Submission to the Consultation on the review of EU legislation on copyright and related rights

in response to the

Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, Brussels, 19.7.2004

1.11.2004

Electronic Frontier Finland ry

www.EFFI.org

Electronic Frontier Finland ry (EFFI) is a Finnish NGO, which was founded in 2001 to defend active users and citizens of the Finnish society in the electronic frontier. The organization has currently more that 650 members. EFFI influences legislative proposals concerning e.g. personal privacy, freedom of speech and user rights in copyright law. EFFI also works in close cooperation with organizations sharing same goals and values in the Europe, United States and elsewhere. EFFI is a founding member of the European Digital Rights (EDRi) and a member of Global Internet Liberty Campaign (GILC).

1. Background

EFFI fully endorses the EDRI's, FIRP's and VOSN's joint submission to the consultation. Consequently, this submission addresses mostly additional points, which are not covered in the joint submission.

2. General Notes

The current "acquis communautaire" on copyright is product of countless compromises and aggressive lobbying. Its content can be best explained by using the public choice theory. The notions of balance mean mostly balance between different players of the lobbying game, not the real balance for the society. As documented in the resent research (e.g. Meir Perez Pugatch: The International Political Economy of Intellectual Property Rights, Edward Elgar Publishing 2004), the decision-making is typically not based on scientific or even objective facts but instead on the demands of certain narrow parts of the industry.

Thus, the very first thing to fix is the process how IPR legislation is prepared in the EU. The role of lobbying has to be restrained and instead much more attention has to be paid on real scientific research on the area. Considering how important this sector is currently for EU, financing wider and richer research on economic, legal and sociologic aspects of copyright should be a central part of good governance. A good start would be even using the existing scientific material as the foundation for the improvements for "acquis communautaire" on copyright.

From EFFI's perspective, the biggest problems (duration, scope, lack of registration, one size fits all-principle) of current copyright system cannot be fixed on the EU-level. Instead, the change has to happen on the international level, in practice in WIPO and WTO. As one of the most powerful trade blocks EU can - if it chooses to do so - facilitate a new regime of science-based copyright.

3. Horisontal Issues

3.1 Exceptions and limitations

First of all, the term should be changed to *Users' Rights*.[1] The Art 5. of the Infosoc Directive should apply by default to all categories of copyrighted works. Some of the Users' Rights may not be very useful for software or databases, but the same can be said about the more "traditional" classes of works. In addition, in the digital environment the boundaries of different categories are becoming more and more blurry. The users should know their rights without knowing the whether the work in question is in the end software, database or written work. Similarly the existing Users' Rights from Software and Database Directive should be extended to all categories of works, if possible. For example, does it make sense that a user has a right to make a back-up copy of software, which is stored on the DVD, but not a back-up copy of a DVD-movie?

Even if nothing else will be done, at least **the mistake with temporary acts of reproduction should be corrected i.e. it should apply vis-à-vis to software and databases.**

Secondly, the potentially biggest problem with the Users' Rights is actually not found from the Art 5. of Infosoc Directive. The big problem is Art 6.4. If the Commission and a large part of the content industry are right, we are heading towards a world, in which TPMs are ubiquitous. This means that users would be -- in practice -- in the mercy of the right holders, because Art 6.4 really does not offer any kind of effective tools for normal citizens to demand their rights. The situation gets even worse with Art. 6.4.4 ("E-commerce safety clause"), which takes away *all Users' Righss* in the Internet environment. Considering that most of the copyrighted material is distributed that way in the future, this means that Users' Rights cease to exist. We'd like to ask, does the Commission really believe, that there should not be an exception for disabled people or that the exception for public security should not be valid for documents traded over Internet?

EFFI suggest, that 6.4. should be totally rewritten so that it takes into consideration that the Users should have effective ways to enforce their rights also in the digital realm.

Finally, EFFI likes to point out that Infosoc Directive is currently against Berne Convention and WCT because in the treaties the right to make quotations is mandatory. This is not the case with Art. 5 of the Infosoc, in which the only mandatory Users' Right is the temporary reproduction and even less with the Art 6.4.

[1] To truly balance the current regime, a separate Users' Rights Directive would be also needed. This question has been addressed in EDRI's statement in more detail.

4. Vertical Issues

4.1 Decompilation

The current 6-step test for decompilation has worked relatively well - at least in than sense that there have been very few court cases about it. Still, the current test is very much in conflict with the foundations of copyright. On of the basic arguments for copyright is that it forces the authors to publish their works. Currently only parties, which are creating compatible product, are allowed to study the inner workings of software.

The compatibility-requirement has also very real negative effects. For example, there is no research-exception for decompilation. Similarly, it is currently illegal to use decompilation to find out, if there is some infringing code inside of software. On the other hand, the benefits of the compatibility-step are minimal. Direct copying is anyway a copyright violation, which means that the competitors can't derive too much competitive advance from it.

EFFI requires that the compatibility-requirement is removed from the 6-step test.

4.2 Protection of technological measures and software

EFFI agrees with the Commission, that the Software Directive addresses currently very well the TPMs for software. As matter a fact, the formulation in Software Directive has worked so well that **EFFI would very much prefer to replace the Art 6. of Infosoc Directive with the similar wordings from Art 7.**

4.3 Duration of related rights

The question of duration of related rights should be solved purely based on scientific analysis. The goal should be to maximize the general welfare of the society, not the welfare of record companies. There are luckily some existing materials available. For example, the leading economist in US argued the following about the extension of copyright:

> "Comparing the main economic benefits and costs of the CTEA [The law in question], it is difficult to understand term extension for both existing and new works as an efficiency-enhancing measure.

> Term extension in existing works provides no additional incentive to create new works and imposes several kinds of additional costs. Term extension for new works induces new costs and benefits that are too small in present-value terms to have much economic effect. As a policy to promote consumer welfare, the CTEA fares even worse, given the large transfer of resources from consumers to copyright holders."[2]

The similar arguments can be made against extending the term protection of related rights. **EFFI agrees with the Commission that there is no need for tem extension.**

5. Issues Outside The Current Acquis

5.1 Definition of the term "public"

The term public is currently understood differently in the member states. EFFI believes that some countries, especially Finland, have widened the meaning of term too far. Thus, it would be beneficial to harmonize the meaning before it starts to affect negatively to the Internal Markets. The term should not be stretched beyond its normal meaning. A taxi driver or physical therapist that listens to radio to have some entertainment for herself should not have to pay copyright fees. Instead, the term should cover only situations in which there is constantly a large group of people, which are listening/watching actively the material.

5.2 Exhaustion of rights

The first sale doctrine should be based on international exhaustion of rights. There are absolutely no sustained arguments for preventing the importation of works without the consent of right holder. The current regime not only hurts consumers but also academics and cultural life in general.

5.3 Dirty Hands Doctrine

The consultation does not address at all a wide range of question pertaining the misuse of copyright. The basic presumption behind current copyright law is that the right holder never tries to use the rights to something harmful. This is not in parity with the reality. For example,

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[2] http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf. The authors were George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott

[Footnote continued on next page]

copyright is a powerful tool to use against critical parties (e.g. Scientology against its critics and Google, Diebold against students that posted documents that its e-voting machines are not safe etc.). Copyright can be used also to limit competition, which has been explained in more detail in EDRI's et al statement.

EFFI believes that a dirty hand doctrine, which would shield the innocent parties against immoral uses of copyright, should be codified to Acquis.

[Footnote continued from previous page]

Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser