National Library of Norway
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Commission of the European Communities

Green Paper on Copyright in the Knowledge Economy [COM (2008) 433/3]

Attached You will find response from the National Library of Norway on Green Paper on Copyright in the Knowledge Economy [COM (2008) 433/3]

Yours sincerely

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Memo

Date: 30. November 2008

Subject: Green Paper on Copyright in the Knowledge Economy

Introduction

The purpose of the Green Paper is to initiate a debate on how knowledge for research, science and education can best be disseminated in the online environment. The Paper highlights a number of issues concerning the role of copyright in the online environment, and raises several questions.

The Norwegian Ministry of Culture and Church Affairs has forwarded the Green Paper to the National Library of Norway. Our point of view on the issues raised in the Paper will be expressed in this document. The Ministry has asked us to send our position statement directly to the Commission. We would like to emphasize that our comments are given on behalf of the National Library only, and not on behalf of the Ministry of Culture and Church Affairs or others.

The National Library of Norway shall be the premier source of information about Norway, Norwegians and Norwegian culture, and is to be Norway's main resource for the collection, archiving and distribution of all sorts of Norwegian media (handwritten works, maps, books, periodicals, newspapers, photographs, films, broadcasting, music and internet publications). As a National Library, our main focus is the dissemination of knowledge. This, obviously, does not mean that the National Library does not respect authors' and other right holders' exclusive right. We recognize that copyright protection is crucial for intellectual creation, which in the end will generate more works that can be disseminated by the National Library. As You will see, our main focus is reflected in this consultative statement. Another national assignment given to the National Library of Norway is to preserve and make accessible to the present and the future the information that shapes our society, regardless of how and in which medium it was published.

The Green Paper consists of two parts:

- General issues regarding exceptions to exclusive rights introduced through the Information Society Directive and the Database Directive.
- Specific issues related to the exceptions and limitations which are most relevant for the dissemination of knowledge and whether these exceptions should evolve in the era of digital dissemination.

General issues

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

No. It should be the legislator's responsibility to provide a proper balance between the right holders' exclusive right on one hand, and the societal interest on the other hand. It should not be left to each library or certain groups of users, such as people with disabilities, to negotiate license agreements. The strength of the parties will in most cases be too uneven. The unfair relative strength might be an obstacle to libraries' and others' dissemination of knowledge for purposes of research, science and education.

In Norway the current list of copyright exceptions, which are allowed under the Information Society Directive, have been implemented to Norwegian legislation after a process where all interested parties were heard in order to find the necessary balance. This has, in our point of view, been successful.

Therefore, contractual arrangements between right holders and users could never replace legal exceptions introduced by the legislator. The former can however be an advantageous supplement to legal exceptions.

In order to prevent publishers or other groups of strong right holders from taking advantage of their position, one should consider the introduction of a new statutory provision, which states that contractual arrangements which are in conflict with legal copyright exceptions are invalid.

(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

As stated above, it should primary be the responsibility of the legislator to provide the necessary balance between the exclusive right of the right holders and copyright exceptions.

If there's a need for other (new) exceptions, in addition to those already introduced through the Information Society Directive, the legislator should assess the situation. We should not expect that private parties alone could handle such problems satisfactorily.

It should, however, not be ruled out that there are certain limited areas where it might be equally appropriate to balance the different interests of the parties in a contractual arrangement, instead of defining a legal exception.

In this regard we would like to direct attention to the Nordic speciality of extended collective licences. This model for rights clearance can be a supplement to legal copyright exceptions or an alternative model for rights clearance in situations or areas where legislative exceptions are not practical.

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

No. The introduction of an exclusive list of 20 non-mandatory exceptions (and only 1 obligatory exception) has not been adequate, considering that the purpose of the Information Society Directive is harmonisation in order to open the Internal Market to copyright products. The non-mandatory exceptions are implemented differently in different Member States, if the exception has been implemented at all.

Moreover, the scope of an exclusive list of exceptions implies that the Member States can not add new exceptions to their national legislation, which is inadequate considering the gradual development of Internet technologies.

This said, it should be added, that the National Library of Norway does not find it desirable that the EU law becomes further harmonised, if this results in *fewer* exceptions than already introduced through the Information Society Directive. These exceptions have been implemented into the Norwegian legislation, which has given the institutions new opportunities when it comes to the dissemination of knowledge.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

Yes. With regard to harmonisation of the term for using copyright material within the EU, exceptions should be made mandatory. As referred to in the Green Paper, some exceptions have not been implemented in the national legislation or have been implemented differently, which has caused legal uncertainty, particularly for persons working on a trans-national level. It might also be an obstacle to co-operation between institutions in different countries.

(5) If so, which ones?

The Information Society Directive article 5(5) states that the exceptions and limitation only shall be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder. The three-step test taken into account, the National Library of Norway believes that all of the exceptions should be made mandatory. As earlier stated, our main focus in this context is dissemination of knowledge.

<u>Exceptions: Specific issues</u>

Exceptions for libraries and archives:

(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

As a starting point, the exception should remain unchanged. At least, the exception for libraries should not become narrower simply because the publishers or other right holders will develop online access to their catalogues. The publishers and other

right holders can not replace libraries and archives when it comes to the obligation of preservation and management of the cultural heritage. In consideration of this, the exception for libraries and archives should rather be expanded.

(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

Yes. The exception in the Information Society Directive article 5(2)(c) enables libraries to make reproductions that are necessary for the preservation of the collections. The Directive's article 5(3)(n) gives the institutions a limited opportunity to give users access to their digitised collections, if the exceptions are implemented to the national legislation.

However, article 5(3)(n) does not open for an unrestrictive online access. In order to increase access to the works, libraries and other institutions should enter into licensing schemes with publishers and other right holders.

A good example from Norway is the cooperation between the rights organizations and the National Library when it comes to material concerning "The High North". "High North" is the National Library of Norway's pilot project, established to make copyrighted material accessible in digital full text. For more information You may visit our website http://www.nb.no/highnorth/. The website also includes the agreement between the rights organizations and the National Library.

The "High North" project has been a success, and the parties of the agreement now want to expand the initiative. The aim of the new project is to digitise Norwegian literature of the 1790s, the 1890s and the 1990s, and make the material accessible online. The project might form the basis for further work on making Norwegian cultural heritage accessible electronically.

In some cases, it might not be possible for libraries or other institutions to enter into licensing schemes with the publishers, e.g. due to the fact that the publisher is not in a position to enter into a license agreement concerning digitising or the right holder is not locatable. In these situations extended collective licensing might be a possible solution. However, the extended collective licensing schemes should not be a substitute for exceptions given through national legislation, but could be an alternative in addition to licensing agreements.

(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

(a) Format shifting;
(b) The number of copies that can be made under the exception;
(c) The scanning of entire collections held by libraries;

(a) *and* (b):
No. There is a possibility that a clarification on this point might lead to further limitation for the libraries, educational establishments, museums and archives. The

decisive matter should be what kind of format and number of copies is necessary in each concrete situation in order to obtain the purpose in question.

(c):
When the Information Society Directive was implemented in Norwegian legislation, the National Library of Norway, for preservation purposes, was given legal authority to digitise every single part of the collection. This is connected to the special mandate that the National Library has received with regards to the preservation and management of the cultural heritage. As a result of that mandate, we can digitise everything, no matter what kind of work is in question, how old or new the work is and so on. There are no limitations when it comes to digitising and choice of format.

The limitation, however, lies in the possibility to make the digitised collections available to the public. There should not be any restrictions when it comes to digitising the cultural heritage, especially not for institutions that are given a special national responsibility for preservation and management of the cultural heritage.

(9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

An exception that gives libraries the opportunity to make the content of books and other works searchable on the Internet would be much appreciated. This would be a huge advantage for the public and for the libraries. As far as we know, there are few publishers that have made this possible in Norway. In situations where the publishers either do not want to make this possible or they do not have the opportunity, the libraries should be allowed to do so. It should also be added that this is free advertising, so it is hard to see why publishers would raise objections to this.

(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

Copyright clearance of orphan works constitutes an obstacle to the dissemination of valuable content. Since the purpose of the Commission Recommendation 2006/585/EC is to make the European cultural heritage accessible online, a further statutory instrument seems to be necessary. The Recommendation and other documents regarding orphan works ("Final Report on Digital Preservation, Orphan Works and Out-of-Print Works" and "Memorandum of Understanding on Orphan Works") do not give libraries and other institutions sufficient legal certainty.

The list of non-mandatory exceptions in the Information Society Directive, do not include any exception regarding digitisation of orphan works, and making them available to the public. Digitising is a requirement if the above-mentioned goal is to be reached. Since the list of exceptions is exclusive, the Member States can not introduce an exception concerning orphan works.

It is, however, stated in the Information Society Directive recital no. 18 that: "This Directive is without prejudice to the arrangements in the Member States concerning

the management of rights such as extended collective licences". Therefore, introducing extended collective licences on a national level could solve the problem which orphan works represent. This implies that the rights organizations are willing to enter into such agreements.

For the time being, as far as we know, most Member States have rejected the extended collective licences as a possible solution. Moreover, in that case the orphan work problem will have to be solved by introducing further exceptions.

It should also be added that a provision concerning extended collective licences would not be in conflict with a possible new exception regarding orphan works. These two legal instruments might as well exist side by side. Accordingly the extended collective licences are an alternative in addition to the exceptions, not a substitute.

(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

An amendment to the Information Society Directive should be sufficient.

(12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

As far as we understand, this question does not only concern the specific issue of orphan works, but also the dissemination of knowledge in the online environment in general.

To ensure EU-wide recognition of the national solutions, a statuary instrument would probably be necessary, such as a mutual recognition of actions made in another Member State as long as this Member States' legislation is in accordance with the EU law.

In this case we would like to direct Your attention to the ARROW project (Accessible registries of rights information and orphan works towards Europeana). The National Library of Norway and a number of other European national libraries, plus representatives of usage rights organisations and various European publishers' associations, are participants in this project. The aim of the ARROW project is to help identify copyright holders of out-of-print works; to create European registers of orphan works; and also to develop models for integrated access to charged and free digital content. Effort is being made to ensure that the project results are compatible with the future European digital library "Europeana". One of the challenges is to find a solution so that the right clearance opens for transboundary access.

The exception for the benefit of people with a disability:

(13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?

No. The exception in favour of persons with disabilities should be mandatory. The legislation should not, obviously, be an obstacle to licensing schemes. As a starting point, it should be the responsibility of the legislator to provide for proper possibility of accessing works so that people with a disability have an equal opportunity to benefit from the knowledge economy.

(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?

No. Different forms of disabilities might require different formats. The choice of format must be determined by the needs of the person with a disability. A clarification of the directive with regard to formats might lead to limitation instead of further access. It should also be taken into consideration that new formats might be developed, thus exemplifying the era of rapid technological progress.

(15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?

Yes. We can't see why other disabilities should be treated differently from visual and hearing disabilities. Besides, the exception in the Information Society Directive is not limited to people with a visual or hearing disability.

(16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?

All forms of disabilities. The decisive matter should be whether the disability prevents or creates obstacles to a person's access to the work. Every person should have an equal opportunity to benefit from the knowledge economy, and in that sense the right is universal.

(17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?

Yes. Disabled people should not be required to pay remuneration to right holders for converting a work into an accessible format.

(18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?

Yes. The exception in favour of people with a disability in the Information Society Directive should also apply to both original and sui generis databases. The exception in both directives should be made mandatory.

Dissemination of works for teaching and research purposes:

(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

In Norway there are examples of agreements between the scientific and research community and Kopinor. Kopinor represents associations of copyright holders, and is empowered by its member organisations to negotiate and conclude collective agreements on photocopying of published works. The agreements give, for example, students and employees in educational institutions the right to make photocopies, within certain limits, from all types of Norwegian and foreign publications. An interim arrangement has also been concluded, which allows digital copying in schools and local administration. This arrangement, which meets a need from the educational sector, is made available through the extended collective licence. The parties will conduct negotiations in 2009 concerning the scope of a new agreement, including the terms and conditions for digital copying.

(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Yes. Both traditional classroom teaching and modern forms of teaching are taken into consideration in the Information Society Directive. A result is recital 42, which states that the exception also may apply to distance education. European research and education institutions now co-operate on a trans-national level. This and the modern e-learning methods taken into account, the exception should be clarified in order to make distance learning function optimally.

(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Yes. As stated above, the teaching and research exception should be clarified so as to accommodate modern forms of distance learning. Therefore, the exception also should cover the use of works at home for study. The set of rules must be adjusted the modern digital office.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works that can be reproduced or made available for teaching and research purposes?

No. The length of the excerpts from works that can be reproduced or made available to the public for teaching and research purposes should not be regulated by mandatory minimum rules. The need, in order to fulfil the teaching or research, might be very different in different situations, and in that sense it could be impossible to set out minimum rules that are reasonable in all situations. The decisive matter should be how much has to be made available in order to meet the need of the researcher or student. The vulnerability of the material should also be considered.

(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Yes. The digital age taken into consideration, the exception should cover both teaching and research. Otherwise, the exception makes no sense.

User-created content:

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?
and
(25) Should an exception for user-created content be introduced into the Directive?

On one hand it is not difficult to see the consumer's need for more precise regulations concerning user-created content. The aim of allowing such an exception would be, according to what is stated in the Green Paper, to favour innovative uses of works and to stimulate the production of added value.

On the other hand, as the Green Paper also states, there are already exceptions that might also be adequate in this regard (Information Society Directive art. 5(3)(d) and art. 5(3)(k)).

An end users usage of a work will normally happen within the private sphere. If the usage of a work takes place outside this sphere, the limitation will follow the set of rules already in force.

The apparent increase of cases of plagiarism makes it quite worrying to expand the opportunity for the re-use of a right holder's work. At the same time, the re-use of works and dissemination of the new work on the Internet has become very common, and the legislation should be adjusted accordingly. If not, a whole generation of end users might risk committing copyright infringement, and maybe without being aware of it.