyright which are the most capable of promoting the dissemination of knowledge, such as the exception for libraries and archives, the exception allowing dissemination of works for teaching and research purposes, the exception for people with a disability and a possible exception for user-created content.
- 3.2 The digitisation of works at libraries and archives for the purpose of preserving original documents – sometimes unique – and making them accessible online is a process which is currently in full development, as demonstrated by the Community digital library initiative, *Europeana*.
- 3.3 The conditions for digitisation and communication of works vary greatly among the Member States and are, the Committee feels, sometimes too restrictive in nature. The directive only allows for an exception to the reproduction right in the case of consultation for specific research purposes and in the case of limited conservation, for non-commercial purposes. The three-step test is a strict requirement, but could be made more flexible, particularly if compensation were established for the benefit of authors, even in the form of a lump sum payment.
- 3.4 A special exception should be made for fragile or rare works, and for lists of works recommended for primary and secondary school pupils and students, and education and lifelong learning could be declared to be of particular national interest. It should be possible to limit the choice of IT format to those covered by an international standard recognised by ISO and which are interoperable with most existing open or proprietary formats⁹.
- 3.5 The number of copies should be fixed, depending on the number of authorised users and based on identified conservation needs¹⁰.
- 3.6 The question of online accessibility entails a specific set of problems which require additional non-dissemination guarantees on the part of end users. Some may pay licence and service fees¹¹.

⁸ Numerous large private companies make an active financial contribution to such projects through individual or free licences, as they consider them to be a profitable source of innovation.

⁹ Each file should contain a "water mark" with a link to an accompanying note, explaining the conditions and limitations in the use of the licence for specifically defined users.

¹⁰ For example one copy on site, one in a similar institution, based on a reciprocal conservation agreement, and one on a digital storage server.

¹¹ For example, for the creation of documentation files for researchers in particular fields and for laboratories or other businesses.

3.7 Consideration should be given to the idea of amending the directive to enable the online lending of works for research and education purposes under conditions that are well-defined both legally and technically. The procedure used and the requirement to have a good understanding of the terms of the special licence and the specific conditions for online lending should help educate people, particularly young people, about the importance of respecting copyright. The Committee has always recommended nurturing a sense of respect for intellectual property as it represents a fundamental part of the ethics of the knowledge economy.

4. **Orphan works**

4.1 Orphan works represent a significant wealth of creativity.

4.2 The Committee believes that the Green Paper raises a number of valid points and puts forward concrete, positive solutions. Lists of orphan works could be published on a regular basis after the completion of thorough research. If no right holders are identified within a given timeframe, the work would not become part of the public domain but be covered by a protection system appropriate for copyright law, in case a right holder emerged at a future date. The choice of licence system used could take its inspiration from the Danish or Hungarian systems; however, a European standard licence would be entirely feasible and, the Committee feels, preferable.

4.3 The EESC believes that there is no need for a specific directive for orphan works. The management of these works does not involve any new exceptions to copyright but rather specific licence management arrangements as part of a system of copyright law. A directive or the addition of a new chapter to the current directive would, the Committee feels, be the appropriate instrument.

4.4 The Commission could publish and regularly update the list of institutions responsible for managing orphan works. This list could be subject to review after an experimental period of five or ten years, to include the publication of a report and statistics.

5. **Exception for persons with a disability**

5.1 The Committee favours a less restrictive approach to the one currently used in several European countries as regards the nature of the disability and difficulties in accessing work since, in addition to the difficulties experienced by people of various disabilities in accessing works, they often have a low income, which represents an unquestionable and socially unacceptable economic obstacle in terms of their access to information, education and culture.

5.2 Involving disabled peoples' associations should assist the process of reformulating exceptions for the various types of disability. They can also help manage special computer terminals and, where necessary, provide staff specifically trained to help disabled people. Such assistance would be financed by private donations and state aid to associations. Associations could, on

similar terms or in cooperation with accredited libraries or museums, negotiate the conditions for the use of works with authors' representatives, ensuring guarantees against piracy; the EESC believes that the exception should also be extended to include databases otherwise there is a risk that access to reference works such as encyclopaedias and dictionaries could be impeded. The "database" directive should be reviewed in the light of these educational and knowledge access needs, and look at the issue of accessibility for disabled people.

- 5.3 The role of associations could be extended to include educating people about the importance of respecting user licenses. In this area also, users must be convinced that respecting copyright is an essential condition for the pursuit of creative activity. Nonetheless, it seems unjust to pass on the cost of the licence and the special terminals to disabled people; an exception is vital for all those types of disability which entail problems with access to works. This responsibility should be entrusted to public institutions which have an obligation to make such works including databases and software, available to disabled people. The legislation for databases should be modified as a result¹².
- 5.4 Europe's principal public libraries and museums could be required to make their collections accessible in a specific format, adapted to the needs of a given disability group, to be paid for from the budget for cultural affairs at regional or national level. This type of policy complies with the obligation to ensure the equality of all citizens and to combat all forms of discrimination.
- 5.5 The exception for teaching and research purposes provided for in the Directive is too restrictive in its application; its scope should be broadened without prejudice to the WTO test by incorporating information about the source and the author into the document, along with details on the limitations on its use and the prohibition of illegal reproduction.
- 5.6 A system of compulsory licences could cover the lending of work online for teaching and research purposes based on a standard agreement between the lending bodies and the approved copyright collection bodies.
- 5.7 It should be possible to apply the exception to both extracts of a work selected by teachers and to entire works: the criterion should be the teaching consideration. This would strengthen legal security without weakening reproduction rights. Strengthened harmonisation under a trans-European educational framework would help avoid situations where an act that is legal in one country is considered as piracy in another.
- 5.8 Distance learning requires that copies (teaching aids) may be used at home, in particular by students but also European citizens resident in third countries.

¹² This should apply to original databases as well as "sui generis" databases (dictionaries, encyclopaedias, etc.).

6. User created content

- 6.1 This issue is becoming increasingly topical, especially in the context of Web 2.0¹³. Copyright or the alternative licence proposed by the original author, may be transformed or developed without such action being considered as piracy.
- 6.2 In the case of initiatives such as participatory encyclopaedias, the simplest approach would be to identify an appropriate type of licence, such as the creative commons or wikipedia licence, with the "original" author acting as moderator prior to any additions or changes, while at the same time maintaining the diversity of ideas.
- 6.3 In this concrete example it is worth noting that the internet does not sit comfortably with copyright.
- 6.4 The fees of authors whose works are distributed on the Internet are less often derived from the payment of direct licence fees than from indirect revenue earned, from advertising, rather than from subscription fees. Even though subscription models are playing an increasingly important role, the internet's "business model" uses innovative solutions for dissemination involving digitisation and digital dissemination. In this context, we are still very much in a transitional phase of identifying new methods of payment¹⁴, the production and dissemination costs of digital works being incomparable with the much higher sales costs of traditional media.
- 6.5 A balance needs to be struck between the new forms of dissemination, new copy technologies, the needs of the knowledge society and the rights of authors/copyright. This equilibrium will not be achieved by the mass application of repressive measures which primarily target an age group that is finding itself increasingly criminalised in the absence of legislation or attempts to find new forms of remuneration for authors. There is an urgent need to expand the current limits given the scale and rapidity of advances in technology.

Brussels, 24 March 2009

The President
of the European Economic and Social Committee

Mario Sepi

13 Web 2.0 is understood to refer to interfaces allowing internet users to interact both with the content of websites and between themselves, making Web 2.0 a community and interactive website.

14 As in the case of the Google initiatives or, more recently, Microsoft.