April response to the

Public Consultation on the review of the EU copyright rules

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Introduction

The consultation on the review of the EU copyright rules launched by the European Commission is an opportunity for April to call for a revised approach of copyright by the Commission.

The current repressive approach, which considers that restrictions of individual rights are the norm in the field of copyright, cannot create a relevant regulatory framework. The lack of even an acknowledgement to the issues posed by digital rights management (DRM[1]) tools, the absence of any question relating to interoperability for users and their issues with the lack of interoperability, the lack of questioning whether levies are needed, are a few of the issues that plague the consultation.

April presents here its answer, and is always putting its expertise at the disposal of the Commission. We however deeply regret that alternatives, new ways of approaching copyright and creation, are not even treated here. April has been working on EU regulations for over 10 years, including a participation in the EUCD.INFO initiative in 2002, whose mission was to inform about the social and economic negative consequences of the European Union Copyright Directive. April regrets that the Commission's stance has not changed, even though current practices and user habits have shown that the current approach is no longer relevant. It is time for a complete revision of how copyright is treated, including revising the false hypotheses which are currently slanting the copyright approach of the Commission.

About April

A Pioneer of Free Software in France since 1996, April is a major player in the democratisation of Free Software and open standards, and in their spread to the general public, professionals and institutions of the French-speaking world. In the digital era that is ours, it also aims to inform the public on the dangers of an exclusive appropriation of information and knowledge by private interests.

The organisation is a non-profit and it has over 3,600 members, who use or produce Free Software.

1 Digital Rights Management" (abbreviated "DRM") refers to technical mechanisms designed to impose restrictions on computer users – a more accurate term to describe them could be Digital Restrictions Management or digital handcuffs.

Answers to the consultation

II. Rights and the functioning of the Single Market

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

NO

The ability to hyperlink is a fundamental basis of how the Internet works. Most people do it every day, without even thinking about it (for instance by making a link on their blog, or by sharing a link via micro-blogging). In other words, a hyperlink is basically giving directions, pointing to available resources. It is a reference, and a reference is not, and should not be, copyrightable. The rightholders already have full control: they choose whether to make some works available on the Internet or not. Once it is online, a hyperlink is equivalent to make a reference or a footnote.

12. Should the 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 rightholder?

NO

The temporary copy is a technical requirement for viewing pages. As said before, the rightholder have full control to publish a content on the Internet or not. Imposing a control on the access to something that has already been made available is a serious threat to the right to read and share information.

13. [In particular if you are an end user/consumer:] Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?

YES

The main issue we have encountered is with Digital Right Management (DRM). Their existence prevent users from using digital files that they have purchased, let alone resell them. Similarly, it prevents users from choosing which software to use, and prevent cross-platform reselling.

This type of restriction does not apply in the physical world: everyone can read a book wherever they want, and a book can be resold by its successive owners without any limitation. On the contrary, DRMs are digital handcuffs that prevent consumers from being able to do some or all of those things. Basically, DRMed works are not fully owned by the consumer, even though he/she paid for it: the consumer cannot do what he/she wants with the work, they just have a limited right to use the works as the rightholder sees fit.

14. [In particular if you are a right holder or a service provider:] What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.

A consumer having purchased (and not rented) works, whether digital of physical, should have the right to do whatever they want with it – including reselling it.

There should not be any specific framework on that issue, unless the Commission considers that selling copyrighted works is merely providing a license to use. If this is the case, consumers should be clearly informed that they do not own a copy of the work in question, but a limited right to use it.

20. Are the current terms of copyright protection still appropriate in the digital environment?

NO

They should be shorter.

The non-stop extension of the terms of copyright prohibits re-making old works, as well as improving them or re-using them freely for new works. It creates an undue, state-sanctioned monopoly where the rise into public domain would contribute to knowledge-sharing and access to those works.

Moreover, the ongoing extension of the terms of copyright causes many issues in the Software sector : with restrictions applicable for 70 years after the death of the author, in the last 30 years no proprietary software is open to the re-use and re-making. This is creating monopolies, without any benefits for the general public and/or society.

However, the problem goes beyond the directive: the Berne convention is outdated and needs also to be revised, in order to take into account the changes in production, diffusion and use of works.

III. Limitations and exceptions in the Single Market

21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?

YES

A first issue is that the lack of clarity on those limitations and exceptions is confusing for EU consumers. For instance, on the circumvention of DRMs, April had to go in front of the French Conseil d'Etat to make sure that consumers actually do have such rights. Another example would be the optionality of a fair use exception, including for teachers: the fact that it was not transposed in France is causing a lot of issues for teachers, who are often not able to use works or sometimes use them illegally.

Moreover, it is problematic in itself that consumers' rights are considered to be "exceptions" and not the rule. The EU copyright directive needs to be rebalanced in favor of consumers, with their rights clearly stated and not narrowly restricted to optional "exceptions".

22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

YES

Consumers rights need to be reaffirmed, clearly stated in the directive, and enforced in all member states.

Currently, only one guarantee for consumer rights is mandatory (temporary acts of reproduction) while all other are optional and much of the freedom-restricting measures are considered mandatory.

This need a complete do-over: consumers rights should not be called exceptions; any limitation to individual rights should be clearly justified, their scope clearly defined and limited. Such limitations to individual rights need to become the so-called "exceptions" rather than the rules in any future directive.

23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

YES

First of all, none of the current "exceptions" guaranteeing consumers' rights should be removed, as they are already too weak. On the contrary, they all need to be made mandatory.

Moreover, a guarantee regarding consumers' rights should be applied: consumers should have the right to expect that the works they buy are DRM-free and interoperable.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

YES

Consumers' rights need to be the rule, not the exception.

As a consequence, they should not be restricted by the EU frameworks.

On the contrary, it should be restrictions to consumers' rights and freedoms that are narrowly defined and limited by the EU framework.

25. If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

The approach needs to be reviewed: consumers' freedom should be the norm, and limitations to their freedoms the exceptions. With such principles put into place, it would mean that the situation would be clearer, with less need for periodic changes in legislation. This would provide more certainty for consumers, more unification on the internal market and less issues related to the lack of flexibility.

Moreover, a periodic revision of the directive does not seem realistic when one takes into account the time taken for the current revision.

26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

YES

Although it might not be the more significant issue here, territoriality constitutes a problem for consumers as it adds uncertainties on what is authorised and what is not.

27. In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of "fair compensation" be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)

The question is problematic in itself, as it considers compensation be a given.

F. Teaching

42. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject-matter for illustration for teaching, including across borders? (b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used for illustration for teaching, including across borders?

YES

Teachers require two types of activities: searching for illustrative resources and sharing works. In both cases, copyright as it is currently enforced prevents the use of some resources. For instance, when searching for

illustrative resources, teachers need to both search for such resources and for their authors, then contact them and ask them for the right to use the resource. In the everyday life of a teacher, this is a real problem as it is very costly in time. Moreover, it causes issues when the teacher want to share his/her works: even though the teacher has the right to use the works, he/she might not have to right to share its lesson plan with other teachers.

The lack of educative contents placed under a free license and the lack of a fair use doctrine for teachers effectively prevent them from using works in their teaching.

In sharing the works, another issue is the formats used: the lack of open standards in education structures and in school's IT equipment choices lead teachers to being unable to exchange information, or require them to buy specific software to be able to share their works.

43. If there are problems, how would they best be solved?

A fair-use mechanism for teaching materials should be implemented, so that teachers can use various works with their students without too many hindrances. Paternity of the works should of course always be recognized, but allowances need to be made to allow teachers to use resources during their classes.

Similarly, mandating the use of open standards in education and education material would significantly help teachers to share their works.

45. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under what conditions?

The main element would be the establishment of a fair-use doctrine that allow teacher to use works for their classes without having to ask for permission from the right holder.

G. Research

47. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject matter in the context of research projects/activities, including across borders? (b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used in the context of research projects/activities, including across borders?

YES

As related by April members, many researchers give up on reading specific articles because they are not publicly available or the access is not provided by their university. And when the article is crucial and absolutely needed, many researchers, after wasting time trying to find it online, need to make a formal request at a university library,

spend time filling out forms, and then wait for the articles to arrive. As a consequence, researchers need to stop their research as long as they cannot access the articles in question, and resume it later on. It leads to huge losses in productivity.

This example is confirmed by UNESCO in its report (http://www.unesco.org/new/en/communication-and-information/portals-and-platforms/goap/) Policy guidelines for the development and promotion of open access (2013). See for instance in Section 3 : "*Many studies have shown that this is so even in wealthy research-intensive countries. The Research Information Network (RIN) in the UK, concluded in a meta-report that brought together the findings from five RIN-sponsored studies carried out on discovery and access51, that 'the key finding is that access is still a major concern for researchers.*"

48. If there are problems, how would they best be solved?

Research means that researchers need to compare their results to those of their colleagues. However, data are often unavailable, and when they are, it is difficult to reuse. Indeed, releasing data represents a significant work which is not considered in the criteria in researchers evaluations. This represents a significant obstacle to make progress in open data.

About articles, it is also well-known that Universities are facing rising costs to obtain access to the main publishers. Thus, collaborations across Universities and countries are necessary to publicly release funded research: research needs to be made available under a free/libre license, so that is can be studied and re-used by other researchers.

49. What mechanisms exist in the Member States to facilitate the use of content for research purposes? How successful are they?

Universities or countries settled public websites in which authors can archive their work. For instance, in France, we can cite HAL (http://hal.archives-ouvertes.fr/) also promoted by universities (e.g. http://hal.upmc.fr/) or institutes (e.g. http://hal.inria.fr/). However, these repositories do not eliminate the issues around scientific publications. Indeed, to appear in these repositories, the journal policy (often difficult to understand for non-lawyers) must comply with such practices and it also requires an additional action from the authors. Thus, only a small fraction of papers are available in this green open access way.

About the gold open access, consisting in paying for a publication under a free/libre license, the cost could not be endorsed by researchers themselves because no budget is dedicated.

For instance, Lund University promotes the publication in open access journals (http://www.lub.lu.se/en/publish/open-access/freely-accessible-journals/funding-for-article-processing-costs.html) by providing funds to researchers.

Such initiatives must be generalized in all European Universities.

H. Disabilities

50. (a) [In particular if you are a person with a disability or an organisation representing persons with disabilities:] Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception? (b) [In particular if you are an organisation providing services for persons with disabilities:] Have you experienced problems when distributing/communicating works published in special formats across the EU? (c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?

YES

Persons with a disability encounter many issues when trying to access copyrighted works.

As said by the Commission in its Communication on Copyright in the Knowledge Economy : "*Persons with disabilities continue to experience obstacles in accessing information or knowledge products. In particular, visually impaired people are pushing to counter their "book famine" - only 5% of European publications are available in accessible formats, a situation compounded by restrictions on cross-border distribution, even between countries sharing a language.*" (source: http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf)

The lack of accessible formats is compounded by the presence of DRMs. By technically restricting their use (for instance by prohibiting copying), DRMs effectively prevent persons with disability from converting works to an accessible format.

Finally, the exception present in the current directive suffers from being optional and vague in its formulation. The lack of clear regulation ensuring that people with disability can access works is preventing them from participating in the cultural life on a daily basis. Such an "exception" needs to become compulsory, and as said before, such individuals rights should not be narrowly defined as "exceptions" but rather as the rule in any future directive.

51. If there are problems, what could be done to improve accessibility?

On the "book famine" issue, an immediate step that needs to be taken by the European Union is the ratification of the Marrakech Treaty for Blind, which provides significant improvements for blind people, including the recognition of their right to participate in the cultural life of the community. Other disabilities must also be included in exceptions to copyright, and these must be made mandatory.

Regarding DRMs, a reform of the EUCD Directive is sorely needed, in order to ensure that existing DRMs can be circumvented, in order to allow for such legitimate uses. Moreover, the question of the legality and relevance of DRMs needs to be posed.

V. Private copying and reprography

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions in the digital environment?

YES

The copyright exception of private copying is far from harmonised, creates legal uncertainties for individual use and barriers to innovation.

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?

NO

The question is problematic, as it is formulated in a way that implies that the fact that users make private copies is undoubtedly harmful to rightholders. On the contrary, exceptions such as private copying were created with the expectation that they do not interfere with the normal exploitation of the works – hence not creating any harm to rightholders.

Moreover, the consumer paid for licenses (when licenses costs are applicable) in order to have access to the work. The act of copying is often needed for private use of the works that where purchased (whether copying it on a portable music player, or copying it from one hard drive to the next). Such actions should not imply that the consumer has to pay to pay again.

66. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?

Once again, the question is problematic.

Levies have been put into place in order to compensate an alleged financial loss for authors and creators in the exploitation of works. This loss have not been proven so far. Before putting any extra tax on upcoming technologies and innovation, the first question to ask is whether levies are justified, whether for online services or not.

Moreover, the issue is not only between "new business models" and "rightholders'" revenue: a key actor is missing here is the consumer, who is the one paying for the levies.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?

YES

If such levies were to be put into place, transparency must be at the forefront – both on the amount paid by consumers and on the distribution of the money collected by the levy, including – but not limited to – how much money is being used by collecting agencies and how much money goes to the creators and authors.

69. What percentage of products subject to a levy is sold to persons other than natural persons for purposes clearly unrelated to private copying? Do any of those transactions result in undue payments? Please explain in detail the example you provide (type of products, type of transaction, stakeholders, etc.).

It is surprising that the European Commission does not have such an information and would rely on stakeholders testimonies.

Moreover, the question is problematic, as it excludes natural persons, who are paying a levy even when their purposes are clearly unrelated to private copying. Memory cards for cameras, hard drives used for operating systems, ... are still subjected to levies even though they are clearly not used for private copying.

In France, the collecting agency for such levies has been under much public and legal scrutiny for forcing companies to due undue payments. (For more information, see for instance : http://www.pcinpact.com/news/86227-copie-privee-copie-france-revoit-discretement-sa-copie.htm.) It is currently close to impossible for a small organisation (a non-profit for instance) to avoid paying the levy even though their work is clearly unrelated to private copying. To take our example as the association April, our organisation ends up paying a levy, even though the hard drives we are buying are for our servers, which do not have any purpose related to private copying.

70. Where such undue payments arise, what percentage of trade do they affect? To what extent could a priori exemptions and/or ex post reimbursement schemes existing in some Member States help to remedy the situation?

The question is problematic as it infers that it is an issue only to the extend that it affects trade.

Moreover, it is problematic that the Commission do not have independent figures on the issue by rather rely on stakeholders testimonies.

A priori exemptions and/or ex post reimbursement schemes are not answers to a problem that starts with the idea of levies itself.

71. If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?

There are many problems with the current levy system: it is based under the assumption that private copying

created a loss that need to be compensated by a tax, it does not take under consideration the fact that consumers pay for such a tax even when their purposes are clearly unrelated, and the system has been put into place without any real answer on how to compensate those, both companies and individuals, who pay for a tax they should not have to pay for.

As a consequence, the system need to be redone and the legitimacy of levies be put into question and studied.

VI. Respect for rights

75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?

NO

Once again, the question is problematic : a commercial purpose is not clearly defined here. It is not possible to answer a question without have the terms clear, especially the "commercial purpose" which is not clearly defined.

76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

First of all, the question is problematic: it implies that intermediaries should be involved in such issues. Indeed, forcing intermediaries such as ISP to monitor copyright infringement is dangerous for privacy and for net neutrality.

On the contrary, intermediaries should only be expected to provide the services they are offering, such as providing Internet access. Moreover, many examples show that when intermediaries are expected to block copyright infringement, over-blocking is a frequent issue, as well as the use of such procedures for intimidation purposes.

77. Does the current civil enforcement framework ensure that the right balance is achieved between the right to have one's copyright respected and other rights such as the protection of private life and protection of personal data?

NO

The way the questions are phrased show that there is no balance between the individual's rights and copyright. Protection of private life and protection of personal data, which are stated in the question, are crucial rights, but

they are not the only rights attacked by the current enforcement framework. For instance, freedom of expression, the right to communicate are also impacted by the imbalance in favor of copyright, yet they are not even mentioned in the question.

VIII. Other issues

80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

Many issues are not addressed in the consultation:

DRMs

One of the most important issues regarding copyright is not mentioned: Digital Rights Management (or DRM).

DRMs' only functionality is to control access to digital works and to restrict their use. Moreover, they prevent interoperability: DRMs are usually tied to the use of one (or few) software, prohibiting users to choose the program with which they want to enjoy the works they have acquired, and usually demanding proprietary programs, hence locking out free software users.

Moreover, the circumvention of DRMs is prohibited by law, with some narrow exception. As a consequence, consumers who unknowingly bought DRMed works are often unable to read them, and could be breaking the law by even trying to read them.

Despite all those problems, the issue of DRMs, which are an important part of the copyright directive, is not even mentioned in the public consultation. Even though DRMs are one of the major issues for consumers, and are even recognized to be inefficient and even detrimental to innovation, the Commission does not take it into account.

Reforming copyright in Europe need to start with DRM and their abolition: they are inefficient in the goals they are purported to have, as those technical measures need to be protected by law in order not to be bypassed; they do not benefit consumers in any way, as their only aim is to restrict functionalities; they restrict competition, by forcing consumers to have specific software (usually the dominant and/or monopolistic ones) to be able to enjoy some of the works they have legally acquired; they limit knowledge sharing and archiving, as they lock cultural works in such a way that they might not be readable in the future.

Interoperability and reverse engineering

Similarly, interoperability issues are not tackled in this consultation. The only mention of interoperability is related to identifiers, never in the context of interoperability for individual users. This is problematic, as the lack of interoperability is one of the major issues encountered by users when using copyrighted works. Whether because of proprietary formats or because of DRMs, many recent works are only proposed to consumers in formats that do not

allow any interoperability. This is obviously an issue for individuals, who cannot enjoy the works they have legally acquired; but it is also causing issues in competition: by creating vendor lock-in, its prevents consumers from choosing other, more innovative solutions.

This issue is made even stronger by the restrictions put on reverse engineering, which is currently only a narrowly-defined exception of the European Union Computer Programs Directive. Reverse-engineering is the one of the only way left to ensure some interoperability for users. With the increase in vendor lock-in for DRMed, copyrighted works, users often find themselves unable to enjoy works they have legally acquired, because their software is not the one requested by the rightholders. Worse still, different works might require different software, or even different software, even though it is the same type of works. It is the case for instance with ebooks, where consumers can be locked in a given platform and cannot buy or exchange ebooks from another, even though the works are essentially the same. As a consequence, a right to interoperability needs to be considered, to ensure availability, competition and reduce technological lock-in.

Abuse of personal data

No mention is made in the consultation of the issue regarding the release of personal data of individual users to private companies.

Neutrality of technical intermediaries

Encouraging intermediaries to take "voluntary measures" against alleged online infringement causes serious issues to fundamental rights, which are not mentioned anywhere in the consultation. Allowing intermediaries to become a private police, by tracking users and taking down content without any court order poses serious threats to due process and presumption of innocence.

Moreover, the experience of the Digital Millennium Copyright Act (DMCA) in the United Stats shows that such private police measures are often used to intimidate and take down content without any legal basis.

Databases

Another issue is the specific rights granted to databases by the 96/9/EC Directive, which April regrets is not taken into consideration by the current consultation. Indeed, the Sui Generis right of the database creator, which can prohibit the re-use of information contained in a database even when this information is public domain, recreate a monopoly and a limitation to the access to information.

Free licenses

Finally, as a last mention, April regrets that the Commission seems to consider copyright to be only consisting of proprietary licenses, without taking into account free/libre licenses, although those are developing in use. Indeed, the undertone in the consultation is that all authors and copyright holders demand to be paid for the use of their works by a license system.

Conclusion

As a conclusion, April is advocating for a new approach for the Commission work, which it is currently based on a willingness to maintain outdated economic models based on controlling digital resources and private use. Deciding on a new directive on the same basis seems reminiscent of lemmings rushing to the sea. Let's promote the creative uses of the Internet, innovation, and the development of new economic models respectful of users, as well a fundamental rights instead.