



**WIKIMEDIA
MAGYARORSZÁG**

Wikimédia Magyarország Egyesület

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Budapest, 30 November 2008

Dear members of the Commission of the European Communities,

Wikimédia Magyarország Egyesület (Wikimedia Hungary) would like to use this opportunity to react on the Green Paper on Copyright in the Knowledge Economy.

In the Green Paper you ask several specific questions, and you invite comment on other issues that are touched in the Green Paper. Wikimedia Hungary would like to accept this invitation. First we will elaborate on our role and give some considerations on the existing legislature.

Wikimédia Magyarország Egyesület and our copyright policy

Wikimédia Magyarország Egyesület (in English: Wikimedia Hungary) is a Hungarian association founded in 2008 with the objective to collect, disclose, secure and promote free and/or freely accessible information of any shape. To reach this objective the association cooperates closely with the volunteers of the Wikimedia projects. Members of the association are generally also active on these projects, such as Wikipedia (free encyclopedia), Wikibooks (free books), Wikinews (free news), Wikisource (free sources) and Wikimedia Commons (free photos and other media). Wikimédia Magyarország Egyesület is a recognized chapter of the Wikimedia Foundation, which is incorporated in the United States of America. This foundation has a policy directed towards the promotion of free licenses.

Free information in this context does not mean that the information is *for free* (gratis) as such. Free should be explained in the sense of the GNU Free Documentation License (GFDL), which means that the information can be re-used freely, however with attribution of the main authors. Authors using a free license such as the GFDL give everybody the right to copy, change and use the work somewhere else, under the provision that the derivative is published under the same license. To develop openness and interoperability work is in progress to harmonise existing free licenses, e.g. those developed by Creative Commons.

Wikipedia, as one of the projects of the Wikimedia Foundation, is in this sense a **freely licensed** encyclopedia.

Considerations on the current copyright legislation

The Green Paper uses the existing copyright legislation as a starting point, and based on that, signals several possible bottlenecks. Especially the differences in national legislation that can lead to legal uncertainty are treated. In our view, attention should also be given to some more fundamental questions on the copyright. In that respect, the Green Paper states in paragraph 1.2 (The Scope of the Green Paper): "A high level of copyright protection is crucial for intellectual creation".

At the creation of the copyright legislation a high level of protection was indeed deemed of fundamental importance for intellectual creation. In the current society, however, this can no longer be considered true in all cases. A growing number of authors (amongst them musicians and writers) renounce their copyright on created works, either completely or in part. This occurs not only on the internet, where more and more works are released under a free license (e.g. Wikipedia, Wikipedia Commons, on Flickr, Tribe of Noise), but also in more traditional media such as books.

This does not mean that these authors stop creating works; on the contrary. The (partially) renounced copyright gives these authors a security that their works will have a long lifetime. Through the easy accessibility and quick spreading via the internet authors reach a much larger audience than via traditional publishers.

Also the lively open software industry has shown that the use of a free license can be interesting for the producers.

Other societal trends

Media directed at the public

There is also a strong trend within traditional media, such as newspapers and magazines, that they provide their content for free. More and more often, they receive their income through advertisement instead of subscription fees. The websites of many newspapers display an abundance of advertisements. The consumers of these products therefore no longer pay for the content of these websites, but only for the transport of the information to their home or workstation. Many television and radio shows can also be viewed and listened to for free via the internet. The interests of the users of the shows might be much larger than the interests of the producers. The free use of newspaper articles, television shows etc. leads to a further spread of information and therewith a better use of the relevant parts of these. Also, different works, which traditionally were only created with commercial intentions, are increasingly spread for free by the authors themselves (think for instance of the CD's of Radiohead and the Hungarian group Pál Utcai Fiúk).

Governments

Harmonisation also lacks in policies to release public sector information. For example, the website of the European Commission states:

© *European Communities, 1995-2008*

Reproduction is authorised, provided the source is acknowledged, save where otherwise stated.

Where prior permission must be obtained for the reproduction or use of textual and multimedia information (sound, images, software, etc.), such permission shall cancel the above-mentioned general permission and shall clearly indicate any restrictions on use.

European governments could, in this perspective, take the example of the American government. In the United States of America all information that is collected by the federal government is freely available in the *public domain* (free of any copyright). In the European Union this is not the case. As a consequence, for example, photos made by NASA can be found everywhere on the internet, in newspapers, books and magazines, while photos by ESA are barely spread. This influences public opinion: NASA is much more known and perhaps also more popular than ESA. In projects such as Wikipedia this is also reflected. Even on the French language Wikipedia the article on NASA is much more in depth, interesting and better illustrated than the article on ESA (as of October 10, 2008), the same is true for the Hungarian and to a lesser extent the English editions of Wikipedia as well.

Collaboration

The current information society is more and more directed towards collaboration. The traditional copyright is not in all respects fit for authors to cooperate effectively. The use of free licenses is therefore necessary, as becomes clear in the Wikimedia projects, where articles are being translated under the same free licenses and a shared media database has been set up (Wikimedia Commons). The applicable copyright (especially regarding media, and government created information) within these projects remains unclear in some respects, not only because the legislation differs between the EU Member States themselves, but also because it differs from copyright legislation in countries outside the European Union, such as the United States of America.

The traditional author?

It seems that in the Green Paper a distinction is made between traditional authors and "amateur" authors of for instance weblogs. For the first category a high level of protection is suggested. This, however, is an artificial separation: both categories consist of authors and deserve a similar treatment. After all, distinctions between an amateur and a professional painter have never been made, so a similar distinction between types of authors does not seem logical. Moreover, one person can operate in different roles. A scientist can publish on a weblog, publish a book and publish in scientific magazines.

Because the Green Paper takes the existing copyright legislation as a starting point, the researcher/student and the author seem to be located in an opposing position, where both would have conflicting interests. This seems to ignore the fact that the researcher/student is generally also an author. The legal construction protecting authors restricts the same persons in their role as a researcher/student. A very careful consideration of author interests is therefore required: copyright protection of one author is not necessarily in the best interest of all authors, especially not in the best interest of the authors who are researchers/students themselves. For the development and affordability of education it would be beneficial if more works were published under less strict copyright protection).

The view of Wikimedia Hungary

Given the above considerations and the objectives of Wikimedia Hungary the main point for copyright legislation should be:

the maintenance, development and distribution of intellectual creations

Copyright legislation should benefit the development of knowledge and culture and progress in general. The copyright legislation should not rest upon exclusive rights but should be aimed at co-operation and sharing.

A new economic model is arising in which exclusive rights are no longer in all cases beneficial. On the contrary, exclusive rights might be counter-productive. The sharing of knowledge and culture is of fundamental importance to contemporary intellectual creations. Therefore, this perspective does not, per se, involve the protection of the author.

The above does not imply that Wikimedia Hungary wants to introduce many limitations on copyright laws. In particular Wikimedia does not advocate limiting existing rights. All Wikimedia projects respect existing rights, which has thorough effects on the information available on the Wikimedia projects.

All information and all media-files in these projects are made available under free licenses that allow re-use and modification without authorisation. Wikimedia Hungary only wishes to emphasise that the protection of the interests of authors should be balanced against other important public interests, such as good and affordable education and the fundamental right of everyone to development.

Balance and options

Wikimédia Magyarország Egyesület notices that, in regard to the interests of stakeholders, the phrase 'the right balance' is mentioned several times in the Green Paper. What this balance should be however is not described. The paper seems to suggest that a 'right balance' exist if the author's rights are sufficiently protected. Wikimedia Hungary believes that the interests of the user are not sufficiently considered in this context, and that there is no (longer a) 'right balance' at all if the existing rights of the user are limited through adaptations in copyright legislation.

Wikimedia Hungary does however recognize the importance of stimulating authors' awareness of the options they have regarding the protection of their works, especially the choices existing between on the one hand completely releasing them into the public domain and full exclusivity on the other hand. Besides that, it might be logical to release the work into the public domain for certain specific authors automatically. This could be the case, for instance, for authors working in public service.

The current copyright legislation demands for authors to actively make it known that they would like to give others the right to copy or redistribute their work. The author can herewith extend the limitations of the copyright which are already provided for in the legislation. As far as the copyright of their works are concerned, a number of authors have a (financial) interest in the widest dissemination possible.

As it is, in general, many authors will however probably not even realize they have a choice to release the work under a free license, nor are they aware of the existing legal possibilities between exclusive exploitation and releasing their work into the public domain. The latter is not even possible within some continental European jurisdictions.

Questions from the Green Paper

The reactions by Wikimedia Hungary to the specific questions in the Green Paper are listed below. The questions themselves are in italic.

Introduction

General Issues

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

The obligation to find the right holder significantly increases the costs of implementing the exceptions in terms of money, time and human resources. The right holder has to be identified (a step to which the current legal structure provides no effective support), contacted, his response awaited and processed; these costs are significant even in the case of single re-use, but they make large-scale or automated re-use totally impossible. With the development of the internet and digital technology, the rapid increase in the information available to us services based on large-scale re-use of information (among them commons-based peer production systems built on the cooperation of huge communities such as Wikipedia) have an ever increasing significance in the transmission of knowledge. In knowledge based society any regulation that prevents or seriously hampers such services based on large-scale re-use is to be avoided for it is harmful.

For the same reason are such legal tools very useful that provide the right holder with the right to permit use to anyone without the re-user having to contact him in cases not covered by copyright exceptions. (Creative Commons licences serve this very purpose). The author's right to dispose of his works in such matter has to be guaranteed; it is highly problematic that in certain Member States the law governing copyright licenses (enacted at a time when the significance of large-scale re-use was unforeseeable) makes difficult licensing that – based on the authors unilateral declaration – does not require the re-user to contact the author.

(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?

For private and non-profit users, who do not have the legal expertise or the funds to procure it, model licences or guidelines for entering contractual arrangements are extremely important, although their provision is not necessarily a state task. In the field of free licences – the field most important to Wikimedia Hungary – as a result of the work of some NGO's (Free Software Foundation, Creative Commons) these are already readily available and accessibly by everyone.

However, it would be an exemplary step beneficial to the development of the knowledge economy and participatory democracy if Member States in respect to works created by their state organs would undertake to sign contracts with potential re-users that would allow the highest degree of freedom for re-use; in particular, where possible, to publish under a free licence all works produced with public funds.

(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?

With the increase in the significance of internet services spanning national boundaries the lack of harmonisation between jurisdictions leads to an increasing degree of legal uncertainty. There is a great need for the development of a mandatory minimum package of exceptions guaranteed by all Member States: as it shall be clear from our answers to the various questions, we would make the exceptions mentioned in points a), c), d), h), i) of article 5 section (3) of the 2001/29/EC directive mandatory to all Member States.

(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?

More legal certainty would follow by making mandatory exceptions that are often tied to uses spanning boundaries, for instance:

- use of works, such as works of architecture or sculpture, made to be located permanently in public places (Article 5, point (3) h) of the 2001/29/EC Directive)
- removal of copyright protection of symbols used in the course of state administration, such as official coats of arms of the settlements
- Making the rule of the shorter term generally accepted so that internet services re-using old works would need only to check whether a work is under copyright protection in the country of origin, and not individually in every country towards which the service is oriented
- quotation and the publication of news (points d) and c) of the above mentioned section)

In the interest of legal certainty it is important to secure exceptions for use-cases where the user is generally not aware of the fact of use (pictures of building and other works located permanently in public places (point h) of the above mentioned section) and incidental inclusion of some protected work in other material (point i) of the above mentioned section)).

Exceptions: Specific issues

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

As numerous examples show, libraries usually do not possess the necessary resources for the digitisation of works, even less so for the processing of the digitalised copies (indexing, tagging with metadata); the economic actors could provide much help in this field. Open and easy access and discovery of information and the works that contain it is essential for such information gathering and organising efforts as are done by the Wikimedia projects. For this reason we propose to extend the exceptions to other actors as well: non-profit organisations and market players should have the right to reproduce a limited number of copies of any work provided that:

1. they do not make the digital copy available (that is the service is not oriented towards the publication of the work, rather its processing as in the case of search engines and data mining tools), except possibly in educational and research institutions on terminals dedicated for this purpose
2. they provide libraries and archives with a copy of the digital reproduction of the work
3. the right holder does not explicitly prohibit this kind of reproduction

(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?

The access to works for teaching and research purposes in a knowledge society is a public interest that can hardly be overestimated; however it is rarely in the interests of publishers to create fair licensing schemes. In this case the public interest is more important than the private, the correct path is the enforcement of the exceptions for teaching and scientific research purposes set out in the 2001/29/EC directive. We propose in place of licensing schemes a minimum package of exceptions.

(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;

We believe in respect of all three questions that no useful purpose would be served by any limitation on the scope of exceptions; for libraries to have their content available in digital, easily processed, automatically convertible (for example easily converted into an accessible format for people with disabilities) format as well is an important public interest, the significance of which goes beyond the preservation of works: these materials are searchable, easily accessible, and make it possible to access works held in different libraries from the library's terminals. At the same time making possible these operations will only make the current method of use (access on dedicated terminals) more efficient, it does not increase the scope of allowed uses and does not breach the interest of the right holder. In conclusion the exceptions in question need to extend to format shifting, the creation of the necessary number of copies and the scanning of the entire collection; if this is not unambiguous in the current Community law, there is a need to clarify or amend the regulations.

(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?

Our answer to the previous question is applicable here as well: in the knowledge society guaranteeing that knowledge be searchable is an elementary interest; the activities of libraries towards this goal must not be limited. If the current regulation in this matter is unambiguous they need to be clarified or amended.

(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?

Our answer to the previous question is applicable here as well: in the knowledge society guaranteeing that knowledge be searchable is an elementary interest; the activities of libraries towards this goal must not be limited. If the current regulation in this matter is unambiguous they need to be clarified or amended.

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

It needs to be secured that the operator of an internet service is only required to check the local legal regulations and/or the legal regulations of the country of first publication.

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?

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

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

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

(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?

(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?

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?

The access to works for teaching and research purposes in a knowledge society is a public interest that can hardly be overestimated; however it is rarely in the interests of publishers to create fair licensing schemes. In this case the public interest is more important than the private, the correct path is the enforcement of the exceptions for teaching and scientific research purposes set out in the 2001/29/EC directive. We propose in place of licensing schemes a mandatory minimum package of exceptions (we have elaborated on the extent of this package in our answer to question (3)).

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

Yes. The distinction between digital and non digital copies is anachronistic and is an unnecessary hindrance to distance learning, as well as to other efficient forms of educational and research use (for example, search, hyperlinks, footnotes).

(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. Making educational materials accessible and thus allowing student to process and learn them at their own pace and timetable, and facilitating self-education that extends the material taught in the institutions are both important goals that should be encouraged.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes? (23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Yes. In the modern world knowledge is the highest value: both its acquisition and distribution are important public duties: copyright exceptions are reasonable in both cases.

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?

The problem with regulations of transformative use is not their imprecision but their nature of being too restrictive. Such uses form the basis of numerous art forms; furthermore, they are essential in the acquisition of digital literacy and the restoration of the “read-write culture”. Works created by using parts or element of other works to reflect on these, their message, role in society, etc, should not be seen as reproductions rather as independent works, all unjustified limitations in the way of creating such works have to be removed; if possible not by formulating new exceptions but with the limitation of copyright protection.

(We note that the identification of transformative and user-created works is misguided. Although the digital technology made the creation, the internet the distribution of such works easier, drawing on other works has been an essential part of artistic creation from the beginning of time.)

(25) Should an exception for user-created content be introduced into the Directive?

The distinction of user-created content is unjustified and even the concept is problematic – there are more differences than similarities between individual works published through internet services that make publishing easy (such as blog posts) and collaborative commons-based peer production of content (such as on wikis). Works created using internet services are author works all the same – copyright law does not distinguish based on the number of authors or their level of professionalism. The possibility of transformative use should not be created as an exception in the context of internet services and Web 2.0, but in general.

Further considerations

Circumvention of technical measures

The current text of the directive makes it possible to limit the users guaranteed exploitation of the exceptions by means of technical measures. The regulation has to be changed so that uses under the exceptions that are otherwise legal and conform to the three-step test can not be limited by abusing the laws prohibiting the circumvention of technical measures. The directive must not limit the circumvention of the technical protection – or the enabling of the same – done in the interest of a legal use based on an exception.

The legal protection of databases

Similarly to the technical measures the rights related to databases can be used to encroach on the exception, thus it is essential to guarantee the use of exceptions in relation to databases as well.

Conclusion

The changes in methods by which works are created and in the public perception of copyright require a different approach of the copyright legislation that should foster the conservation, development and dissemination of knowledge and culture. Copyright legislation should give a positive impulse to the development of these goals. The exclusivity upon which current copyright legislation is based is no longer always beneficial and can even be counter-productive. Copyright legislation should be based less upon exclusivity and more upon the sharing and development of material amongst authors. The sharing of knowledge and culture is of fundamental importance towards the knowledge society.

Signature

Wikimédia Magyarország Egyesület hopes to have contributed usefully towards the discussion on this topic within the European Union.

With kind regards,

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Board Member for International Relations
Wikimédia Magyarország Egyesület

pp. **Péter Gervai**
President
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