European Commission
Internal Market and Services DG
Unit D1 - Copyright
SPA 2 04/085
1049 Brussels
Belgium

TO: markt-copyright-consultation@ec.europa.eu

Vienna, 17th February 2014

ISPA COMMENT ON THE PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES

Dear Sir/Madame,

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) is pleased that the European Commission has issued this public consultation on the review of the EU copyright rules.

ISPA would like to emphasize that it is very pleased that the aim of the public consultation lies in adapting the EU copyright regulatory framework to meet the challenges of the digital reality. ISPA is convinced that the current European copyright legislation needs to be revised in order to improve and harmonise rights management and to adapt them to the development of the Information Society. ISPA supports the harmonisation of IPR for digital content; the fragmentation needs to be solved.

The limitations and exceptions provided in the EU copyright directives in ISPA's opinion lack the flexibility to adapt to the changes occurring in a rapidly evolving online environment and therefore need to be revised. The terms of copyright protection should be also adjusted to the digital environment. ISPA stresses that the civil enforcement system for infringements of copyright with a commercial purpose in the EU should be revised in the context of the IPRED and the E-Commerce directive and not separately in the Information Society Directive (Directive 2001/29/EC). ISPA would like to point out that in its opinion the provision of hyperlinks and the viewing of a web page should not be a subject to the authorisation of the rightholder. Digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders should not be subject to private copying levies, as this would create a situation of double payment. ISPA furthermore suggests that levies should be made visible on the invoices of such products.

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1. The territorial fragmentation of rights should not apply for digital content

Question: 1. Have you faced problems when seeking to provide online services across borders in the EU? **and**
Question: 7. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?

Despite the fact that there are no legislative obstacles preventing or prohibiting the provision of cross-border digital services and the development of a unique continental market for online content, the commercial practices actually put in place by rights-holders have the result or the scope to create a pervasive territorial fragmentation. This has very much to do with the fact that online rights are still managed in many cases in bundle with other forms of distribution (broadcasting for instance) for which the territorial dimension still makes more sense that the European one.

Licensing of content by right holders (major studios, independent producers, and broadcasters) is, in fact, still managed at national level based on the concept of the territorial exclusivity. This means that in acquiring the content in a given country, for instance, a video on demand (VOD) operator can only make the content available in that given country and has to put in place DRM measures (geo-filtering of IP addresses) to prevent EU citizens living in different countries from acquiring that content. A provider willing to put together a cross-national EU VOD service, would then need – for each content item in the library - to negotiate and sign a specific contract in each specific territory.

The territory-by-territory acquisition of rights does not entail simply having different libraries for each territory, but also different economic conditions, retail prices, availability dates, usage limitations, as again the condition at which the right is negotiated depends by the local branch dealing with it. This creates another important barrier to the establishment of a pan European digital service, as the usage condition and billing models of the content may vary from country to country.

Beside the above issues, the impact of the collective right management system on the digital single market is also relevant, creating additional complexities. In practice, even when rights are acquired by on-line platform operators for each country, a further territory-by-territory clearance has to be gained through the national based Collective Management Organizations (CMOs) each with a different spread of (national) rights holders. The relevance in this context of the restrictive behaviour of collecting societies was confirmed by the European Commission in the antitrust decision of 2008.

As a result, under the current system, most digital content that could easily be distributed through an online platform for the entire continent's consumption may then be subject to several deals and to clearance 28 times through at least 28 different Collective Management Organizations, not taking into account a large number of mayors and independent labels in many cases not represented by CMOs. All such deals involve significant transaction costs and potential restrictions dramatically hampering the roll-out of start-ups and cross-border services. This frustrates and

brakes innovative and competitive players which, in the absence of the above obstacles, could easily develop online content offers with continental reach, thanks to the capability of the Internet protocol and the wide presence of broadband and high-speed connections.

Therefore at ISPA's opinion, a comprehensive review of Directive 2001/29/EC on Copyright in the Information Society would be needed along with clear measures specifically aimed at ending the current restrictive licensing practices.

2. The provision of a hyperlink should not be a subject to the authorisation of the rightholder

Question: 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?

A hyperlink is a reference to data that the reader can directly follow to find an already available content. Their function is to link any information to any other information over the Internet; hyperlinks are therefore essential to the creation and functioning of the World Wide Web. A link is not a transmission or communication of the work but a reference to an already available work.

Furthermore, sharing hyperlinks on the internet is one of the most common activities. Requiring the authorisation of a rightholder before sharing a hyperlink would not only be cumbersome but would also severely undermine the fundamental right of free speech.

Hyperlinking in general should not be considered as an act of communication to the public (see European Copyright Society Opinion on Case C-466/12 Svensson)[1] as:

> "*Firstly, the right of communication to the public requires a transmission that is absent when merely a hyperlink is provided. It is merely a location tool, but exists independently from the actual availability of the work. Secondly, the communication should address a public or a "new" public. The hyperlink does not extend the public of the work, published online: those who had access to the web page will still have access, those who did not have access (e.g. absent the payment of a fee) will not gain access through the hyperlink.*"

[1] De Wolf & Partners, Study on the application of Directive 2001/29/EC on copyright and related rights in the information society, 2013 http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf
European Copyright Society Opinion on The Reference to the CJEU in Case C-466/12 Svensson, 15 February 2013

3. The viewing of a web-page should not be subject to the authorisation of the rightholder

Question: 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?

The viewing of web-pages is a widely accepted, general practice and part of the everyday life of users all around the world. If merely viewing, without downloading or printing a website was subject to copyright, many people are likely to infringe copyright while browsing the internet and coming across websites containing copyright protected material.[2]

Although the normal use of the internet involves the creation of copies, this is the automatic result of browsing the internet. The making of such copies in the cache is indispensable for efficient web-browsing and therefore in line with Article 5 (1) of the Directive 2001/29/EC. The copies retained on the screen or in the cache are merely the incidental consequence of the use of a computer, and are temporary.

Furthermore, as suggested in the opinion of the UK Supreme Court *"it has never been an infringement, in either English or EU law, for a person merely to view or read an infringing article in physical form."*[3]

4. The terms of copyright protection should be adjust to the digital environment

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

The current terms are excessively long and are nowadays a crucial limitation to the availability of content online. The term of 50 years after the death of the author prescribed by the Berne convention of 1886 are not fit for the digital environment, which has the unlimited potential of dissemination of cultural material. The 70 years after the death of the author term of protection provided by the EU is hardly incentivizing the production of content and its dissemination.

Shortening the term of protection at least until the minimum 50 years provided by the Berne Convention would create a competitive advantage to EU enterprises creating and distributing content as they would gain accessibility to 20 years of currently protected material.

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[2] See UK Supreme Court 17 April 2013, Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others, [2013] UKSC 18, accessible via http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_Judgment.pdf , (UKSC Meltwater).

[3] UK Supreme Court 17 April 2013, Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others, [2013] UKSC 18, accessible via http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_Judgment.pdf , (UKSC Meltwater).

5. The limitations and exceptions provided in the EU copyright directives lack flexibility and therefore need to be revised

Question: 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? **and**

Question: 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?

ISPA believes that the current European copyright legislation needs to be revised in order to improve and harmonise rights as well as protection systems and adapt them to the development of the Information Society. Some areas of traditional copyright rules risk to be unable to keep peace with the changes in the way intellectual property circulates over communications networks.

Furthermore, the exhaustive list of strictly defined exceptions lacks flexibility to adapt to the changes occurring in a rapidly evolving environment for content, creation, access and distribution.

In the interest of all stakeholders, it is essential to offer the broadest, reasonable and most predictive scope to the exceptions in Article 5, under the condition that these be read within the context of the three-step test described in Article 5.5.

6. New limitations and exceptions should be added to the existing catalogue

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

[Open question]

Considering the large size and increasing number of user-generated content, failure to adopt the copyright regime to the digital reality risks creating a situation where activities perceived as normal by users are made illegal. This would undermine the credibility of copyright law among average users and thus threaten broader right holder interest.

In order to clearly recognise the difference between the use of protected material as part of user-generated new content (e.g. mashups) and illegal file sharing of a work, it would be necessary to adapt the copyright regime to include audiovisual content which incorporates users' creative output, creating this way a completely new work. ISPA believes that the exceptions for non-commercial use should be broadened.

7. Digital copies made by end users for private purposes should not be a subject to private copying levies

Question: 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?

Licensed copies should not trigger the application of levies. According to Recital 35 of Directive 2001/29/EC, *"In cases where rightholders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due."*

Making these digital copies subject to levies would create a situation of double payment and would go against the view and expectations of the end users as service providers usually acquire license from the right holder that covers all relevant acts in the given service, including reproduction by the end user.

ISPA therefore strongly rejects private copy levies but urges to simplify and harmonise the process of granting licenses to ISPs. The acquisition of content or services licensed by the rightholders implies already the usage of digital copies for private purposes. Therefore such copies should not be a subject to private copying levies in order to avoid a situation of double payment as the right to copy content several times is usually covered by the license fee paid by the consumer.

8. Levies should be made visible to end customers

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

Making levies visible on the invoices for products subject to levies, on the one hand would create a trusted relationship with the user. On the other hand transparency of the system would also contribute to the better remuneration of authors. ISPA therefore strongly supports the idea of making copyright levies visible to end users. ISPA emphasise however that the appropriate way of making the levies visible to the end users is through displaying it on the invoice and not through marketing communication (advertising).

9. The civil enforcement system for infringements of copyright committed with a commercial purpose in the EU should be done in the context of the IPRED and not separately in the Information Society Directive

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

ISPA considers that the current framework, the Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) together with the E-Commerce Directive 2000/31/EC offer a well-balanced and functioning framework to address in particular online IPR infringements. The reason for this is that IPRED contains checks and balances for enforcement which are not present in the Copyright Directive. They ensure that the protection of IPR is balanced with fundamental freedoms and rights.[4]

If problems arise in the uniform respect of copyright, they stem from the late or uncompleted implementation of the IPRED at national level and not from its legal provisions. However, should there be in the future a need to address the enforcement of copyright, this should be done in the context of the IPRED and not separately in the Information Society Directive, for the reasons mentioned above.

10. The current legal framework is clear enough to inhibit online copyright infringements with a commercial purpose

Question: 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?

[Open question]

Articles 9 and 11 of the IPRED already foresee the possibility of injunctions against intermediaries whose services are used by a third party for any proven IPR infringement, and lay down the minimum legal conditions that must be adhered to by national courts when formulating injunctive measures.

At the same time article 12-15 of the E-Commerce Directive demand that such injunctions are proportionate and cannot result in general monitoring obligations. In the past years the Court of Justice of the European Union kept refining the possible scope of injunctions against internet

[4] freedoms of expression, the free movement of information, the protection of personal data in paragraphs 2 and 15 of Directive 2004/48/EC, Article 2 (3) (a) of Directive 2004/48/EC

intermediaries (e.g. C-324/09 - L'oreal./.eBay; C-70/10 - Scarlet Extended, C-360/Sabam/Netlog) and made clear that such injunctions need to be very specific with regards to the measures to be taken by intermediaries and must not merely be success oriented. General filtering systems installed for the prevention of copyright infringements were held disproportionate by the court.

Multi-stakeholder cooperation should not be limited to ISP cooperating with rightholders to defend the latter existing business models. Cooperation should also concern:

- Widespread availability of legal online content in affordable price
- Empowerment and education of consumers

Furthermore, currently DG Marked of the Commission is working on an Action Plan addressing IPR infringement.[5]

The initiative recognises the wide range of intermediaries and aims at exploring non-legislative initiatives, such as:

- improve exchange of information and cooperation between relevant authorities in charge of enforcement of IPR in the Member States
- strengthen due diligence across the entire supply chains for products/services which depend heavily on intellectual property
- develop an MoU on advertising/ 'Follow the Money' approach

ISPA would like to reiterate that it is very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria

Dr. Maximilian Schubert

General Secretary

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework to support optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.

[5] Commission Roadmap on the Communication on an Action Plan addressing Intellectual Property infringements, 12/2013 http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2013_markt_047_ip_infringements_en.pdf