privatkopie.net

Aktionsbündnis „Urheberrecht für Bildung und Wissenschaft“

Forum InformatikerInnen für Frieden und gesellschaftliche Verantwortung (FIfF) e.V

Berlin, October 31, 2004

To the
DG Internal Market of the European Commission
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Submission to the Consultation on the review of EU legislation on copyright and related rights[1]

in response to the

Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, Brussels, 19.7.2004[2]

[1] http://europa.eu.int/comm/internal_market/copyright/review/consultation_en.htm

[2] http://europa.eu.int/comm/internal_market/copyright/docs/review/sec-2004-995_en.pdf

Privatkopie.net is a civil society initiative working to protect information user rights like the one to make private copies. Its petition urging the German government to preserve the private copying exception in the digital age has so far received nearly 50.000 signatures.

http://privatkopie.net

Aktionsbündnis „Urheberrecht für Bildung und Wissenschaft“ is is a civil society initiative working to protect information user rights in the fields of science and education. It is a alliance of institutions and persons who signed the "Göttinger Erklärung zum Urheberrecht für Bildung und Wissenschaft vom 5. Juli 2004." These are all major science and academic organisations in Germany, namely Der Wissenschaftsrat (WR), Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung e.V. (FhG), Helmholtz-Gemeinschaft Deutscher Forschungszentren e.V. (HGF), Hochschulrektorenkonferenz (HRK) and Wissenschaftsgemeinschaft Gottfried Wilhelm Leibniz e.V. (WGL) as well as at present 79 science societies, research institutions and organisations, and 1.145 professionals from the science sector.

http://www.urheberrechtsbuendnis.de/

Forum InformatikerInnen für Frieden und gesellschaftliche Verantwortung (FIfF) e.V. is an association of computer scientists who feel responsibility not only for the technical aspects but also for the societal impact of their discipline and want to contribute accordingly.

http://fiff.de

Summary

We urge the Commission ...

- to take a more holistic and forward-looking approach to the review, i.e. to include the Infosoc Directive into its scope, to also test for possible transfer of solutions from earlier Directives into the current ones, and to begin to address rapidly-approaching issues that the current instruments are not suited to dealing with.
- to turn Art. 5 Infosoc Directive into an open list. Not only in light of a possible Digital Rights Directive protecting the interests of users in the information society, more flexibility is needed with respect to newly created or modified limitations and exceptions. While allowing the testing of new exceptions appropriate to the digital realm, established limitations and exceptions should be truly harmonized, i.e. made mandatory.
- to repeal Art. 6(4) par 4 Infosoc Directive.
- to make the quotations exception mandatory and, following the suggestion of Ricketson, to bring it within the scope of Article 6(4) of the Infosoc Directive, and to mandate that the exception must be provided in cases where a work is only available in digital protected formats.
- to create meaningful exceptions allowing for online access to library resources and for online document delivery by public libraries.
- to generalize the back-up exception to all digital works in order to ensure sustained usability.
- to reconsider its all-out support for DRM, and to actively promote the research and development of alternative compensation systems.
- to establish an ongoing review process of the copyright acquis with special emphasis on the impact of DRM and on limitations and exceptions. It should be open to all concerned parties, cover the impact on digital culture as well as on the media economy, and be able to react to rapidly changing conditions in a timely fashion. We furthermore urge the Commission to start harmonizing user rights and permissions throughout Europe.
- to actively promote the research and development of and to facilitate a broad debate on alternative compensation systems.
- to adopt a forward-looking approach to rights and responsibilities in the digital age and start work on a Directive on Digital Rights of Information Users and Citizens in the Information Society immediately.

We welcome the opportunity to comment on the European acquis on copyright and neighbouring rights. We would like to do so from the perspective of citizens in the digital information society who use and create information and knowledge for purposes of education, research, self-fulfillment and participation in culture, arts, sciences and political discourse.

We fully support the submission by EDRI, FIPR, VOSN and other civil society organisations to this consultation.[3] We would like to supplement this Joint Statement by highlighting some additional issues.

The Information Society Directive

One of the main objectives of the review of the „acquis communautaire" on copyright and neighbouring rights is to test the first generation of EU copyright law Directives[4] for inconsistencies with a recent and the most horizontal Directive, namely, the Information Society Directive 2001/29/EC.

How can a directive that has been characterized as „unimportant and possibly invalid" be the standard for measuring others? Bernt Hugenholtz called the Infosoc Directive a „disastrous mistake":

> The intense pressure from the copyright industries and, particularly, from the United States (where the main right holders of the world reside), to finish the job as quickly as possible, has not allowed the Member States and their parliaments, or even the European Parliament, to adequately reflect upon the many questions put before them. Thus, an array of controversial copyright issues was hammered through the European legislative process in less than three years. ... The result of this over-ambitious undertaking has been predictable. The Directive is a badly drafted, compromiseridden, ambiguous piece of legislation.[5]

A much more productive approach has been suggested by Michel Walter in his 2002 Santiago paper that laid the groundwork for the acquis review. „A further harmonisation could start in extending vertically harmonised solutions horizontally. Several directives

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[3] Available at http://www.edri.org/campaigns/copyright

[4] The first generation of EU copyright law consists of five 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. All at: http://europa.eu.int/comm/internal_market/copyright/documents/documents_en.htm#directives

[5] Bernt Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR 11, 2000, p. 501-502, and at http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html.

provide for solutions which could easily be transferred to other comparable fields of copyright and related rights."[6]

Another declared aim is „to make sure that this first generation of EU legislation is still up to speed with today's technology and the realities of the markets."[7] The same is true even of the most current legislation. The speed of change of technology and media use is such that once legislation is enacted it already lags behind reality. The Commission should not view the review as minor repairs in an otherwise finished legal framework[8] but allow for fundamental corrections and shifts in orientation that are able to meet the needs of an informational landscape that is fundamentally changing.

- **We therefore urge the Commission to take a more holistic and forward-looking approach to the review, i.e. to include the Infosoc Directive into its scope, to also test for possible transfer of solutions from earlier Directives into the current ones, and to begin to address rapidly-approaching issues that the current instruments are not suited to dealing with.**

Exceptions

Exhaustive List of Optional Limitations and Exceptions

Exceptions are an essential instrument to re-establish balance when legal, technical or market developments harm the interests of groups other than rights holders. But the exhaustive list of permissible limitations and exceptions of Art. 5 Infosoc Directive is inappropriate in such a highly dynamic area of regulation. As Bernt Hugenholtz has observed: „How can a legislature in his right mind even contemplate an exhaustive list of limitations, many of which are drafted in inflexible, technology-specific language, when the Internet produces new business models and novel uses almost each day?"[9]

By granting unconditional protection to whatever can be claimed to be an „effective technical measure," the Infosoc Directive has ensured rights holders maxium flexibility in modulating their interests in the digital realm. At the same time, it has closed the list of possible exceptions that member states may implement. It thereby severely restricts the flexibilty that legislators need in order to correct unwanted effects on education, science, disabled persons and other information users.

The exhaustive list itself is inconsistent with some exceptions in other Directives. Walter argues that the compulsory mechanical license for musical recordings is a valid

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[6] Michel M. Walter, Updating and Consolidation of the Acquis. The Future of European Copyright, speech at the conference „European Copyright Revisited," Santiago de Compostela, 16-18.06.2002, p. 6, http://europa.eu.int/comm/internal_market/copyright/docs/conference/2002-06-santiago-speech-walter_en.pdf

[7] Announcement of the Review: http://europa.eu.int/comm/internal_market/copyright/review/review_en.htm

[8] The Commission Staff Working Paper contains 23 proposals, most of them not to take action.

[9] Hugenholtz, op.cit.

exemption even though it is not listed in the Infosoc Directive. So are the exemptions in the Satellite- and Cable Directive. „However, the establishing of such systems in other fields than satellite and cable transmission may be reasonable, for instance as regards mechanical rights as just mentioned. It should be made clear, therefore, that such systems are reconcilable with the closed catalogue of exceptions and limitations as provided for in Article 5 Infosoc Directive."[10] In doing so, it should also be made clear that additional exceptions not listed in the catalogue are permissible as well.

Digital copyright law aims at a rapidly moving target. Instead of tying national lawmakers' hands, the European lawmakers should provide a framework that allows for recalibrating the balance of copyright law flexibly and efficiently.

We encourage the Commission to follow Prof. Walter's suggestion: „Of course, one must be aware of the fact that further harmonisation can only be achieved step by step and that sometimes it may be even more advisable to let Member States come up with national solutions and testing them rather than elaborating them pre-maturely on the European level."[11]

There is an inherent tension between the principles of territoriality and subsidiarity on the one hand, and the urge to harmonize the copyright framework for the Internal Market on the other. The strategy of the acquis so far has been to fully harmonize exclusive rights and rights protection technology but to only set a common ceiling for permissible limitations and exceptions. This leads to a fragmented European copyright landscape which creates barriers to cross-border provision of information goods and services, and is harmful to the interests of rights holders and users alike. When a citizen of one EU country moves to another country, the data on her laptop or MP3 player that were legal before might become illegal because e.g. the private copying exception is defined differently in both countries. A document delivery service by public libraries might be permitted to provide its services to beneficiaries of a private copying exception in some member states but not to others. „The only legal security this type of lawmaking creates, is the certainty of another round of lobbying and infighting at the national level... At best, some countries will add one or two exemptions from the list, now bearing the EC's seal of approval. So much for approximation!"[12] The only way to harmonize limitations and exceptions is to make them mandatory.

- **We urge the Commission to turn Art. 5 Infosoc Directive into an open list. Not only in light of a possible Digital Rights Directive protecting the interests of users in the information society, more flexibility is needed with respect to newly created or modified limitations and exceptions. While allowing the testing of new exceptions appropriate to the digital realm, established limitations and exceptions should be truly harmonized, i.e. made mandatory.**

[10] Walter, op.cit, p. 4

[11] Walter, op.cit., p. 8

[12] Hugenholtz, op.cit.

No Online Exception

One of the biggest shortcomings of a Directive that was intended to translate the existing copyright balance into the digital age is that it does not provide for any exception in the online realm. Art. 6(4) par 4 Infosoc Directive that binds Member States to take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation the means of benefiting from that exception or limitation expressly excludes works made available online from this enforcability.

This is in deviation from Art. 10 WCT which does allow for such exceptions within the confines of the three step test.

> Agreed statement concerning Article 10 WCT: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is incomprehensible that all exceptions including those for education, science and disabled persons that member states may make, and in fact in various ways have made, enforceable against DRM on offline media, in the online realm can simply be switched off by rights holders through means of contract and technology.

- **We urge the Commission to repeal Art. 6(4) par 4 Infosoc Directive.**

Quotations Exception

There is an incomprehensible inconsistency over the quotations exception: It is mandatory in the Berne Convention[13] and in WCT[14], but optional in Infosoc Directive which supposedly implements the WCT. All EU members are Berne members as well and therefore already bound to the exception mandate. Why does the Infosoc Directive not reflect this fact?

Assuming the necessary corrections are made to Art. 5(3)d Infosoc Directive and the quotations exception covering all categories of works including audiovisual and multimedia works[15] is made mandatory, it would again clash with the DRM anti-circumvention provisions. DRM could be used to deny users access to the protected works for the purpose of making quotations or to prevent them from making the necessary reproduction or dissemination of the quotation. Sam Ricketson clearly spells out the consequences:

> ... if a work is only available in a digital protected format, with no provision for the making of quotations other than on the terms specified by the right-holder, the effect

[13] Art. 10(1).

[14] Agreed Statements Concerning the WIPO Copyright Treaty, Art. 10 par. 1

[15] The recent draft of the German copyright law expressly extends the scope of the quotations exception to film and multimedia works.

> of this will be to deny the exception under Article 10(1) [Berne Convention] altogether. This will obviously have far-reaching consequences into the future as more and more works become available in digital protected formats only. The result would be that the only exception specifically mandated under the Berne Convention would be effectively neutralized in the digital environment.[16]

Quotations as an essential element of follow-up creations are too important for cultural and scientific production and the political debate necessary in any democracy to be left to the discretion of member states and individual rights holders to permit or not permit.

- **We urge the Commission to make the quotations exception mandatory and, following the suggestion of Ricketson, to bring it within the scope of Article 6(4) of the Infosoc Directive, and to mandate that the exception must be provided in cases where a work is only available in digital protected formats.**

Teaching and Research

The optional library exception of Art. 5(3)n Infosoc Directive allows noncommercial publicly accessible libraries, educational establishments, museums and archives to make works digitally available to their users. While this is a laudable regulation, it is incomprehensible that this exception is tied to „dedicated terminals on the premises“ of named establishments and to the condition that these works are not subject to purchase or licensing terms.

It is an absurd parody of the vision of the information society in which information is available from anywhere at any time, that users have to physically go to a library building to make use of its digital resources. Where the protection of copyrights is concerned, the Commission unconditionally seems to believe in the power of technology. It should consider much simpler conditional access systems for restricting online access to library resources to registered users as a means to protect public interest in a way that is adequate in the digital age. For the same reason, it is incomprehensible that such an exception „should not cover uses made in the context of on-line delivery of protected works or other subject-matter“ (Recital 40 Infosoc Directive).

The second condition is another example of the lack of balance in the Infosoc Directive. By allowing rights holders to contractually evade any exception, it grants them unlimited exclusive rights in the online realm. This condition prevents public libraries from fulfilling their public task of making published works available to their users without prejudice to their ability to pay their market price.

- **We urge the Commission to create meaningful exceptions allowing for online access to library resources and for online document delivery by public libraries.**

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[16] Sam Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, presented at the WIPO SCCR meeting Geneva, June 23 to 27, 2003 (WIPO SCCR/9/7), p. 84, http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf

Back-Up Copy

The Commission Staff Working Paper points to the discrepancy in the way technological measures are protected in the Software Directive and the Infosoc Directive. The Software Directive, while prohibiting the circulation and the possession for commercial purposes of any means the sole intended purpose of which is circumvention, does not provide explicitly for protection against acts of circumvention (Art. 7(1)c). Even though there remains an inherent tension between prohibiting devices and allowing for exceptions, this is a remarkable balance which could have set an example for the Infosoc Directive. Conversely, the Paper discusses the option of introducing for computer programs a provision similar to Article 6(1) of the Information Society Directive. Luckily, it refutes this option, arguing that this would inhibit or prevent the application of the exceptions in the Software Directive.

Not only does the Commission perceive no problem with the lack of anti-circumvention provisions in the software sector, it also sees the clear need for keeping the exceptions available under any circumstances. „In particular, it would have to be made sure that any further protection against circumvention of technological protection measures cannot be used to block decompilation to achieve interoperability.“[17] We fully agree with the Commission and encourage it to apply the same reasoning to the exceptions in the Infosoc Directive.

Rather than applying a regulation from the Infosoc Directive to the Software Directive where it is apparently not needed, it makes more sense to ask whether the time-tested Software regulations should not be made into horizontal rules for the digital age. The boundaries between software programmes and other other categories of works are becoming increasingly fuzzy in products like computer games and multimedia works, and many of the same conditions apply to digital content works as to software programmes. Therefore, also in the Infosoc Directive, acts of reproduction if they are necessary for the use of the digital product by the lawful acquirer in accordance with its intended purpose should require no authorisation by the rights holder.

In particular, the making of a back-up copy by a person having a right to use the digital product is just as much required for digital content as for computer programmes where it is considered to be so important that it may not be prevented by contract (Art. 5(2)). Digital storage devices have a comparably limited life span. To ensure sustained usability of digital products a general back-up exception is needed. Many copyright laypersons intuitively already hold the idea that they have the right to make back-up copies of digital works. The Commission should work to bring legislation in line with this subjective idea derived from actual experiences with digital works.

For software-based content products also other exceptions from the Software Directive should be considered for generalization, like that for error correction (Art. 5(1)), that to observe, study or test the functioning of the program (Art. 5(3)) and that to decompilation (Art. 6).

- **We urge the Commission to generalize the back-up exception to all digital works in order to ensure sustained usability.**

[17] Commission Staff Working Paper, op.cit., p. 9

DRM

Alternatives to DRM are Needed

Eversince the copyright and IT industries pioneered technical copyright protection measures, the Commission has been wholeheartedly supporting this development to the exclusion of any alternatives. This is in stark contrast to the wide-spread conviction among technology experts, including those developing DRM technologies inside large corporations, that DRM is „ineffective“ (Biddle et al. (Microsoft),[18] Haber et al. (Hewlett-Packard),[19] Steve Jobs (Apple)[20]), „stupid“ (Safford, IBM),[21] „futile“[22] and „a non-starter.“[23] While DRM is not only unsuitable to provide solutions for current copyright issues, it structurally endangers privacy, competition,[24] innovation, user choice, long-term preservation, a sustainable culture, and the open infrastructure of PC and Internet on which the wealth of technological and media-cultural innovation of the last 30 years was based.

On the contrary, a growing number of copyright scholars, practitioners and activists see that alternative compensation schemes are clearly the only way forward for the dissemination of content in digital networks and for the development of new and innovative

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[18] Biddle, Peter; Paul England, Marcus Peinado und Bryan Willman (Microsoft Corporation), „The Darknet and the Future of Content Distribution“, 2002 ACM Workshop on Digital Rights Management, November 18, 2002, Washington DC, http://crypto.stanford.edu/DRM2002/darknet5.doc

[19] „We conclude that given the current and foreseeable state of technology the content protection features of DRM are not effective at combating piracy.“ (Haber, Stuart; Bill Horne, Joe Pato, Tomas Sander, Robert Endre Tarjan (Trusted Systems Laboratory, HP Laboratories Cambridge), If Piracy is the Problem, Is DRM the Answer? HPL-2003-110, May 27 th, 2003, http://www.hpl.hp.com/techreports/2003/HPL-2003-110.pdf

[20] „We said [to the record companies]: None of this technology that you're talking about's gonna work. We have Ph.D.'s here, that know the stuff cold, and we don't believe it's possible to protect digital content.“ (Steve Jobs: The Rolling Stone Interview, December 03, 2003, http://www.rollingstone.com/features/featuregen.asp?pid=2529)

[21] „My personal opinion (not speaking for IBM) is that DRM is stupid because it can never be effective and because it takes away existing consumer rights.“ (David Safford, IBM Research, „Clarifying Misinformation on TCPA“, October 2002, http://www.research.ibm.com/gsal/tcpa/tcpa_rebuttal.pdf)

[22] „Digital files cannot be made uncopyable, any more than water can be made not wet.“ (Bruce Schneier, The Futility of Digital Copy Prevention, in: Crypto-Gram Newsletter, May 15, 2001, http://www.schneier.com/crypto-gram-0105.html#3)

[23] „It's baffling to me that the content industries don't look at the experience of the software industry in the 80's, when copy protection on software was widely tried, and just as widely rejected by consumers.“ (Tim O'Reilly interview: Digital Rights Management is a Non-starter, Stage4, 27/07/03, http://stage4.co.uk/full_story.php?newsID=272)

[24] The Commission is well aware of anti-competitive dynamics in the DRM market. In a landmark decision last spring, DG Competition found Microsoft guilty of anti-competitive practices and ordered the company to unbundle the Media Player, Microsoft‘s software for displaying DRM protected audio and video content, from its operating system products. More recently, the European anti-trust regulators ordered an in-depth probe into the planned joint acquisition by Microsoft and Time Warner of ContentGuard, a Xerox spin-off that holds the rights to important DRM technologies.

services. In the „Berlin Declaration on Collectively Managed Online Rights: Compensation without Control,“[25] a number of them spoke out in favour of „a flat-rate for digital works to balance the interests of the various stakeholders and to create innovative markets and foster an equitable and inclusive European Information Society.“

- **We urge the Commission to reconsider its all-out support for DRM, and to actively promote the research and development of alternative compensation systems.**

Until Then, a Close Review of DRM Effects is Required

The European Parliament was well aware of the conflict between DRM and exceptions. It therefore provided that member states shall take appropriate measures to ensure the enforceability of exceptions against DRM in Art. 6(4) Infosoc Directive, but without any guideline as to what these measures might entail. Again, this led to a great diversity of models for implementing this provision and to unfavourable conditions for rights holders, individual and commercial users, and DRM manufacturers. DRM manufacturers, service providers and users, in the extreme case, might have to deploy 25 different versions of the technology in order to comply with different implementations of Art. 6(4). This legal uncertainty needs to be removed.

While the definition of the technology that the anti-circumvention provisions of the Infosoc Directive apply to are extremely unsatisfactory,[26] their biggest shortcoming is the lack of a remedy against abuse of DRM. Where DRM is used to infringe a consumer's rights, to block competition, or where it is applied in non-copyright sectors like printers, cars, or pharmaceuticals it should not retain the anti-circumvention protection of copyright law. We fully agree with the ‘fruit-of-the-poisoned-tree’ clause called for in the EDRI Joint Statement.

Therefore, close and ongoing scrutiny is required as to the impact of DRM on limitations and exceptions, on privacy, competition, innovation, sustainability and on the open infrastructure of the information society. The instruments in the Infosoc Directive to facilitate this kind of review, the tri-annual report by the Commission of Art. 12(1) and the Contact Committee of Art. 12(3), are insufficient, especially if meetings are conducted in a

[25] Berlin Declaration on Collectively Managed Online Rights: Compensation without Control, in response to the call for comments on the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market (COM(2004) 261), Berlin, 21 June 2004, http://europa.eu.int/comm/internal_market/copyright/docs/management/consultation-rights-management/berlindeclaration_en.pdf

[26] Art. 6(3) defines it as any technology that, „in the normal course of its operation, is designed to prevent or restrict“ infringing acts. It allows for DRM to be used in an abnormal course of operation for other puroposes than protecting copyrights, e.g. for protecting works in the public domain, without losing its statutory protection. Art. 6(3) continues with a tautological definition of the „effectiveness“ that does not give any indication when a given DRM is to be deemed „not effective“ and therefore not protected against circumvention.

way as to exclude critical voices from civil society and concerned professional groups from being heard.[27]

- **We urge the Commission to establish an ongoing review process of the copyright acquis with special emphasis on the impact of DRM and on limitations and exceptions. It should be open to all concerned parties, cover the impact on digital culture as well as on the media economy, and be able to react to rapidly changing conditions in a timely fashion. We furthermore urge the Commission to start harmonizing user rights and permissions throughout Europe.**

Alternative Compensation Systems

As restrictive as the provisions regulating the online realm are, they are unsuitable to address the rapidly changing use patterns and, in fact, topology of the Internet. Since the year 2000, peer-to-peer file sharing (P2P) has become the single largest consumer of data on the Internet. 75% of EU broadband subscribers are using P2P every month. The total population on major P2P networks at any given time is 8 million. Contrary to the claims of IFPI, RIAA and other industry groups that the draconian measures against thousands of individuals in the U.S. and in Europe show results, P2P is still on the rise.

Filesharing demonstrates a stark economic reality: shipping bits from A to B has become such a low value service that Internet users can effortlessly provide it themselves without the need for industrial distribution systems. This is a fact of life that should not be fought but utilized. Indeed, the BBC is planning to use peer-to-peer file sharing for the distribution of its programmes.[28]

In the light of these developments, the legal and technical protections measures established so far seem like building a fence around the garden to prevent the neighbour‘s children from stealing apples while an avalanche is approaching that is about to bury the whole premises. Since P2P cannot be prohibited alltogether,[29] file sharing, including sharing of copyright protected works, will continue, with no compensation.

Media-technological innovations that enabled unauthorized uses on a massive scale are not a new phenomenon. As in the case of private copying, the time-tested solution is to permit what cannot be prohibited and impose a levy. The same approach needs to be applied to P2P file sharing. Bennett Lincoff, former Director of Legal Affairs for New Media at ASCAP, concluded the exposition of his version of such an alternative compensation system thus: „The online transmission right, collectively administered, and subject to a statutory

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[27] Commission curbs Civil Society in DRM Hearing, EDRI-gram - Number 2.20, 20 October 2004, http://www.edri.org/edrigram/number2.20/DRM

[28] NewMediaAge, 19 September 2003, http://www.newmediazero.com/nmz/story.asp?id=244087

[29] See, for example, the U.S. Court of Appeals ruling in MGM v. Grokster affirming that distributors of software using the Gnutella and FastTrack P2P technologies are not liable for copyright infringement committed by users of the defendants' software. (Metro-Goldwyn-Mayer v. Grokster, Ninth Circuit, August 19, 2004, http://www.grokster.com/files/MGM_v_Grokster_9th.pdf)

license, is the best model for music rights administration in the digital age; it is a full, fair and feasible solution to the dilemma of online music licensing. If implemented, it will allow an online music marketplace to flourish.“[30]

Such an approach has clear advantages for authors as well as for users. But is it feasable under international law for the European lawmakers to create a new Internet exception?

The WCT certainly permits the creation of new exceptions tailored to the online realm, as the the Agreed Statement clearly states:

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

Also the Berne Convention does not prevent the Commission from pursuing this path, as one of the leading scholars on international copyright law, Sam Ricketson concludes: „... clearly the three-step test under Article 9(2) [Berne Convention] will apply and will permit the extension of existing exceptions into the digital environment and/or the creation of new exceptions that apply in the digital environment alone. The same considerations clearly apply in the case of the new WCT rights, in particular the right of communication to the public.”[31]

- **We urge the Commission to actively promote the research and development of and to facilitate a broad debate on alternative compensation systems.**

User‘s Rights

„The Commission has made clear that their [copyright and neighbouring rights] protection ensures the maintenance and development of creativity not only in the interest of authors and of cultural industries, but also in the interest of consumers and the society as a whole.”[32] After exclusive rights have been harmonized at a high level of protection, a similarily high level of protection of user rights is therefore needed as well in order to rectify the apparent imbalance.

The Commission therefore should now shift its focus to consumer and user rights, and complement the copyright acquis with a Digital Rights Directive. It should facilitate a broad, inclusive debate on the needs and requirements of education and science, of persons with disabilities and other special informational needs, of personal and collective participation and

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[30] Lincoff, Bennett, A Full, Fair And Feasible Solution To The Dilemma of Online Music Licensing, New York, New York, November 22, 2002, http://www.quicktopic.com/boing/D/uhAMNwVb8yfkc.html.

[31] Ricketson, op.cit, p. 79

[32] Walter, op.cit., p. 8, referring to Recital 10 of the Term Directive

self-fulfillment in culture, arts, and civil engagement, and of the unique „commons-based peer-production“[33] brought forth by the Internet. It should strive for a protection of creativity rather than the protection of its products.

It should also introduce relevant aspects of protection of consumer rights, privacy, freedom of speech and competition into the regulatory framework of the digital copyright environment. Consumer protection law, designed for qualities of tangible goods, could inspire comparable provisions for intangible goods. Many provision of the Directive concerning unfair business-to-consumer commercial practices (COD/2003/0134) already imply unfair contracts concerning copyright protected works. It should also include mechanisms for redress against abuses of DRM systems enforcing such contracts.

The World Intellectual Property Organization (WIPO) has set the precedent when at its General Assembly in October 2004 it adopted a decision to examine an initiative for a development agenda which includes a Treaty on Access to Information and Technology.[34] The European Commission should follow suit and not only further this process at WIPO but also start exploring ways towards a digital Europe more equitable to all.

- **We urge the Commission to adopt a forward-looking approach to rights and responsibilities in the digital age and start work on a Directive on Digital Rights of Information Users and Citizens in the Information Society immediately.**

[33] Yochai Benkler‘s term for the mode in which free software like GNU/Linux and free content like Wikipedia is created. (Yochai Benkler, Coase's Penguin, or Linux and the Nature of the Firm, 112 Yale Law Journal 369 (2002), http://www.benkler.org/CoasesPenguin.html)

[34] WIPO Press Release 396, Geneva, October 4, 2004, http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_396.html