THE COPYRIGHT MANIFESTO

How the European Union should Support Innovation and Creativity through Copyright Reform

NOW IS THE TIME TO FIX COPYRIGHT!

COPYRIGHT for CREATIVITY
A Declaration for Europe

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COPY-'RIGHT' 50 SHADES OF EXCEPTIONS

THE CURRENT COPYRIGHT REGIME IS BUILT ON THE FOLLOWING LOGIC:

Copyright **protects rightholders, which are not always the** creators of works but can typically include publishers, producers, recording companies, etc.

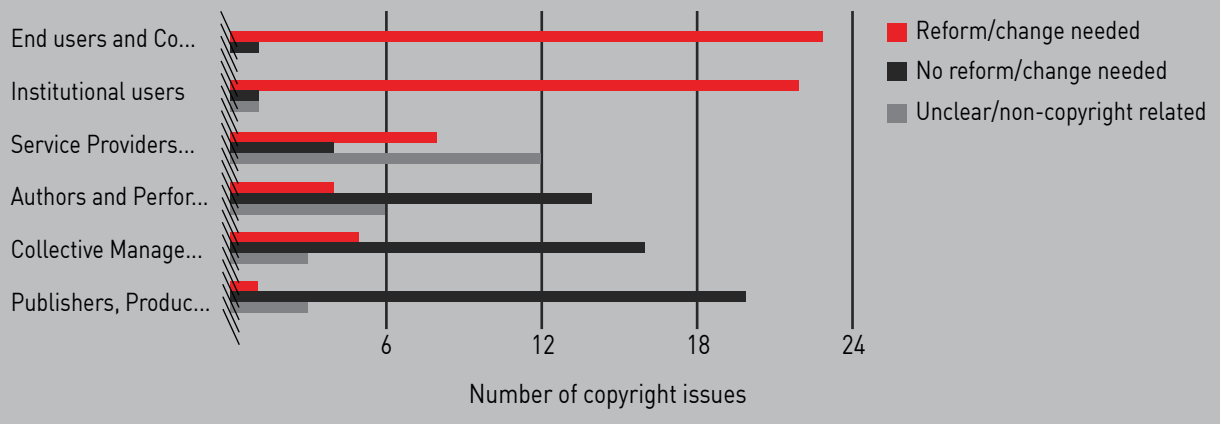
Copyright means that rightholders have an exclusive control over copying and other exploitation of a work for a specific period of time, after which the work enters the public domain.

All uses of a copyrighted work require permission of the copyright owner **EXCEPT if the use is covered by a limitation or exception**. The **scope** of copyright has continuously **expanded** to cover not only books, but also maps, performances, paintings, photographs, sound recordings, motion pictures, databases and computer programs. Its **duration** has also increased, reaching up to 70 years after the death of the last surviving major contributor for certain works.

Under current EU law, **copyright harmonisation is limited to the exclusive right** of the rightholder of an original work, but fails to address the other part of the system, namely the exceptions and limitations.

COPYRIGHT DIVIDE IN NUMBERS

Stakeholder orientation towards the need for copyright reform



Source: Leonhard Dobusch: Re-Balancing Copyright: Insights from the EU Consultation

WHY DOES COPYRIGHT REFORM MATTER?

FOR USERS

Copyright is not just a dry legal issue: it affects users in their everyday activities.

In a digital borderless world, Europeans discover regularly (and with increasing frustration) that they cannot access the same content across the EU. This was crystal clear from their responses to the European Commission 2014 consultation, which showed that copyright law in the EU is perceived as both "arbitrary and unpredictable".

Moreover, parents do not always understand if what their child do online is in line with copyright rules, nor can they honestly explain the rules to them; teachers and researchers are unsure of what they can and cannot share with students and colleagues and to what extent they can use digital tools to enhance their work; every online user could be breaching copyright rules unwillingly and unknowingly on a daily basis, as a behaviour that is legal in their country could be illegal in another one (or something they could do offline is not allowed online).

At the same time, libraries, archives and cultural heritage institutions are limited in their public mission to provide access to and preserve knowledge and culture, as copyright rules or licensing conditions prohibit them from embracing technological evolution.

FOR BUSINESSES

Many of the most successful online services are based on reasonable exceptions and limitations to copyright.

Yet, with Europe's fragmented rules, businesses have a hard time launching Europe-wide services, or even national services that are accessible online.

Spotify was not available in every Member State a full four years after its launch and had to undergo long discussions with GEMA (German Collecting Society) before launching the service in Germany due to excessive fees requests.

The patchwork of rules makes it really hard for a company to know whether or not their services will be legal in one Member State, let alone in all of the EU.

This leads to the absurd situation where the safest approach for a European innovator is to move to the USA, take advantage of the real single market there and the 'fair use' approach to copyright, and come back to the EU once the service has developed to a stage that it can afford the legal fees, years-long procedures and unpredictable results of European court cases.

FOR EUROPE'S ECONOMY & COMPETITIVENESS

Europe's fragmented approach sits in stark contrast with the US, which offers businesses a single, unified market. As a result, US businesses do not face 28 sets of copyright laws when launching a new product or service on that market.

Moreover, the US copyright rules are built around what is called the 'fair use' doctrine: under this doctrine, users and businesses are allowed to use copyrighted material so long as the use is deemed 'fair', a concept assessed by the court according to various parameters defined over the past decades.

As a result, 'fair use' style provisions have been adopted in knowledge intensive economies such as Israel, South Korea, China, Taiwan and Singapore.

Singapore's 2005 adoption of a 'fair use' copyright regime provides an interesting case study. The law simultaneously stimulated the country's technology and Internet-services sectors while leaving unaltered the economic output of content-publishing companies, indicating an evident net economic benefit from the reforms.

This more flexible, open norm approach allows the legislative framework to adapt to technological evolutions and innovations, and avoids situations where users are criminalized for their behaviour or new technological uses are stifled in their development due to legal uncertainty.

FOR INNOVATORS

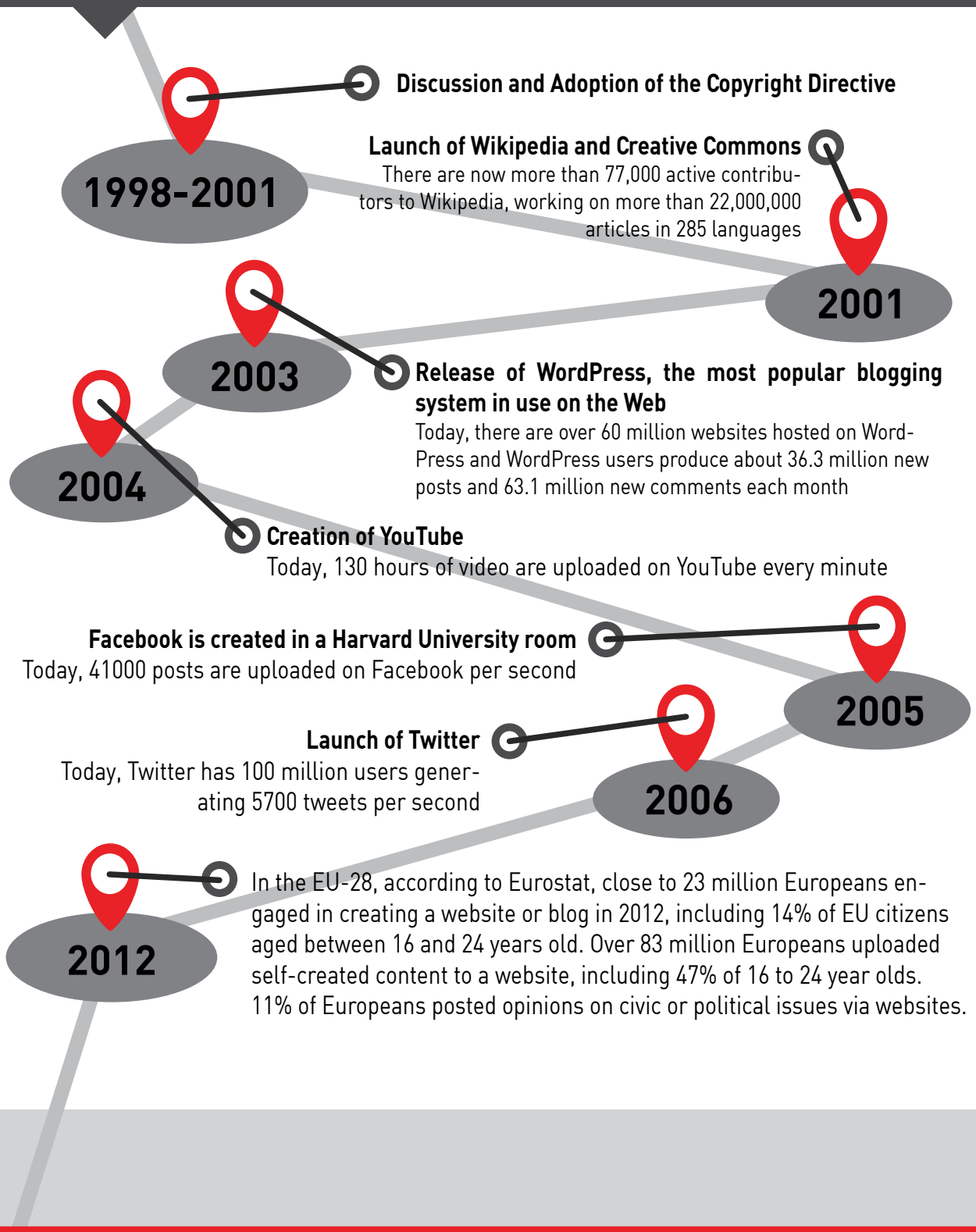
In Europe, innovators often have to rely on exceptions and limitations to give them room to spread their wings. A 2010 study revealed that EU industries relying on exceptions and limitations to copyright generate an added value added of EUR 1.1 trillion, or 9.3% of EU GDP. Nearly 9 million people are employed in these industries amounting to 4% of EU employment.

Just imagine what could be achieved if these exceptions and limitations where a source of legal certainty rather than confusion? New technologies like text and data mining could be fully adopted and used by European researchers, as they already are extensively by their counterparts in the US and Asia.

Europe's copyright rules must stop creating a **competitive disadvantage for European innovators**.

OUTDATED COPYRIGHT RULES

the new reality since their adoption in 2001



THE MAIN FLAWS OF THE CURRENT SYSTEM:

A. OUTDATED EXCEPTIONS

The Copyright Directive dates back to 2001, pre-Facebook, pre-YouTube and pre-pretty much most of the Internet. In fact, over half of the history of the web has happened since the Directive was adopted!

As a result of this hugely outdated legislation, everyday habits of today's internet users could be considered illegal. A blogger linking to or embedding copyrighted content, a meme based on a copyrighted image, a video with some footage from an existing movie or a song or using the possibilities of automated reading of content to conduct research: all of these actions can generate legal risks for the user conducting them and some of them have generated disputes in front of the Court of the Justice of the European Union. Moreover, in a world of tablet computers and smartphones, some absurd anachronisms populate the list of exceptions, such as the requirement to use 'dedicated terminals on the premises of establishments' when making available digitised works in libraries, for example.

B. NO HARMONISATION

There are 22 limitations and exceptions in the EU Copyright Directive BUT **Member States are not obliged to implement them** in national legislation, except for one (related to temporary copies).

The result is that a so-called "harmonising" EU legal instrument foresees over 2 million possibilities to implement the existing EU law, depending on which exceptions or parts of exceptions a Member State decides to put in its law; this is extremely confusing for users and businesses; and prevents cross-border exchanges between researchers, educators, and general users, and prohibits businesses from availing of economies of scope and scale.

EU/EEA teaching provisions are hardly homogeneous. It shouldn't be like that.

Limitations and exceptions to copyright vary wildly inside the EU/EEA. We can compare one of the most restrictive countries with one of the most permissive.

ESTONIA
permissive

vs.

FRANCE
restrictive

A teacher in **Estonia** can do all of the following within an educational context:

Quote works to any justified extent
Compile works of any nature
Translate and adapt entire works

(in face-to-face or online teaching environments and for free)

While a teacher in **France** is not allowed to do any of these things!

Source: Creative Commons, 'Open Educational Resources Policy in Europe'

C. PROTECTION THAT IS TOO LONG

The duration of copyright protection is disproportionate compared to the average commercial life of copyright protected works. Indeed, in the EU, copyrighted material remains protected up to 70 years after the death of the author for artistic works, and up to 70 years after the death of the last surviving major contributor (e.g. director, composer, screenwriter), for audio-visual content.

These terms do not reflect sound economic and legal considerations of the actual duration required for creators to recoup their investment in their works and their creativity.

D. DYSFUNCTIONAL IMPLEMENTATION OF THE RULES AND ENFORCEMENT

The implementation of rules often works from the unverified assumption that every technological development negatively impacts rightholders, and that they need to be compensated for the assumed losses arising from them.

This assumption governs private copy levies, which apply in most Member States when consumers or even businesses buy photocopy machines, hard disks, memory cards, smart phones, etc., regardless of the fact that these tools: (1) are used or not to store copyrighted materials, and (2) even though the so-called loss that is being compensated has never been clearly demonstrated.

The random nature of these levies is rendered worse when looking at their use, once collected: according to an 2011 economic analysis on Compensation of Private Copying by think tank ENTER there is an economic waste of at least 51.2 Cents for each 1 Euro collected. In other words, for every Euro collected by a collecting society, less than half ends up being distributed to rightholders.

Moreover, the current copyright rules allow technical protection measures (TPMs, also referred to as digital rights management tools or DRM) as well as licensing conditions to override the exceptions and limitations granted by law – i.e. a payment can be required from the consumer, even if no copying is possible. In no other area can measures by private entities simply disregard rights to access and use granted by the law.

Finally, a lot of energy is spent on adding layers of enforcement rather than re-thinking the rules that need to be enforced, in order to adapt them to the digital world, make them easier to comply with and give them back some of the legitimacy they have lost over past decades.

Criminalisation of individual users is certainly not a sustainable route to follow.

THE EU INSTITUTIONS SHOULD:

01 **Simplify and modernise** copyright rules to bring them into line with today's reality

02 **Harmonise** copyright rules across the EU

03 **Shorten** the duration of copyright protection

04 Stop the current dysfunctions in the **implementation and enforcement** of the rules

01 SIMPLIFY AND MODERNISE COPYRIGHT RULES TO BRING THEM INTO LINE WITH TODAY'S REALITY

WHAT?

Copyright rules should make sense

The copyright legal framework needs to be reviewed in a manner that it makes sense to consumers and citizens, hence making it possible and preferable for them to respect the rules.

Copyright rules should encourage innovation

The rules need to focus on enabling business innovation rather than protecting entrenched and often obsolete business models. They also need to ensure that European researchers and education professionals can benefit from the power of new technologies and the possibility to collaborate with colleagues across borders, and that businesses can have access to an EU-wide single market.

Copyright rules should include a flexible mechanism to cope with evolution

Flexible mechanisms or open norms are typically principles that allow room for interpretation as regards the application or not of copyright to a given situation. In recent years, several technologically ambitious countries, including Israel, South Korea, China, Taiwan and Singapore, have adopted a version of the fair use system, which exists in the USA for many decades.

HOW?

- **Modify** existing exceptions and limitations to remove anachronisms, due to the fact that the Copyright Directive dates back to 2001.
- **Clarify** that exceptions apply regardless of the type of work (neighbouring right) and regardless of the technical nature of use (whether the work is fixed on a tangible medium or not).
- **Add new exceptions** notably for user-generated content, text and data mining, hyperlinking and e-lending to make the list more robust in light of technological evolution and changes in users' behaviour.
- **Add an open norm** that allows the exceptions to be interpreted to 'similar uses' than the cases explicitly listed and cater for future evolutions.

02 HARMONISE COPYRIGHT RULES ACROSS THE EU

WHAT?

Copyright should not be perceived as a source of frustration & confusion

"Why can't I get access to this video on the Internet? Why is my subscription to this online service in my home country not working when I am travelling in the EU?"

"Why is this parody I just put online legal in my country but illegal in over 20 other EU countries?"

These types of questions were raised by the over 5000 responses from consumers to the European Commission consultation in 2014. Limits to access to online content were widely perceived as arbitrary and unpredictable, and the general copyright framework is perceived as a source of legal uncertainty.

Copyright should not act as a barrier to innovation

Why do I need to hire a lawyer when I launch a new product or service as a business to check not only if it complies with my own national law but also to check the 27 other ones?

Why are my US researcher colleagues allowed to do text and data mining under fair use whilst European researchers face an unclear set of rules combined with unfair licences?

These problems need to be fixed if Europe is serious about creating a digital single market and remaining competitive with other big markets such as the USA and China.

The scope of copyright should not be extended further

A couple of Member States create even more confusion and complexity in the copyright area, through the creation of what Commissioner Almunia very appropriately called 'a new type of copyright for publishers', and lawyers refer to as 'ancillary copyright'. These initiatives are causing legal uncertainty for digital innovators and publishers alike, and the European institutions should stop them.

HOW?

Fixing it is not very complicated, but requires a political will to:

- **Make the list of limitations and exceptions mandatory** in all Member States. This is perfectly possible from a legal point of view, as the temporary copy exception was already made mandatory by the 2001 Copyright Directive.
- Stop the creation of new rights at national level by Member States, extending the scope of copyright even further whilst creating even more fragmentation.

03 SHORTEN THE DURATION OF COPYRIGHT PROTECTION

WHAT?

The Duration of Copyright Protection should Reflect its Intended Purpose

The current protection terms for copyright are confusing and excessively long if you think that the purpose of copyright is to enable artists and writers to create. This duration should be reduced in order to become better aligned with the average commercial life of copyright protected works, rather than creating rent-seeking scenarios not only from right holders (who are not necessarily the creators), but also from the generations that follow them.

The Duration of Copyright Protection should not Inhibit unduly the Access to our Knowledge and Culture

The length of copyright protection prevents cultural heritage institutions digitising and making available in-copyright works. This in turn means they cannot effectively fulfil their public mission.

For example, libraries are not making digitised versions of newspapers published after a given date available to the public because of the difficulty of tracking down rights owners. Austria has the earliest cut-off date (circa 1840), followed by Portugal (1860), Czech Republic (1890). This demonstrates that 'life plus 50 or 70 years' does not necessarily mean this in practice: tracking down right holders for something as complex as a newspaper is so prohibitively expensive for libraries that they will opt to make the content available under very conservative conditions to protect themselves from litigation.

HOW?

- **Copyright duration needs to be shortened**, to enhance access to knowledge and culture much more quickly, in compliance with the EU's international treaties' commitments.
- **Similar limitations of term should be processed with regard to neighbouring rights and database protection**, where there is a clear risk of the latter remaining indefinitely under copyright protection if their creator 'updates' them every 20 years to start a new term.
- Moreover, a mechanism needs to be put in place to enable **faster transfer to the public domain** of works whose right owners abandon them (as in the case of some orphan works), dedicate them to the public domain on a voluntary basis, or which are not available any more (out of commerce works).

04 STOP THE CURRENT DYSFUNCTIONS IN THE IMPLEMENTATION & ENFORCEMENT OF THE RULES

WHAT?

Copyright Levies need to be fair & transparent

Copyright levies can represent very different amounts (e.g. the levy on the same MP3 player is 900% higher in Austria than in Germany), have no clear justification, and apply regardless of the fact that the device is used or not to copy (e.g. in the case of smartphones, where many are used purely for calling, texting and e-mailing). This leads to the absurd situation where creators pay a levy to create a back-up copy of material they themselves authored, photographers pay a levy to store their pictures on the memory card of their own digital camera, and job seekers pay a levy to make a photocopy of their CV.

Granted Exceptions Should not be Taken Away Through Technical or Contractual Measures

Common restrictions on digital files purchased by users comprise restrictions on the right to make back-up copies, and the conversion to other formats, limitations of compatibility with certain devices, technical impossibility to remix, etc.. The circumvention of these digital restrictions is explicitly prohibited by the Copyright Directive, even when this circumvention is done in order to benefit from flexibilities that are provided for in national and European law (for example, to make a private copy for which the user paid a levy, as well as paying for the licence for using the content). Moreover, licensing conditions often reinforce these technological hurdles, or add additional ones through contractual terms and conditions that are usually imposed rather than negotiated.

It is an absurdity that technological progress has led to a situation where actions that were possible before these technological developments – such as buying and selling second-hand cultural goods – are now being prohibited, to the detriment of citizens.

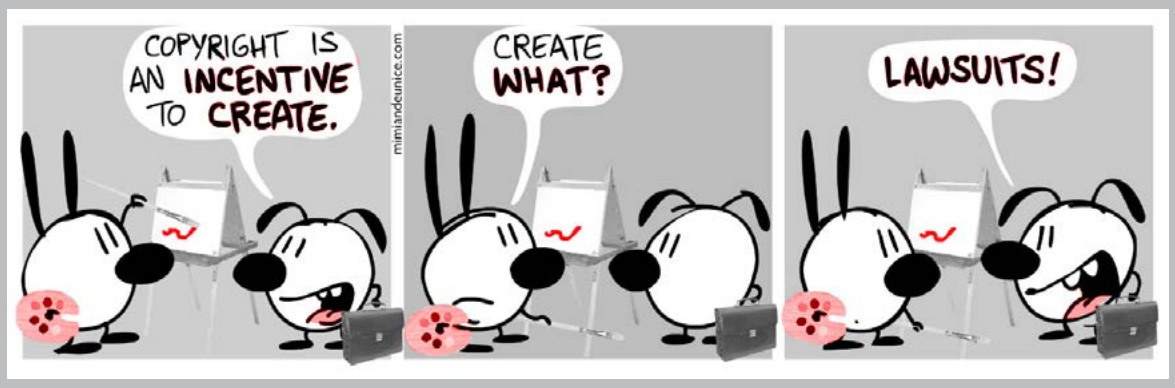
Enforcement needs to be Proportionate and follow Due Process

Strengthening the enforcement of rules that 'normal' people do not understand and consider as arbitrary and confusing can hardly be considered the best way forward.

Moreover, middlemen such as internet service providers or platforms should not be held liable nor should privatised enforcement be considered the solution. The rule of law needs to apply and the SOPA/PIPA discussions triggered by the US and the ACTA discussions in Europe have shown that there is no support for such enforcement actions among citizens. Without due process, there is a high risk of censorship and arbitrary interferences with freedom of expression, freedom of communication and also the freedom to conduct a business.

HOW?

- The focus should be on **adapting the rules to the digital era and not on strengthening enforcement**.
- There is a need to undertake a **thorough analysis of the economics** underlying the creation and dissemination of culture, since currently it is often wrongly assumed that every use of a work should be remunerated in order to satisfy creators' interests. There is evidence that these interests are not harmed, or that the public interest benefits in cases where some uses are not remunerated. This evidence should be systematically gathered and analysed before any legislative action is undertaken to further extend or empower copyright monopolies.
- If it is demonstrated that private copying or any other levies should apply, **citizens need to be informed** about (1) how much is being levied, (2) for what purpose the levy is collected, and (3) how the collected levy is being put to use.
- It should be explicitly stated in the law that **technical protection measures** (TPMs, also referred to as digital rights management tools or DRM) **and contracts should not override the exceptions and limitations granted by law**.
- The **limitation of intermediaries' liability must be upheld** in EU law and **the rule of law must apply to any enforcement mechanisms**, in order to avoid the risks linked to voluntary privatized enforcement, implemented in the absence of the presumption of innocence and due process of law.



Source: Mimi & Eunice's Intellectual Pooperty Minibook https://archive.org/details/MimiEunicesIntellectualPoopertyMinibook

#FIXCOPYRIGHT

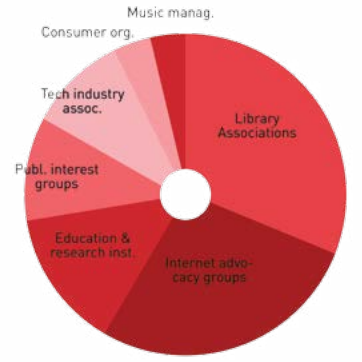
COPYRIGHT FOR CREATIVITY – C4C

COPYRIGHT for CREATIVITY
A Declaration for Europe

Created in 2010, C4C is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity.

36

SIGNATORIES



with global (12), European (7) and national (17) representativity

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