



Public Consultation of the European Commission

The review of the EU Copyright rules

ORANGE contribution

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Introduction

Orange thanks the European Commission for the opportunity to provide inputs to its public consultation on the review of the European copyright rules.

Orange would like to reaffirm that copyright is fundamental to innovation and copyright owners need to be properly remunerated for their works. As part of an innovative industry, Orange supports a sound regulatory framework for copyright and an appropriate protection mechanism. But the current regulatory framework for copyright faces many challenges in the internet era. Orange thus believes it is appropriate that the European Commission questions the adequacy of the current regime in the digital context.

We would also like to highlight that Information and Communication Technologies are an enabler of new content distribution mechanisms and services bringing enormous opportunities. As such, Orange is investing heavily to ensure that the underlying infrastructure is in place to support this innovation and believes that all players benefitting from the digital environment should contribute to its growth and investment.

In the following, Orange provides insights on the questions which are relevant to Orange's activities, namely: provision of content, exceptions and limitations to copyright, copyright levies and enforcement of rights.

Answers

Question 2: Have you faced problem when seeking to provide online services across border in the EU?

Although Orange operates in seven countries of the European Union¹, cross-border trade is currently limited in our organization. Copyright is one of the reasons of such limited development but barriers to cross-border trade go far beyond copyright issues.

Cross-border availability of content is essential for the development of cross-border services and must be facilitated: 1/ when customers that have subscribed to online services in the Member State of their residence want to access these services when travelling abroad (via roaming, Wi-Fi connections, fixed access, etc.); 2/ when customers wish to access content distributed by a provider based in another country. Orange shares the view that European customers need a content single market.

¹ France, Poland, Belgium, Spain, Romania, Slovakia and Luxembourg

The fact that copyright and licensing are national-based is an obstacle to the achievement of the European single market. But series of other obstacles do exist such as the existence of national cultures and languages; the need for the adoption of open standards for content delivery; the cost of compliance with different national consumer protection laws and fiscal regulations; the cost of providing customer care and customer complaints in several languages; the risk of fraud and non-payments and the diverse economic realities which make a single price impossible.

4. If you have identified problems in the answers to any of the questions above –what would be the best way to tackle them? [Open question]

I. Identified issues

National cultures and languages

European content is nationally segmented because content is related to national cultures and languages. This is particularly true for audio-visual works. Subtitling and dubbing films helps to overcome these difficulties but these solutions carry a cost which online distributors are not always able to support, especially when consumers' interest is low. Also for marketing and budget reasons, European works are not as attractive as US ones outside their country of origin. This is true not only for television programs (news, games, etc.), but also for most films.

Distributors will typically not take the risk of financing films produced in other Member States as it is also difficult for those distributors to find interested advertisers. In this context and considering these barriers, distributors are legitimately reluctant to undertake international online provision of content in other Member States of the European Union.

Standards for content delivery

Standardization is necessary to achieve convergence in the audio-visual business. These standardization processes should involve all the stakeholders of the value chain, from content providers to Internet Service Providers and home network technology vendors, including transit network operators. This is crucial to make cross-border distribution to end users efficient.

Industry initiatives are important and should be accompanied by institutional efforts focused on achieving and ensuring adoption of open standards for online services. The European Commission should nonetheless refrain from mandating any standard which has not proven to be widely accepted by the market in terms of market share and sales figures. Indeed, mandating standards can hinder innovation.

The promotion of standards via bodies such as ETSI could foster market penetration of standards on a voluntary basis and thereby help to achieve more interoperability. This definitively enhances the competitiveness of telecom and content industries in the European Union.

Many standardisation activities are developed in order to enable the provisioning of NGA/NGN services across networks in a multi-carrier environment. Some of these standards dedicated to the future networks could also facilitate content delivery and online distribution of audio-visual media services.

As identified by one of the 11 proposals of the industry in their “How to achieve the 2020 European Digital Targets”, there is an immediate need for Europe to promote open and interoperable standards for IP-based Quality of Service Interconnection (such as IPX) as well as for next generation bit-stream access and other NGA products. They are essential to enable the provisioning of NGA/NGN services across networks in a multi-carrier environment.

Consumer protection law

Notwithstanding the Citizen Rights Directive² to be implemented this summer, the laws regulating consumer contracts are varied across Member States. This constitutes an obvious barrier to cross-border trade. The lack of harmonisation generates legal uncertainty for service providers, as well as additional costs, and impedes the development of cross-border online distribution of works.

Personal data protection and privacy

Creating, promoting and adopting a global set of principles based on a harmonised and consistent approach to privacy would primarily benefit users. Enjoying the same level of protection no matter where the websites are based is a crucial issue. European businesses should also be able to compete on the same level playing field with non-European market leaders. Harmonisation would greatly reduce privacy compliance costs, which is an important step for the take-up of new activities, such as cloud computing, in the European Union.

On this issue, Orange welcomes the ambitious plan to revise European data protection rules, among whose clauses there are measures the telecoms industry has long wanted to see improved.

Tax issues

The current tax system in place in the European Union is an obstacle to the development of cross-border content offers. Opportunistic companies distributing content cross-border may escape European tax obligations. The changes in the European Value Added Tax (VAT) rules are an important step in the right direction to limit VAT forum shopping for those players that are not linked by establishment in a specific European Union country, such as some “Over The Top” internet companies.

² Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

Cross-border payments

Reducing the compliancy costs of online cross-border payments is another key target for regulators.

II. Proposal for improvements

Orange believes that transparency in the process of establishing “who owns what rights” is key. It is essential to both define the scope of the rights and identify the collecting society(ies) or the rights holders competent to grant a license. In cross-border businesses, this is even more important. Currently, developing cross-border services requires providers to repeat costly and time consuming negotiations to clear distribution rights in each Member State where the service is to be made available. This is clearly unsatisfactory.

In relation to on-line music content, the new Directive on Collective Rights Management could help to solve some problems such as the lack of transparency, the excessive transaction costs in the negotiation and implementation of license agreements with collecting societies, the lack of clarity on rights ownership and the complexity of rights management. In this respect, national implementations will be key and Orange calls on the Commission to closely monitor the different national transposition processes.

As regards the introduction of pan-European licenses for audio-visual works covering the entire European Union’s footprint, Orange questions whether it would be an appropriate solution. It would not suit the reality of the market and would impose on distributors clearance of very expensive rights available in 28 Member States with no guarantee of return on investment in each of them (return from consumers' subscriptions, advertising, etc.). Pan-European licencing would rather tend to benefit only to large players that are already established in the market or which have the economic capacity to bear the related investments. The revision of the European licensing schemes should therefore consider the current market structure in order not to grant competitive advantages to selected players.

Regarding taxes, Orange considers the current fragmented system as an obstacle to the efficient and competitive development of the media services industry in the European Union.

Such a fragmented situation allows either undertakings from outside the European Union or opportunistic European players to provide services from the most advantageous Member States regarding taxation, even more because Member States can only levy a tax on a company turnover if it is established on its territory.

That is why Orange supports the planned evolutions of taxing rules and in particular the country of consumption of services principle. Implementation of the European principle of the taxation in the country of consumption in 2017-2018 will be a first positive step to improve the situation. In addition, implementation of a harmonized European VAT for online content would not only reduce costs of managing cross-border trade but would also remove a source of competition distortion. The process should consist in applying a harmonized reduced VAT rate to the online and physical versions of the same content and to linear and

non-linear services. Last of all, corporate taxes are not harmonized in the EU and apply differently between Member States where companies are established.

6. Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?

Creating a single market for content in the European Union by improving the licensing framework may tend to favour large players that are already established in the market or those which have the economic capacity to bear the related investments. Maintaining some territorial restrictions would be beneficial for those actors that need, as a first step, the removal of non-copyright related barriers in the single market to develop. Orange is in favour of this second approach.

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?
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?
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?

Ideally, the European single market should be based on consistent and harmonised rules. The fact that limitations and exceptions vary from one Member State to another does not encourage nor facilitate pan-European business models and cross-border trade. However, we acknowledge that, in the field of copyright, Member States have their own specificities and that it would be very difficult to achieve a mandatory and unique regime of limitations and exceptions.

Orange believes that a reasonable way out would be to maintain exceptions and limitations to copyright rules optional for Member States but having a full harmonised regime in case they decide to implement exceptions and/or limitations in their national legal system.

As an example, in Member States where the private copy regime is applied, this regime would have to be the same with full harmonisation, especially in relation to the criteria for the determination of the tariffs, the fair compensation principle, the double compensation, etc.

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

The territoriality of limitations and exceptions creates uncertainty for distributors. It is difficult to have a full knowledge of the applicable regime in place and to understand the conditions under which content/product can be legitimately distributed in each Member State a distributor operates or wishes to operate in. The private copy levy regime is one of the most striking examples of fragmentation: this exception is not provided for by all Member States (e.g. in the United Kingdom), but also the conditions for its application vary significantly. Both the requirements triggering its application, the devices it applies to and the amount of fair compensation differ from one Member State to another.

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 concept of ‘fair compensation’ should be addressed at European level. Orange reminds that the ‘fair compensation’ is an autonomous concept of European Union law since the ECJ’s Padawan decision³. This requires a uniform interpretation for Member States having introduced the private copy exception. A uniform approach is essential to ensure an efficient functioning of the copyright regime in the age of cloud computing developments (for further development on the issue, please see Annex 1).

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?

Both the scope and the application of private copying and reprography exceptions need clarification at European level. This is a fundamental requirement to ensure legal certainty.

Currently, we face diverging national systems targeting different products and applying different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market.

In addition, some Member States continue to allow the indiscriminate application of private copy levies to transactions irrespective of the person to whom the product is sold (e.g. private person or business). Orange reminds that the Padawan decision⁴ has clearly stated that private copy levy does not cover professional uses. But not all Member States have ex-ante exemption and/or ex-post reimbursement schemes to remedy these situations and

³ ECJ, 10 octobre 2010, Padawan vs SGAE (C-467/08)

⁴ See footnote 3

reduce the number of undue payments. It is therefore important to ensure this is implemented in a harmonised way in order to avoid competition distortions. It has to be unambiguously confirmed that compensation for private copying is exclusively targeted to private copy and must not be extended to professional use.

Compensation should be based on real harm and should therefore not exist if there is no proven substantial harm to right holders. In addition, private copy levies should be paid once: double payment in the context of cross-border transactions must be avoided.

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?⁵

No. In cases where a service has been licensed by right holders and includes a number of digital copies which generates minimal harm to these right holders, imposing private copy levies is not justified. Compensation should be based on real harm and should therefore not exist if there is no proven substantial harm to right holders. Considering that compensation is needed would run the risk of hindering the digital distribution economy.

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?

The extension of the current levy system – which was conceived within the analogue world – to the online environment needs to be properly assessed, in order not to hamper the development of innovative technologies and services. The Vitorino report⁶ presents arguments against the extension of levies to services based on cloud: attempts to broaden the interpretation of the private copying exception are not only to the detriment of rights-holders and legal offers based on license agreements, but are also legally questionable.

The development of innovative technologies and services, in particular on demand services, allowing users to enjoy digital content over different platforms and devices has led to the emergence of new business models, in particular around music and audio-visual works. Consumers want to be able to access digital content from several connected devices, at all times and from where they want. In that sense, cloud computing responds to their demands.

⁵ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

⁶ Recommendations resulting from the mediation on private copying and reprography levies, Antoni  Vitorino, Brussels, 31 January 2013, http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

It allows users to enjoy digital content they recorded without having to store it on a physical support. European consumers and Internet users would therefore be the first victims of the imposition of levies on cloud services since prices would most certainly rise because of levies.

Imposing levies on cloud services would also have a negative impact on European cloud service providers. The obligation to pay levies added to new administrative burden would significantly limit their competitiveness on the global market. The negative impact would be immediate, as levies would raise prices and thus limit the attractiveness, competitiveness and future development of business models based on new technologies.

Moreover in the digital world, rights-holders already receive compensation for licensed content including subsequent copies in the framework of licensing contracts. In these cases, applying the copyright levy system to cloud services would result in an unjustified triple payment by consumers (i.e. for the licensed content, for the connected device, and for the cloud service).

If such a system would nonetheless be envisaged, calculating the amount of the compensation based on the general capacity of a server to store digital content would not only be contrary to the basic principles of the private copy levy but would also seriously threaten innovation. Moreover, due to the global nature of cloud services, imposing territorial/national levy systems on global services would require to overcome the lack of harmonization of the private copy levy system, in particular for the calculation of the tariffs.

In addition, offers of cloud services have been launched throughout the European Union but are subject to different regulatory regimes. There is a strong need to ensure that the regulatory framework applicable to this kind of service is future-proof and fosters investment in innovation.

67 Would you see an added value in making levies visible on the invoices for products subject to levies?
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Yes. Despite the risk of increasing the "copyright levies forum shopping", visibility of the levy on the invoice of those products that are subject to levies would increase transparency and awareness among customers.

Orange believes that the burden of providing information should be borne by those who benefit from the revenues of the levies. In case the European Commission decides that information should be delivered by distributors, proportionality requires that costs are borne by right holders. Distributors should not have to pay copyright levies and, in addition, to bear the financial burden of informing end-users.

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

Please refer to combined answer to questions 21, 22 and 24.

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

Yes. Orange recognizes the importance for right holders to be compensated for their works and highlights the necessity of enforcement of Intellectual Property Rights. However, Orange would like to remind the European Commission that it should not be seen as the sole solution against piracy. A more holistic approach is needed to fix this problem and to ensure an efficient protection of intellectual property rights. Focusing on how to increase the offer and the consumption of legal content is key also to ensure the protection of right holders.

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?

The current system on enforcement such as the Intellectual Property Rights Enforcement Directive (IPRED) has played and continues to play a crucial role in providing right holders with a high level of intellectual property rights' protection. These texts are based upon principles that are still valid today and that should be maintained.

In addition, any future eventual revision must be coherent with the intermediary liability regime in place today. The current EU legal framework on e-commerce - in particular the provisions related to intermediaries' liability - strikes the right balance amongst the interests of the different stakeholders and this should not be undermined by any eventual review of the copyright framework.

Moreover, it is also crucial to recognize that counterfeiting and online Intellectual Property infringements are different in nature, and require different approaches.

The transposition of the IPRED has unfortunately led to big differences amongst Member States, impacting the efficiency of the enforcement regime. Orange would like to alert the European Commission on measures which may jeopardize the balance of the entire system. The IPRED is meant to regulate the procedures in front of the judicial authority and the lack of IPRED harmonisation does not guarantee the same level of impartiality and control. For example, several Member States provide for a right of information only in the context of judicial proceedings while other Member States provide for a right of information even before formal proceedings as a provisional measure. This goes far beyond the IPRED

provisions and their objective and its application must remain compliant with privacy regulation.

As a remark, Orange would like to highlight that internet service providers have always worked in collaboration with judicial authorities to protect copyright in a way that guarantees citizens' fundamental rights: presumption of innocence, fair trial, privacy and confidentiality of communications. However, efficient enforcement depends also on a global approach where all internet players of the value chain have to cooperate. But as the current approach is mainly focused on internet service providers working in collaboration with judicial authorities, it can only have a limited reach.

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?

Yes. The current civil enforcement framework remains sound and is based on principles that are still valid today. Implementation measures must be viable for all stakeholders and proportionate to the gravity of infringement.

Orange shares the views of the European Commission on the necessity to find the correct balance between fundamental rights and especially between the right of property and the right to privacy. Both have to coexist. The European Court of Justice has given important and useful indications in two well-known cases (Promusicae⁷ and Tele2⁸), asking Member States and their respective authorities to take measures that, while balancing both rights, should respect the principle of proportionality. The European Court of Justice decisions imply also that internet service providers cannot assume the responsibility to balance the rights and become controllers of the Internet. As a consequence, the enforcement framework completed by the European Court of Justice ruling achieves a right balance between copyright and the right to privacy and protection of personal data.

In addition, other fundamental rights should be taken into account. This is the case the presumption of innocence, fair trial, confidentiality of communications for instance. Since the SABAM case⁹, the European Court of Justice has considered the right to conduct a business as a fundamental right that should be taken into consideration during the balance process.

⁷ ECJ, 29 janvier 2008, Promusicae (C-275/06)

⁸ ECJ, 19 February 2009, Tele 2, (C-557/07)

⁹ ECJ 24 novembre 2011, SABAM (C-70/10)

ANNEX 1

➤ Limitations and exceptions in the Single Market

21. 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?)

Il est indispensable de renforcer l’harmonisation des règles applicables en matière de droit d’auteur sur l’ensemble du territoire l’Union Européenne au risque de faire émerger et prospérer des distorsions de concurrence préjudiciables pour le marché intérieur.

Conformément à la Directive 2001/29/CE du Parlement européen et du Conseil du 22 mai 2001¹⁰ sur l’harmonisation de certains aspects du droit d’auteur et des droits voisins dans la société de l’information, l’exception pour copie privée doit permettre de maintenir un niveau élevé de protection de la propriété intellectuelle tout en encourageant « *des investissements importants dans des activités créatrices et novatrices, notamment dans les infrastructures de réseaux* » et favorisant ainsi « *la croissance et une compétition accrue de l’industrie européenne (...) aussi bien dans le secteur de la fourniture de contenus que dans celui des technologies de l’information* » (cons. 4).

En effet les entreprises innovantes contribuent à la vitalité économique nationale et à la diffusion des technologies et des produits nouveaux sur le marché et dans la société. C’est pourquoi la loi doit leur assurer un environnement juridique stable et incitatif.

Ainsi il est admis que les règles en matière de droit d’auteur doivent être adaptées pour tenir compte des réalités économiques sauf à ce que les Etats membres fassent l’impasse sur les innovations technologiques et économiques. Une posture contraire freinerait grandement la compétitivité à la fois de notre industrie mais aussi de notre secteur culturel à l’heure où des acteurs étrangers proposent des services équivalents sans rémunérer les ayants droit.

De même, cet impératif d’adaptation doit se conjuguer avec celui de l’harmonisation des règles du droit d’auteur dès lors qu’une disparité dans l’application des normes porte atteinte au bon fonctionnement du marché intérieur, comme le rappelle le considérant 7 de la Directive 2001/29/CE :

“Le cadre législatif communautaire relatif à la protection du droit d’auteur et des droits voisins doit donc aussi être adapté et complété dans la mesure nécessaire au bon fonctionnement du marché intérieur. Il convient, à cet effet, d’adapter les dispositions nationales sur le droit d’auteur et les droits voisins qui varient sensiblement d’un État membre à l’autre ou qui entraînent une insécurité juridique entravant le bon fonctionnement du marché intérieur et le développement de la société de l’information en Europe et il importe d’éviter que les États membres réagissent en ordre dispersé aux évolutions

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:fr:HTML>

technologiques. En revanche, il n'est pas nécessaire de supprimer ou de prévenir les disparités qui ne portent pas atteinte au fonctionnement du marché intérieur”.

A cet égard, Orange relève qu'une application non homogène du droit d'auteur dans les différents Etats membres permet à certains prestataires d'exploiter, sur le fondement de l'exception de copie privée, des services de type « cloud computing » sans pour autant s'acquitter d'une compensation équitable (rémunération pour copie privée).

Orange constate par exemple que le Luxembourg a introduit dans sa législation nationale¹¹ l'exception de copie privée mais que néanmoins le mécanisme de compensation équitable qui en est le corollaire nécessaire n'a pas encore été fixé, de sorte qu'une entreprise établie au Luxembourg peut tout à fait commercialiser un service fondé juridiquement sur l'exception de copie privée sans payer de compensation équitable.

En pratique, cela revient à créer une situation d'iniquité voire de réelles distorsions de concurrence entre un exploitant établi au Luxembourg et un autre établi en France, dès lors que les services (de cloud computing) des deux concurrents s'adressent aux consommateurs français.

A titre d'illustration, la société The Digital Nation, établie au Luxembourg, commercialise un service de type cloud computing dénommé « Streamnation »¹² destiné aux consommateurs français. De par son établissement social, cette société bénéficie d'un avantage concurrentiel par rapport aux sociétés françaises, avantage qui repose sur une transposition différente (parce qu'incomplète au Luxembourg) entre les Etats membres de la Directive 2001/29/CE.

Dans ces conditions, Orange invite la Commission à renforcer le processus d'harmonisation des règles applicables en matière de rémunération pour copie privée, d'autant plus que la compensation équitable est désormais une « notion autonome » en droit de l'Union européenne¹³.

¹¹ Article 10 4° de la Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données : <http://www.legilux.public.lu/leg/a/archives/2001/0050/a050.pdf#page=2> .

¹² <https://www.streamnation.com>

¹³ CJUE, 10 octobre 2010, Padawan c/ SGAE (Affaire C-467/08).