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European Copyright Law : Quo vadis? The European Commission asks for your opinion

Tatiana Synodinou (University of Cyprus) · Friday, December 13th, 2013

"The first question (territoriality) and the last question (single EU copyright title) could be considered as the alpha and the omega of the questionnaire and they are interlinked in various ways."

A public consultation on the review of EU copyright rules was launched by the European Commission a few days ago . The consultation refers to key issues of copyright law in the digital environment which have been identified in the Communication on Content in the Digital Single Market, such as "*territoriality in the Internal Market, harmonization, limitations and exceptions to copyright in the digital age, fragmentation of the EU copyright market and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform*".

At a time where the young generation, the most dynamic and promising part of copyright users, appears generally to brazenly turn its back to copyright law in its present form, shaping the future of European copyright law is certainly an intricate task. The challenges, the pitfalls and the dilemmas of copyright law in the digital era have been strongly pinpointed and analyzed by academics, judges, lobbies, politicians, activists, authors, intermediaries, consumers. Lawmakers have generally responded to some of these pressing needs and concerns through delicate compromises in the direction of the gradual multidimensional expansion of copyright law.

Today the core of harmonized European copyright law rules consists of a compound legal patchwork that can be found both in legislation (9 EU Directives about the protection of computer programs, rental and lending rights, term of protection, satellite and cable transmission, the protection of databases, copyright in the information society, resale right, enforcement, orphan works) and in the CJUE's case law. At the same time the legislative and jurisprudential evolutions in the national jurisdictions of EU member states act as a precursor or as a negative example (see for example the French cutting off Internet access penalty for repeating downloaders that has officially been replaced by a fine) for future regulations at the European level.

Nevertheless, the shaping of European digital copyright law as far as now could be likened to the fate of Danaides, the Daughters of Danaus who were condemned to spend eternity carrying water in a bathtub without a bottom. Indeed, if one thinks to copyright's enforcement deficiencies and the impuissance of existing rules to keep up with technological challenges and societal concerns and practices, it could be argued that the water-or at least some water- is there but the bottle is still empty.

So, what's next? Could this public consultation have a decisive role for future changes that will better take into account all the conflicting interests and concerns? The question is obviously rhetoric if one considers the complex realities of EU lawmaking. Nevertheless, it is a significant occasion to count the pulse of various stakeholders in respect of burning and fundamental issues of European copyright law, while the answers to this consultation could serve as an authoritative report or as a guide that could prepare an overall discussion about the reform of European copyright law.

The aim of the consultation

The aim of the consultation is undoubtedly ambitious. As it is mentioned in the second paragraph of the document, the main challenge on which the consultation focuses is "*ensuring that the EU copyright regulatory framework stays fit for purpose in the digital environment to support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity"*. Stakeholders are invited to express their views until the 5th of February 2014 on a series of questions that, more or less, correspond to the most tenacious copyright issues in the EU digital market.

The order of the questions in the document follows a logical structure, while logically the center of reference in all sections is the functioning of the single market: rights, limitations and exceptions, specific issues in respect of limitations and exceptions, -namely private copying and fair remuneration-, and the respect (alias the enforcement) of copyright. The questionnaire does not include interrogations or concerns about the implications of non-harmonized fundamental copyright law issues which are traditionally strongly connected to national jurisdictions and sensibilities, such as the moral right, the question of authorship or copyright contracts despite the possible implications of the existing divergences in the single market.

Territoriality and a single EU copyright title

Symbolically, the first question (territoriality) and the last question (single EU copyright title) could be considered as the alpha and the omega of the questionnaire and they are interlinked in various ways. For certain circles, the establishment of a single EU copyright title could be the adequate answer to the problematic question of the territorial fragmentation of the market, while at the same time answers in respect of both issues could be seen as the consecutive stages of an overall copyright reform consisting of short and medium initiatives and a long term solution.

Indeed, while the ideal of a single market of cultural goods presupposes the free circulation and enjoyment of these goods anywhere in Europe,-regardless if they are accessed in tangible form or via services- the territorial nature of copyright law poses significant impediments to the dissemination of copyright-protected content on the Internet. Difficulties might arise when searching to being awarded a multi-territorial or pan-European license (for example due to the lack of harmonization of the rules about copyright authorship and ownership the rights may belong to

different persons in different member states).

Moreover, as it is stated in the document *"there are continued problems with the cross-border provision of, and access to, services. These problems are most obvious to consumers wanting to access services that are made available in Member States other than the one in which they live. Not all online services are available in all Member States and consumers face problems when trying to access such services across borders. In some instances, even if the "same" service is available in all Member States, consumers cannot access the service across borders (they can only access their "national" service, and if they try to access the "same" service in another Member State they are redirected to the one designated for their country of residence"*.

The fortune of copyright territoriality was strongly implicated in the famous CJUE's "Premier League" Case (C-403/08) whose final outcomes are less far reaching than the General Advocate's views . The verdict could be simplistically summarized as following: territoriality (and, therefore, territorial mechanisms of commercialization) is not dead (at least for the moment), although clear anticompetitive restrictive clauses (which are designed to result in restrictions that go beyond what is necessary to achieve the objective of protecting IP) will be deemed to violate EU competition law. Estimations about the impact of this judgment on the on line marketing of cultural goods are diverging.

Even more far from unanimous are the views in respect of the last question, the idea of establishing a unified EU Copyright title. As it is stated in the document, "some see this as the only manner in which a truly Single Market for content protected by copyright can be ensured, while others believe that the same objective can better be achieved by establishing a higher level of harmonization while allowing for a certain degree of flexibility and specificity in Member States' legal systems".

the idea of abandoning national copyright traditions in favor of a EU unified copyright law is rather provocative indeed, especially if the current crisis of the European integration ideal is taken into consideration. Merely posing directly the question seems to detour the preliminary issue of the existence of a legal basis for such a radical reform, an issue that for certain still remains disputed even after the Lisbon Treaty.

And even if the answer to this question is in the affirmative, further more intriguing interrogations arise. If rationalism, humanism and democracy comprise a certain core of common European culture, could the creation of a unified copyright law successfully combine these substantial elements under the current political, economic and social conditions? Which will be the form and the content of such a "title"? Does establishing a "single EU copyright title" mean establishing a European copyright Code? Which will be the legal form and the content of such a Code? Will this Code be a consolidation of the acquis or will it consist of an in depth redesigning or/and reorienting of EU copyright law?

Other questions

Apart from these two fundamental issues, many other technical questions that lie in the heart of EU digital copyright law are posed : the definition of the making available right (what exactly is covered and where the act of making available takes place under the light of the emerging "targeting" and "accessibility" criteria), the need to preserve the diptych of the reproduction right and the right of making available in respect of a single digital transmission (it has often been

denounced as a burdensome legal fiction that does not take into account the reality of digital transmissions and complicates the on licensing of works) and the legal qualification of two of the cornerstones of the function of Internet, namely browsing and linking (more precisely whether a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the right holder and whether viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the right holder).

Linking

Liability for linking to copyright protected content has constantly been one of the most controversial digital copyright law issues both in doctrine and in EU national case law (see, for example, the decision of the District court of the Hague in the case of Buma/Stemra against the operator of radio streaming websites 'Nederland.fm' and 'Op.fm' that ruled that a website that is embedding or linking to radio-streams without a license infringes copyright (2012) and the Spanish "SGAE/Indice Web" case where it was found that providing a link to potentially copyright infringing content that could be downloaded with P2P software does not imply making available the protected work (2011)).

Diverging views on the issue have also been expressed by the Executive Committee of the Association Littéraire at Artistique Internationale (ALAI) (see Report and Opinion on the making available and communication to the public in the internet environment focus on linking techniques on the Internet) and the European Copyright Society in its opinion of the 15th of February 2013 on the Svensson case (C-466/12) , the first of the cases in respect of hyperlinking that has been referred to the CJUE (see also Cases C More Entertainment (C-279/13) and BestWater International (C-348/13)).

Since hyperlinking appears irreversibly as an essential part of the way Internet functions and a trend in social media, it is not probable that the mere placing of hyperlinks without the prior authorization of the right holder will be considered as illegal, but it has to be decided whether this will be affirmed by considering that hyperlinking is not covered by the making available right or whether hyperlinking should be exempted from the application of the making available right thanks to the establishment of a new copyright exception.

The ownership of digital files

Another hot question is this of the ownership of digital files and the possibility of their resale (and par extension of their donation or inheritance) that is linked to the current limitation of the application of the principle of exhaustion to the distribution of tangible copies of works (indeed the answer that has been provided by CUEU's case law in the Oracle vs. UsedSoft decision, Case C-128/11, is limited only to the specific case of software, but what happens with music, films or e-books?).

Regitration and term

The next two questions (registration of works and the appropriate term of copyright protection) have been thoroughly analyzed in doctrine and both form part of a discussion about a deeper and substantial copyright reform. While under current international copyright law norms a system of

registration cannot be made compulsory or constitute a precondition for the protection and exercise of rights, the unquestionable advantages of registration as regards the proof and the facilitation of licensing of copyright could support the idea of promoting optional registration schemes.

The question of the term of protection is more delicate since it touches upon the philosophical justifications of copyright law. Here too, minimalist and maximalist approaches (the "copyright forever" argumentation) have been expressed. While making the term of copyright law longer or perpetual seems nowadays to be at odds with every common sense, the question of a shorter copyright term poses also significant problems since it is obvious that a reduction of copyright protection in the form of the shortening of copyright term cannot apply immediately for existing works.

Copyright exceptions and limitations

The next part of the questionnaire is dedicated to the challenging and fiercely debated issue of copyright exceptions and limitations. Here too, many solutions shall be explored. First, horizontal issues are discussed, such as making all or certain of the copyright exceptions mandatory or how to reach more flexibility via the introduction of an open ended clause in the form or a EU fair use or a fair dealing provision. Surprisingly, an interrelated vital question that is missing is about the implications of the application of the three step test as a general clause of limitation of copyright exceptions or generally about the role and the possible interpretation of the three criteria of the test in national jurisdictions.

The second series of questions is about the application of copyright exceptions and limitations in specific sectors. Here, too, the redesigning of the existing legal framework has to keep up with new challenges and perspectives that have emerged from technological evolution.

Promoting the access to content in libraries and archives implies a more flexible, consistent and harmonized approach in respect of preservation and archiving of works held in their collections but also in the form of harvesting and archiving publicly available web content. E-lending, the remote access to libraries' electronic collections and mass digitization licensing schemes are also vital topics that have not been dealt with by the Information Society Directive.

Educational exceptions shall also be discussed and probably have to be revised in order to take into account the multiple realities of distant learning education and research projects across borders. Since the relevant exceptions of the Information society Directive are defined in abstract terms which permit diverging implementations by the Member States, the promotion of multi -territorial or pan European education and research activities can be seriously compromised by the fragmentation of the relevant national exceptions.

Indeed, complex legal problems might arise from common everyday practices, such as posting to the audience of students of a distant learning class a multimedia work comprising of a list with links to newspaper articles, photographs, videos and of other copyright protected content for the purpose of illustration for teaching. Another intriguing question is what exactly "illustration" means, since both narrow and broad interpretations of the term could be supported.

The legal qualification and the regulation of text and data mining techniques and of user generated content (more precisely whether is opportune to institute a relevant new copyright exception or on the contrary to promote the further development of diversified licensing schemes). Promoting access to content for people with disabilities is another significant question. Here, apart from the

guarantee of the possibility offered by the Marakkesh Treaty to exchange accessible format copies across borders in the EU, it has to be explored whether the existing exception in the Information Society Directive that permitted diverging implementations should be replaced by a new unified European norm that it is clear that goes further than the Marakkesh provisions, for example via the possible extension of the categories of beneficiaries (the Treaty covers visual impaired people excluding other kinds of disabilities) or of the categories of works that can be transformed to accessible formats (the Treaty covers only literary works), while the question of the recognition of the relevant exception as mandatory, in the sense that it cannot be overridden by contractual terms, could be discussed in the broader context of rendering mandatory certain of or all the copyright exceptions.

Fair remuneration and the application of levies for the private copying in the digital environment and more specifically the perspective of imposing levies in services based on cloud computing are also open to discussion. The controversy here too is strong. On the one hand, imposing levies in the cloud is seen as an impediment to the promotion of new services. On the other hand, it could be seen as a natural extension of the existing levy scheme that is consistent with the ideal of technological neutrality in copyright law.

Enforcement

Finally, the tough issue of copyright enforcement is addressed. Here too, apart from the question about the purposefulness of a greater involvement of intermediaries in inhibiting the Lernaean Hydra of online copyright infringements especially when the last have a commercial purpose, the right balance of the protection of copyright with other fundamental rights, such as privacy and protection of personal data has to be further scrutinized and put in more concrete and unified terms, since the sibylline decisions of the CJUE in respect of that issue have certainly paved the way for such considerations, but left as far as now the delicate task of the proper calibration of the conflicting rights on the basis of the principle of proportionality on the diverging discretion of Member States (see the cases Productores de Música de España (Promusicae) v Telefónica de España SAU (C-275/06) and LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH (C-557/07)).

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