

RESPONSE OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA) AND NETCOALITION TO THE EUROPEAN COMMISSION GREEN PAPER ON
COPYRIGHT ON THE KNOWLEDGE ECONOMY

Overview

The Computer & Communications Industry Association (CCIA) and NetCoalition appreciate this opportunity to respond to the Green Paper on Copyright in the Knowledge Economy.

CCIA is an international, nonprofit association of computer and communications industry firms, representing a broad cross section of the industry. CCIA's long-standing mission has been the promotion of open markets, open systems, and open networks. CCIA members employ more than 600,000 workers and generate annual revenues in excess of \$200 billion.¹

NetCoalition is a public policy voice for some of the world's largest and most innovative Internet companies on key public policy matters affecting the online world. Its members are providers of search technology, hosting services, Internet service providers, and Web portal services and include Google, Yahoo!, eBay, Amazon.com, Ask.com, IAC, Wikipedia, and Bloomberg.

CCIA and NetCoalition members depend upon intellectual property protection in their business activities. At the same time, the ability to create and innovate free from disputes over intellectual property is essential to these companies, as it is to the entire information and communications technology (ICT) industry.

These comments focus specifically on Questions 1-5 of the Green Paper. These comments observe that while exceptions and limitations have always given creators the necessary breathing room and raw materials for new works, in a knowledge economy, limitations and exceptions now form the basis for the business models for innovative ICT and Internet companies. This development has led to the need for harmonized, mandatory minima for limitations and exceptions, just as it was once necessary to harmonize to a mandatory minimum for the protection of exclusive rights. This need is most evident in the absence of protection for the provision of innovative online services, particularly those that depend upon copying and indexing, and so-called "Web 2.0" services of a participatory or user-generated nature.

General Comments

Vigorous enforcement of copyright can coexist peaceably with a robust system of limitations and exceptions. Enforcement and balance are independent parameters, and it is submitted that the U.S. experience with copyright law has shown that it is possible to have broad, flexible exceptions without compromising protection for authors' rights.

In fact, a properly crafted system of limitations and exceptions can enhance copyright protection. Robust limitations and exceptions enable rigorous enforcement by preventing situations in which enforcement would deter or punish socially desirable activity. The establishment of broad and

¹ A complete list of CCIA members is available at <http://www.cciagnet.org/members.html>.

dynamic exceptions allows judicial authorities to confidently enforce copyrights, secure in the knowledge that the carefully delineated scope of the underlying right mitigates any risk that enforcement will deter socially desirable activity. Therefore, harmonization of certain limitations and exceptions at a pan-European level can be expected to have a salutary effect on the rights of authors.

The fact that a properly crafted exception need not diminish the author's incentive to create has been evident since the drafting of the Berne Convention. The Berne Convention's mandate that exclusive rights not prohibit short quotations² does not discourage authorship; on the contrary, it is through quotation that works gain reputation and fame, contributing to the social dialogue while increasing demand for the author's work.

In sum, strong copyright protection is necessary but not sufficient to promote a knowledge economy. Because information services are largely the means by which the public accesses knowledge economy goods, it is as necessary to promote a healthy environment for these services as it is to promote the creation of expressive content. Just as the absence of an effective system for the protection of copyright undermines the incentives for authors and producers to invest in creative works, the absence of rigorous and effective protection from liability undermines the incentives for IT service providers to invest in the deployment of innovative services for the dissemination of information and transformative content.

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

(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?

The Commission need not encourage contractual arrangements regarding the use of copyright exceptions. The purpose of a copyright exception should be to delineate a use for which no license is required. If parties are obliged to license an excepted use, the exception is rendered moot.

The inherent complexities of contractual arrangements may disadvantage user groups that lack the sophistication or economic means to navigate the copyright system. Thus, while model licenses may be useful at the margin, relying exclusively on such a remedy would favor sophisticated, wealthier participants over unsophisticated, less wealthy participants. On the other hand, limitations and exceptions apply evenly regardless of market participants' sophistication or economic means.

Additionally, contractual arrangements or licensing activity may also inhibit the exercise of the relevant exception in situations where there are economic disincentives to license particular activities. Two such examples are parody and reverse engineering. Because an effective parody

² Berne Convention for the Protection of Literary and Artistic Works, art. 10(1).

of a work can undercut the market for that work, authors have little incentive to license the right to mock their work. Similarly, copyright law generally permits reverse engineering to ensure interoperability in order to promote competition in software markets. Prohibiting one's competitors from accessing *de facto* standard interface specifications may lock one's users into a particular platform, allowing a vendor to leverage less competitive products and extract greater revenue from locked-in users. As a result, rights-holders have disincentives to permit reverse engineering of their products. For this reason, U.S. courts treat such reverse engineering as fair use,³ and the Software Directive explicitly permits decompilation to achieve interoperability.⁴

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

Permissive exceptions will not enable broad economic activity depending on the exception. To provide pan-European service, ICT innovators require confidence that the service offered is not infringing in any European jurisdiction. In a non-harmonized environment, whether a given service is offered will be controlled by the least common denominator. Thus, even if several jurisdictions have developed innovation-friendly exceptions to encourage the deployment of new ICT services, the fact that a neighboring state treats that service as infringing means that it is less likely to be deployed in any jurisdiction. Only harmonized, pan-European copyright exceptions will encourage significant market entry by ICT innovators whose business models are enabled by those exceptions.

Pan-European harmonization is also essential because consumers are unlikely to accept as legitimate a copyright system that places different restrictions on their use of information depending on the jurisdiction in which they happen to be. The notion that format-shifting one's personal media collection might be legal in one jurisdiction but not in another, or that web search could be available, for example, to American Internet users but not European users, is likely to erode the perceived legitimacy of the copyright system. Indeed, it cannot be overemphasized that shifting social expectations pose a serious threat to an inflexible copyright system. Because the copyright system relies extensively on the voluntary compliance of the public, its perceived legitimacy is instrumental in assuring that authors' rights are respected. If that legitimacy is lost due to the inflexibility of copyright limitations and exceptions, voluntary compliance will disappear, and the cost of enforcing authors' rights will become prohibitive.

Policymakers can either adapt the copyright system to match social expectations or undertake the

³ *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996); *DSC Communications Corp. v. DGI Techs.*, 898 F. Supp. 1183 (N.D. Tex. 1995), *aff'd*, 81 F.3d 597 (5th Cir. 1996); *DSC Communications Corp. v. Pulse Communications, Inc.*, 976 F. Supp. 359 (E.D. Va. 1997), *aff'd in part, rev'd in part, and vacated in part*, 170 F.3d 1354 (Fed. Cir. 1999); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir.), *cert. denied*, 531 U.S. 871 (2000).

⁴ See Council Directive, 91/250/EEC, Legal Protection of Computer Programs (May 14, 1991) (hereinafter "Software Directive"). One of the benefits of fair use's flexibility permits courts to adapt the rule to technological progress, saving the costs and long-run uncertainty inherent in legislating reactively. Article 6 of the Software Directive, for example, protects decompilation to achieve interoperability with software, but says nothing of hardware.

unenviable task of reshaping social expectations. Given the difficulty of the latter option, the widespread acceptance of functions like format shifting, user-generated content, and search functionality must be reflected in the copyright law if it is to retain legitimacy.

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

(5) If so, which ones?

It cannot escape notice that the Internet search industry as well as many user-generated content services and similar “Web 2.0” sites have been founded and have flourished in the United States, where the IP system exhibits both strong protection for rights-holders and broad exceptions to enable ICT and Internet innovation, notably the fair use doctrine.

The adoption of a mandatory “fair use” provision—or a functional equivalent to the flexible fair use framework—is critical to the ability of Internet companies to provide pan-European information services. Given the lack of flexibility in the current Directive, it cannot adapt to a dynamic market. By contrast, flexibility is one of the great merits of a fair use provision. For example, a wide range of *educational uses* are considered fair use, including for example photocopying newspaper articles for use in a classroom. Second, certain *personal uses* should be considered fair, most notably the time-shifting of television programs permitted by the Supreme Court of the United States in *Sony v. Universal*.⁵ Third, fair use generally protects *creative* or *transformative uses* of works, such as rap group 2 Live Crew’s parody of Roy Orbison’s “Pretty Woman” in *Campbell v. Acuff-Rose*.⁶ Consistent with the Berne three-step test, such uses do not conflict with a normal exploitation of copyrighted works and do not unreasonably prejudice the legitimate interests of authors.

The absence of fair use provisions exposes Internet firms to liability for transformative activities that U.S. courts permit, and in fact encourage. In cases such as *Perfect 10 v. Amazon.com*⁷ and *Kelly v. Arriba Soft Corp.*,⁸ U.S. courts have permitted the development of innovative Internet services. The economic benefits to remedying this liability concern are substantial. In 2007, CCIA commissioned an independent study to assess the amount of economic activity dependent upon limitations and exceptions to U.S. copyright, employing a methodology for assessing copyright-related economic activity that had been developed by the World Intellectual Property Organization (WIPO).⁹

Applying this methodology, the study concluded that industries benefiting from fair use and other limitations and exceptions to copyright law make a large and growing contribution to the U.S. economy. This “fair use economy” in 2006 accounted for \$4.5 trillion in revenues and \$2.2

⁵ 464 U.S. 417 (1984).

⁶ 510 U.S. 569 (1994).

⁷ 487 F.3d 701 (9th Cir. 2007).

⁸ 336 F.3d 811 (9th Cir. 2003).

⁹ Guide on Surveying the Economic Contribution of the Copyright-Based Industries, WIPO, Geneva 2003.

trillion in value added, roughly one-sixth of total U.S. GDP. In addition, this economic activity was estimated to employ more than 17 million people and supported a payroll of \$1.2 trillion, generated \$194 billion in exports, and rapid productivity growth.¹⁰

The absence of a robust system of harmonized, pan-European exceptions thus impairs the economic prospects of industries far beyond Internet and ICT services; it imposes a considerable cost upon the economy at large.

CCIA and NetCoalition Recommendations

It is now necessary to establish harmonized, international minima for limitations and exceptions, just as we have harmonized to an international mandatory minimum for the protection of exclusive rights. If the public is to fully appropriate the benefits of the knowledge economy, one such exception must be to protect from litigation those ICT innovators whose products and services make information goods accessible to the public. For this reason, CCIA and NetCoalition urge that an exception be designed to protect innovative new-technology uses, including web search, indexing, user-generated content and similar Web 2.0 activities.

¹⁰ A complete copy of the study is available online at <http://www.ccianet.org/docs/FairUseStudy-Sep12.pdf>.