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Brussels, 1st June 2007

CMBA comments to the study commissioned by the European Commission¹ on the “recasting of copyright and related rights for the knowledge economy”

The Creative and Media Business Alliance (CMBA) is an informal grouping gathering some of Europe's top media and creative businesses and industry associations. It was launched in November 2004 to give the sector a strong and united voice at the level of the European Union. The CMBA notably calls upon the European Commission, the European Parliament and the 27 EU Member States to focus on the creative and media businesses in their joint efforts to foster innovation, growth and employment in the Information Society. The sectors represented by the CMBA are more than a mere driver for technology development or an "added value" to the Lisbon Agenda for European competitiveness. They are the true value of the Information Society.

(For more info see: <http://www.cmba-alliance.eu/about.htm>)

Introduction

The CMBA wishes to provide comments to the study on the “recasting of copyright and related rights for the knowledge economy” published earlier this year. We have a particular interest in this issue because the copyright and related right regime is the very cornerstone of our businesses. Copyright is the economic basis for the investment required to create new works since it provides the means for creators and investors to be rewarded for their efforts and make a return on their investment. Furthermore, proper implementation and enforcement of the copyright “acquis communautaire” is absolutely necessary to ensure a well functioning legal system.

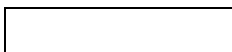
Creative industries based on the value of intangible services and rights are today widely acknowledged as the key to future economic growth and employment. This is a fast-growing, dynamic sector, one of the most successful globally, providing millions of jobs and bringing important benefits in particular to the EU economy. A recent study on “The Economy of Culture in Europe” prepared for the Commission demonstrated that the cultural and creative sector had a global turnover of more than € 654 billion in 2003, which represented a contribution of 2.6% of EU GDP. By providing a continuing incentive to invest in content and ensuring that it is not considered as a mere commodity, the EU is achieving one of its conditions to fulfil the goals of the Lisbon Agenda. Moreover, the creative, media and information sector plays an essential role in contributing to cultural diversity, disseminating content all across Europe.

On a general note the CMBA members find that the study does not sufficiently take into account the interests of creative industries. It appears to be one-sided on a number of issues and it fails to provide a balanced argumentation. This is

¹ Call for tender MARKT/2005/98/D, Study on the recasting of the copyright for the knowledge economy, Notice of contract 2005/S131-129165 of 09.07.2005



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for example the case in relation to parts of chapter 6 on consumer awareness and acceptance of copyright. The study seems to consider that lack of consumer acceptance of copyright, e.g. in the context of P2P file sharing, is likely to be due to “bad bargains” on the part of the commercial content providers, e.g. with regard to prices and restrictive use conditions (hereunder portability to other devices). The study suggests in addition that the EU institutions have limited options for helping compliance, that no more initiatives aimed at raising copyright awareness are called for and that the “acceptance issue” should be resolved by “consistently seeking input from stakeholders that represent consumers in the policy making process” (executive summary, p.VIII). The CMBA members continuously strive to create attractive new business models, which respond to consumer demand, and remain open to a continuing dialogue with users and consumers. The study also contains a statement indicating that recording producers often just “push a button on a recording device” (executive summary re extending the term of protection, p. IV). This caricature of the recording industry bears no resemblance to reality and shows an alarming lack of knowledge of the creative process involved in making sound recordings. The CMBA members regret the study’s lack of a balanced approach, which seems to indicate an absence of understanding of the reality of creative businesses.

Specific comments

Due to the scope of the study and the fact that, in part, it refers to some particular industries, we have selected some issues of general interest to CMBA members, which we will focus on below.

1. Harmonisation issues

a) Exceptions

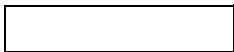
A highly controversial point in the study is the regime of exceptions and limitations at European level. Several purported inconsistencies are identified in the study concluding that the European legislator should consider declaring a *small number of strictly worded limitations mandatory for all Member States. With respect to such mandatory limitations, it would be advisable to declare any non-negotiated contractual agreement to the contrary null and void. In addition, a non-exhaustive list of limitations would allow Member States to adopt ad hoc solutions in answer to pressing situations (page 75).*

CMBA members object to this recommendation. The reason for the current list of optional limitations in the 2001/29 Directive is the result of long negotiations that proved difficult and there is currently no evidence showing that the result of a new debate to agree a shorter list of mandatory limitations would be any easier now. Experience has shown that the national implementation of limitations is intrinsically linked to national and cultural traditions.

The rationale for suggesting a small number of mandatory limitations seems to be i.e. that the current exhaustive voluntary list creates a “mosaic of different limitations across the Member” (should probably read “Member States”).



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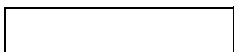
It therefore does not seem consistent with the aim of simplifying and harmonizing to combine a small number of mandatory limitations with a non-exhaustive list of limitations, since this would lead to an even more diverse and colourful mosaic. The CMBA-members believe that a sufficiently balanced and harmonized approach has been achieved with the current Copyright Directive and that there is no need to change this at present.

In regards to the contractual overridability of limitations, the provisions in the 2001/29 Directive that confirm the importance of the development of new ways of providing content to consumers are essential for CMBA members. These provide an important incentive to invest in new business models and develop contractual practices on the basis of the principle of freedom of contract. The creative industries can provide nowadays, by way of contractual solutions, the innovative content needed to meet consumer demand in the digital environment. Recital 30, Article 9 (the Directive shall be without prejudice to the law of the contract), Recital 45 (the exceptions will not prevent the definition of contractual agreements) and Article 6(4)(4) (provisions on accommodation of exceptions do not apply in case works are made available to the public under contract in such a way that members of the public may access them from a place and time individually chosen by them) are key provisions that must remain in place.

While the online environment provides an exciting opportunity to develop new business models, it should be kept in mind that it also allows for the creation and/or illegal mass dissemination of clones of protected works and other subject-matter (leading to massive losses for right holders). The Directive has provided an adequate framework to allow businesses to develop new modes of distribution including for example video on-demand (which is on-demand content transmission for limited viewing period). Such models allow consumers convenient access to new content.

The study recommends that contractual boundaries be set to avoid abuses. On the contrary, the CMBA members are convinced that competition law and consumer protection law are perfectly well suited to meet the needs of users in the digital environment while providing the flexibility for right holders to fit their offers to the needs of users and respecting the fundamental principle of freedom of contract.

Furthermore, the three-step test, which is the international standard for defining the scope and limitations, is also subject to analysis in the study. The conclusions in the study indicate that the Commission should clarify that the test must be seen *not only as a guideline for the legislator but also as a rule of interpretation for the courts* (page 75). CMBA members agree with this suggestion. We note that this is already the case. Most Member States have transposed the test into national law and in others, where it is not in national law, the courts have already applied the test.



b) A Copyright Community Code

Territoriality, due to different cultural and legal traditions, is the basis of the intellectual property system in Europe. By licensing by territory, creative industries tailor their content for the benefit of end users.

The territorial nature of copyright is criticised extensively in the study. The authors of the paper raise the question whether the EU legislation has aimed at the wrong target by basing its harmonization agenda on disparities in national laws, instead of abolishing territoriality. The study suggests that a copyright Community code is the/a long-term solution. In our view, this is at present not a realistic approach since it would be highly unlikely that such an instrument could take into account the different national, cultural legal traditions from the Member States and as result it is not a politically feasible goal. As it has been recognised in the study, the continental approach of “droit d’auteur” and the copyright approach are just too far from each other in many respects and it would not be possible to combine them in a common copyright text. However, on the assumption that online platforms are going to be an important way for the creative industries to reach audiences and viewers in the next years, unified European copyright law may be a long term aspiration but it would need thorough consideration. Another alternative mentioned in the study is applying the country of origin rule, however this is in no way a viable solution for several reasons. One of the consequences of applying the country of origin rule is that countries offering a low level of protection or enforcement would become piracy havens at the expense of rights holders (as it is recognised in the study too). We must also take into account the principle of National Treatment (Bern Convention) establishing that works originating in one of the contracting States must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals. Finally, territorial distribution plays a crucial role in the financing of the production of European films

Moreover, it was already a great effort for all parties involved to arrive at an acceptable solution during the negotiations of the 2001/29 Directive on the information society and it has been an extremely arduous task to implement it at national level. Furthermore, the last country to implement, France, has only done so a few months ago for which reason it is still too early to know whether it will have the desired effects in the knowledge economy. Some vertical Directives like the rental and lending Directive from 1992 have not even been implemented in all Member States yet and it is therefore essential that the Commission continues to ensure that Member States fully and correctly implement the acquis.

The study compares the EU with the US (page 218) stressing that due to the territorial system in the EU, Europeans are at a competitive disadvantage. We would argue that to achieve a unitary copyright like in the US system by pre-empting national “local” laws is not realistic, particularly as two opposed copyright concepts have developed in Europe, the continental “droit d’auteur” system and the Anglo-Saxon “copyright” system.



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For all the above reasons, we do not see a Community copyright unitary code as a pragmatic alternative. In our view a necessary step, even beyond the revision of the acquis, is finally the ratification of the WIPO Treaties. These have been adopted in 1996 and the EU is lagging behind in the implementation. We urge the Commission to find a way to ratify these International Treaties as soon as possible and if not, at least to permit those Member States who have not already ratified, to do so.

Finally, as mentioned, the implementation process has only just been finished in some countries and it is therefore too early to say whether the Directive has had or will – in the future – have the desired effects. Any analysis carried out at this stage would to a large extent be based on uncertain predictions. Furthermore, it should be borne in mind that a number of other factors, not related to the Directive may inhibit or slow down the process of achieving the aim, i.e. to encourage online business models. An important inhibitor to the emergence of a flourishing market in legitimate services is the existence of multiple illegal services where content can be downloaded for free.

2. Consumer awareness and acceptance of copyright

The CMBA members do not consider the chapter concerning consumer awareness and acceptance of copyright as balanced since it is one-sided, not taking the views of the industry into account. It is in the interest of right holders to develop consumer friendly business models that are adapted to consumer needs. This is an obvious statement but it is often forgotten by many that tend to present the consumers and the industry as adversaries without any common interests. In direct response to consumer demands, CMBA members are providing forever more exciting new legal services on line, offering creative content. Increasingly, consumers are taking up these services.

On the one side, the basic principles of copyright protection must be applied and enforced in the digital environment if rights holders are to be persuaded to continue to invest in and provide content for online services. On the other side, it is also in the interest of the general public to know what they can and cannot do online so that the potential of the information society can be realised.

In our view, some examples of statements in the study which do not reflect a balanced view are:

- While the content and software industries tend to criminalize unauthorized uses, network providers and device manufacturers have other interests (page 205).

Right holders only aim to enforce their legitimate rights and to apply for remedies both at civil and criminal level. Piracy is a growing menace not just to the copyright industries but to a wider range of sectors and this has been



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recognized recently at International and European level by including enforcement issues as a priority in several political agendas².

Furthermore, it is creative content people are looking for when they are connecting to the internet, activating their broadband connection, switching on their 3G mobile phone or choosing a channel on their digital TV service. Without the creative and media sector the information society would be nothing more than empty pipes. ISPs have a responsibility to cooperate in dealing with online infringements. The support of device manufacturers and technology developers in the fight against piracy is paramount for the future of on line services

- Commercial download services normally come with usage restrictions enforced by DRM that may frustrate consumers and make them opt for unauthorised uses. Consumer surveys have shown that consumers especially dislike that paid files have a lack of portability to other devices (page 206).

CMBA members do not want to lock up content; on the contrary we want to sell our works to the widest possible audience. Depending on the business model, DRM technologies are consumer enabling technologies, assuring respect of copyright and remuneration, allowing a potentially infinite variety of business models giving the consumer what he/she wants. Interoperability is paramount for a proper development of the online market but this is not to be done at the expense of security.

A good example of the efforts carried out by rights holders to face the challenges created by technology is ACAP (Automated Content Access Protocol). This project, led by the publishing industry, is being developed as a non-proprietary, self-regulatory standard to enable providers to communicate permissions information in a form that can be recognised by a search engine, making it possible for the operator of the service to comply with each individual publisher's policies.³

Furthermore, the respect of EU copyright legislation by all stakeholders is indispensable for establishing good conditions regarding the use of works of the various content sectors which have made all the necessary investments in the production and the publication of this content.

We agree with the authors of the study that education and awareness-raising campaigns are essential to fight piracy both in the analogue and in the digital world. The intellectual property system is the result of a delicate balance between the rights of the creator and the user, and is intrinsically designed to benefit society as a whole. On the contrary, piracy has a negative impact on the European economy and society: according to a study on the Economic Impact

² Commission's Communication on "Strategy for the Enforcement of IPR in Third Countries", November 2004/ Commission staff working document "EU's growth and jobs strategy" confirming the EU's focus on enforcement, October 2006 / EU-US Action Strategy on IPR Enforcement, 2005/ WIPO Third Global Congress on Combating Counterfeiting and Piracy, January 2007.

³ For more information see: www.the-acap.org



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of Counterfeiting in Europe (Global Anti-Counterfeiting Group, June 2000) more than 17,000 legitimate jobs are lost annually through piracy and counterfeiting in the EU. Copyright industries are already carrying out education campaigns in the different Member States but more support from Governments (both at national and community level) is needed to raise awareness and understanding of copyright and to fight the fallacious idea of “access for free to information and culture”.

Final remarks

Since copyright is not a static concept and it has developed throughout the centuries to keep pace with the introduction of new technologies, we understand that the European Commission may want to assess regularly whether the right instruments are in place. However, we understand and trust that the Commission will carry out an independent assessment of the issues discussed in the study on the “recasting of copyright and related rights for the knowledge economy”.

Finally, CMBA members consider that at present⁴ copyright legislation is sufficiently harmonised at EU level. Efforts at present should concentrate on the proper implementation and enforcement of this vital framework if a true commercially viable and diverse digital content market is to emerge.

⁴ This is without prejudice to the specificities of each individual industry e.g. extension term protection for phonogram producers or harmonisation of the term for co-written works.