



TELEFÓNICA'S RESPONSE TO THE PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES

EXECUTIVE SUMMARY

Telefónica welcomes the opportunity it has been given by the European Commission to comment on this Public Consultation and, therefore, to review whether the existing EU copyright regulatory framework remains 'fit for purpose' and provides the best possible environment not only for authors, performers, producers but also for disruptive companies willing to offer innovative online content distribution services and/or 'value added' services which rely on use of third party content. We firmly believe that an adequate EU copyright legal framework which is 'fit for purpose' would play a crucial role in contributing to the growth of a thriving "online-content based" European digital economy.

- Firstly, the new Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market is a step in the right direction and it will help to tackle many of the problems that currently prevent an efficient management of such rights. However, the practical implementation by each Member State of the measures and requirements set forth by the proposed Directive will determine whether the principles enshrined therein are effectively put into place. The monitoring of the implementation procedure of the future Directive and the close scrutiny of the working practices of CSOs, both at national and EU level, are therefore of key importance.
- Secondly, Telefónica believes that the whole debate should be defined within the idea of a Digital Single Market. The main aim for the Commission on this matter should be to ensure that there are no unreasonable burdens or artificial barriers to a single market for content in Europe. Hence, it may be, in the future, that a single market for content becomes an economic driver that delivers a single digital market for telecommunications.
- Telefónica main concerns are related to the following questions:

- Territorial nature of copyright and copyright licensing practices.
 - The current application of two rights (the “right of reproduction” and the “right of making available”) for one act of exploitation and EU harmonization of the copyright limitations and exceptions.
 - The retention of the country of origin principle
 - Rethink how ‘Private copying’ will suit in the Digital environment
 - Preservation of the hyperlink/web-page current status quo
 - Preservation of intermediary non – liability principle
- Bearing this in mind, we would like to highlight that the territorial nature of copyright and copyright licensing practices certainly creates tensions with the open nature of the Internet: while users are granted universal access to the Internet and its content all over the world, significant restrictions apply to paid content, i.e. in many cases consumers cannot access paid content in their local territory on the same terms as that content is made available in other countries, even though the consumer is willing to pay for it. The geographical foreclosure of content limits competition and users’ freedom to access content of their choice, while at the same time it results in consumers paying higher prices for access to paid content.
 - It is also important to reconsider the current application of two rights (the “right of reproduction” and the “right of making available”) for one act of exploitation since it creates problems with regards to the distribution of online content by providers. There is no doubt that making copies of copyright works is necessary for providing online services but it is also clear that these reproductions are ancillary to the public communication of this content and have no economic value by themselves. In other words, to offer content to users via online and mobile platforms, the reproduction on the server of the service provider and on the device used by customers are necessary conditions for the provision of such content.

Therefore, in order to avoid the unnecessary complexity arising from the application of two rights to the same act of exploitation and to facilitate the clearance of rights, we advocate for the removal of the reproduction right from the provision of online content services and the transfer of the economic value it may have into the communication right to the public.

- Regarding the term of protection, it is clear that the emerging digital environment raises questions as to the ‘fitness for purpose’ of certain aspects of copyright law. However we do not consider that it requires any lengthening of the current terms of copyright protection but rather evaluating the effects of shortening the duration of the rights, given the speed of change in the digital era.

- Moreover, Telefónica believes that increased EU harmonization of the copyright limitations and exceptions would be desirable. We agree that the differences between EU countries in the application of these limitations and exceptions, is a hindrance to the creation of an adequate digital framework to the development of new business. The simple fact of each country having its own legislation in this regard creates complexity, discrimination and interoperability barriers. Hence, we support making all the exceptions mandatory to Member States

Regarding limitations and exceptions, we would be supportive of the introduction of a new mechanism at EU level to create a built-in adaptability to the copyright laws of Member States. This would accommodate future digital technologies which make certain 'non-consumptive' uses of copyright works.

- Although private copying levy schemes may have proven useful in the analogue world, it is very questionable that they are still valid for the digital environment and it makes no sense to try to stretch them to provide an additional source of remuneration to authors, performers and producers. The problem behind the copying levies is economic and the solution is not to extend the concept of private copy levies to digital uses. It creates legal uncertainty and greater imbalances and distortions than the ones it tries to solve.
- With regard to the remuneration of authors and performers, we firmly support the granting of fair remuneration to any individual or entity in the content value chain that provides value to the market. However, we consider that from an economic perspective, the logical way to reward them is not via remuneration rights but directly through the producer, who gathers all the contributions and has the final decision over the work.
- Last but not least, we would like to point out that the principles around intermediary liability contained in the e-Commerce Directive and the lack of either obligation or legal capacity to monitor internet content have provided important guidance to ICT companies like Telefónica. They set out clear rules for companies which provide consumers with access to ICT services, combining efforts and resources to achieve the strong growth of internet over the last ten years. Under the 'no monitoring' principle, users were assured that their private communications were protected, thus generating confidence in using electronic communications. On the other hand, ISPs have been willing to create the possibilities of unhindered internet connections because they were not held liable for the content of the communications sent over those connections. In Telefónica's opinion the current e-Commerce Directive strikes the right balance between the obligations regarding the protection of right holders (intellectual property rights is a good example of this) and the need to preserve at the same time Internet access freedom, confidentiality of communications, personal data protection and privacy on line.

II. Rights and the functioning of the Single Market

A. Why is it not possible to access many online content services from anywhere in Europe?

[The territorial scope of the rights involved in digital transmissions and the segmentation of the market through licensing agreements]

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

YES.

In general, there has been an increase in availability of on-demand and on-line digital content for territorial and cross border dissemination. However, there are some issues that restrict on-demand and on-line availability in comparison with other platforms.

One issue has been the restriction imposed on end users to access the service when they are roaming outside their country, or the inability to remotely access home country content whilst in another member state due to multiterritorial licensing.

Another concern arises from exclusive collective licensing arrangements on a national basis, prohibiting such content from being distributed over the internet to other EU countries. This situation is harmful to competition, cultural inclusion and innovation among entities that would have been potential competitors in the absence of a particular license on this particular content provided on an exclusive territorial basis.

We would also like to explain how other gatekeepers can distort the creation, distribution and availability of content in Europe. New devices (e.g. Set-Top-Boxes, Gaming Consoles), the evolution of existing devices (smart OS-run TVs, smartphone/tablets) and “software TV” (Apps) have led and will further lead to a bright variety of receiving paths. Taking into account the aforementioned context of device and channel diversity, the “front-end-layer” or user interface will become significantly important for controlling the content and services delivered, as well as the way they are received by the user. Built-in operating systems will determine the display and choice of content which is presented by (self-designed, maybe proprietary) interaction layers (e.g. OS for mobiles or gaming consoles). These layers will provide for controls of the content delivered to the user. While usually these layers are adaptable by the user to some extent, market distortions can arise out of proprietary or “closed” interaction-layers directly or indirectly blocking or influencing the choice of services to be delivered to the customer.

In this context, Telefonica generally prefers open and interoperable standards over proprietary and non-standardized solutions.

We would also like to point out the problems that Telefónica is currently facing when providing digital music services through a wholly owned subsidiary in Spain, Portugal and other European countries. Problems have also occurred when providing IPTV services in Spain and Czech Republic and in many Latin American countries too.

In relation to on-line music content the most relevant problems are listed below:

- Excessive transaction costs in the negotiation and implementation of license agreements with collecting societies (“CSOs”) and right-holders;
- Complexity of rights management;
- Lack of clarity on rights’ ownership;
- Territorial copyright legislation vs. multi-territorial exploitation of contents;
- Governance and transparency concerns with respect to CSOs regular functioning;
- Technical management of license agreements with CSOs and right-holders, based on proprietary and non- standardized solutions.

With respect to audiovisual services we have thus far been providing not pan-European but local video/TV services. Our main concern here is again territoriality and lack of competition among CSOs that makes it impossible to clear the necessary rights in the European collecting society which may offer the best conditions for a given commercial exploitation. It is clear for us that their monopolistic position has reduced their efficient management incentives and led to the emergence of unequal rates.

If payments to CSOs are for use of the repertoire, the territory should not be a limitation. Collective management of these rights must be made by entities encompassing rights and holders of a different nature, promoting transparency and competition between CSOs and avoiding single-holder or single-territory models. Of course, the above should be applied to both musical content and to audiovisual works.

Telefónica welcomes the initiative undertaken by the European Commission to draft a *Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* which has been recently approved. This piece of legislation has tackled many of the problems that are referred to in this particular question and will decisively foster the functioning of the internal market of digital contents, particularly in the field of music.

Nonetheless, much of the work to be accomplished relies on the national transposition of the future Directive and, particularly, on the choice of mechanisms made by Member States and its subsequent compliance by national CSOs.

As the draft text of the future Directive rightly points out, the existing differences between national rules governing the functioning of collective management organizations have led to inefficiencies in the exploitation of copyright and related rights across the internal market. It is

therefore of great importance that Member States ensure that national CSOs align their current operational structures to the principles of transparency, accountability and governance sought by the draft Directive.

Therefore, in view of the current existing problems related to the provision of online content across the EU we encourage the Commission to keep working for greater transparency and clarity in the application of tariffs and more effective competition among CSOs.

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

The territorial nature of copyright frequently clashes with the multi-territorial exploitation of contents. The excessive transactional costs faced by companies act as a deterrent to the establishment of legal multi-territorial online businesses. Paradoxically, illegal music providers benefit from this situation. Copyright regulation requires further harmonization in order to remove such restrictions and foster competition.

Some aspects of CSOs functioning are critical to the well-functioning of the EU digital content economy. The EU institutions, through the drafting procedure of the proposed *Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*, have tackled many of the problems that prevent an efficient management of rights. However, the practical implementation by each of the Member States of the measures and requirements set forth by the recently approved Directive will show whether the principles enshrined by the institutions are effectively put into place. The monitoring of the implementation procedure of the Directive and the close scrutiny of the working practices of CSOs, both at national and EU level, are of key importance.

This territorial nature of copyright is certainly a great contradiction within the open nature of the Internet: while users are granted universal access to the Internet and its contents all over the world, significant restrictions apply to paid content. In most cases consumers are unable to pay to access content in countries other than the one content is designed to be accessed from, even if the consumer is willing to pay for it. The geographical foreclosure of content limits competition and users' freedom to access content of their choice, while at the same time it results in higher prices for consumers to access paid content.

6. Are there reasons why, even in cases where you have acquired all the necessary rights for all 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)?

NO

7. Do you think that further measures (legislative or non-legislative, including market led solutions) are needed at EU level to increase the cross-border availability of content in the Single Market, while ensuring an adequate level of protection for right holders?

YES.

From a legislative point of view, EU copyright should be further harmonized. For instance, some technical acts of reproduction are exempt in some countries from the need to obtain a license, whilst in others these are subject to payment. In many cases, it is up to the national courts to apply the local legislation to each case. This situation leads to uncertainty.

Market led solutions should be encouraged and reliable databases and interoperable solutions must also be developed.

This would increase market efficiency to clear European works more effectively across EU countries by decreasing search, match and clearing transaction cost.

Apart from the issues mentioned previously, right holders often include contractual constraints to the provision of their contents. A very common constraint is the restriction imposed to end users to access the service when they are roaming outside their country. Telefónica is now offering its consumers the chance to enjoy audiovisual contents not only through the TV but also via PCs, tablets and smartphones. Many of these customers have expressed their willingness to access to the content they are paying for when travelling abroad. It is technically feasible but we cannot proceed due to the contractual restrictions imposed to roaming, mainly by major American studios.

License restrictions with respect to one market (i) may harm competition in another market by for example anti-competitive foreclosing access for the digital on-demand/online platforms vs. physical cinema, music store or bookstore, and DVD physical distribution markets (ii) promote inappropriate uses and (iii) encourage piracy of people that, having legal content, cannot enjoy them whenever they want. We believe the Commission should monitor this practice to ensure that there are no unreasonable burdens or artificial barriers to a single market for audiovisual and musical works in Europe. Therefore, the main point in this matter should be the idea that a Digital Single Market implies also a single European market for content.

B. Is there a need for more clarity as regards the scope of what needs to be authorized (or not) in digital transmissions?

[The definition of the rights involved in digital transmissions]

8. Is the scope of the “making available” right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?

NO

The issue regarding territoriality with regards to on-line transmissions is an issue that has been ongoing since the early times of Internet. A specific analysis should be carried out in order to evaluate which of both principles should apply, if any of them, or even both of them for different purposes.

Nevertheless, the country of origin approach should be stated as it brings clarity and certainty. One single clearance operation must be undertaken in the country where the signal is transmitted as opposed to the targeting approach which is a more obscure criterion.

10. Does the application of two rights to a single act of economic exploitation in the online environment (e.g. download) create problems for you?

YES.

Firstly, Telefónica concurs with the introductory words of the Public Consultation which states that digital technologies and the Internet have reshaped the ways content may be created, distributed and accessed. The Directive we are now reviewing dates back to 2001 where Youtube, Facebook and Spotify did not exist and iTunes was about to turn the music industry on its head. In other words, the current legal framework comes from the analogue world and it has been stretched to fit into the digital age.

We firmly believe that if the copyright regulation were drafted from scratch to face today's concerns, the outcome would differ greatly to the regulation currently in place. Therefore, we consider that we have a great opportunity to review whether the copyright regulation in place is still 'fit for purpose' and provides the best possible environment not only for authors, performers and producers but also for disruptive companies willing to offer innovative online content distribution services and/or 'value added' services which rely on use of third party content.

In particular, we think that the reproduction right should not remain as a stand-alone right but rather be absorbed into the communication to the public right in digital services. There is no doubt that making copies of copyrighted works is necessary for providing online services but it is also clear that these reproductions are ancillary to the public communication of this content and have no economic value by themselves.

Therefore, to avoid the complexity related to the application of two rights to the same act of exploitation and in order to facilitate the clearance of rights, we advocate for the removal of the reproduction right and the transfer of the economic value it may have into the communication to public right.

We understand this is something that is difficult to achieve at a European level but our proposal would be to take it into consideration when thinking about the modernization of the international treaties.

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorization of the right holder?

NO

Linking is in the essence of the Internet. It is impossible to conceive the functioning of the Internet without links. Potentially any link may lead to a copyrighted work (whether it is text, photo or a video). Therefore, if the provision of a link is subject to authorization of right holders, the way Internet works today will simply collapse as it will be impossible to include any link in a web page due to the potential infringement copyright.

A hyperlink provision facilitates access to a work that has already been published on a specific website. Therefore, this should not be understood as a new publishing or as a duplication of this work.

In other words, Telefónica is of the opinion that in the digitized world where copyright protected content is made available on the internet by the right holder, it would limit the availability to the content if the provisioning of a hyperlink to such content should be subject to the right holder's authorization. Such limitation for the consumer, distributor or new innovator is in our opinion not in proportion to the potential benefits of control for the right holder.

Besides, the provision of a hyperlink does not amount to the transmission of an actual work, which is a necessary condition for the consideration of a "communication to the public".

Accordingly, we strongly advocate for leaving the question as it is standing now.

Anyway, in case this is amended, the liability regime for intermediaries stated in e-commerce Directive 2000/31/CE should be secured to avoid any doubt that may arise. Moreover, no obligation to monitor or prevent the copyright infringements should be imposed to telco operators as it would be absolutely disproportionate.

12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

NO

According to Directive 2001/29, Article 5.1, such temporary reproductions are not considered to be copies other than temporary and are exempted from the reproduction right. There is no need to modify this rule and any change towards a more restrictive approach makes no sense at all in the digital age.

Telefónica is again of the opinion that in the digitized world where copyright protected content is made available on the internet by the right holder, it would limit the availability to the content if such viewing of a web-page should be subject to the right holder's authorization. Such limitation for the consumer, platform provider or new innovator is in our opinion not in proportion to the

potential benefits of control for the right holder internet and would make infringers of many millions of ordinary users of the internet across the EU.

Furthermore, everyday interactions of users with digital technology give rise to multiple temporary digital reproductions of fragments of content. These are essential to the functioning of digital technologies, devices, networks, etc. The answer to these questions is critical.

In this line of reasoning, it must also be noted that the UK Supreme Court delivered a judgment on this issue on 17 April 2013 in Case NLA v. PRCA and argued that temporary copies made in an end-user's browser cache and on the screen when simply viewing the content of a web page are exempted from copyright infringement by the temporary copies exception of Directive 2001/29. This point has been referred to the CJEU for a preliminary reference.

14. What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.

To answer this question we first have to take into consideration the current window system for the exploitation of audiovisual works. Given the time frames and the prices of both the theatrical and the home video releases the chance to make electronic sell through transactions economically viable is very small.

In this context, allowing end users to resell digital files would jeopardize the sustainability of current business models and put legal distribution schemes under high risk. We also consider that the concerns raised as to the difficulties of ensuring that re-sellers would not retain and continue to use a copy of a work after they have “re-sold” it are well founded and not easily solved technically.

Digital transmission among individuals (by selling, donating or inheriting) is a threat for the sustainability of content windows ecosystem. It could derive in an environment where contents are resold several times without control and prices are thrown in a “second hand” market. It is impossible to build a sustainable “first hand” market (creating platforms, developing services, negotiating rights, digitizing...) with such unfair competition.

In summary, translating the re-selling environment that exists in the physical world into the online/digital field is unlikely to be simple. Re-selling online would only be viable and acceptable if there were tight controls and limitations place on the amount of re-selling that can take place in order to maintain the value of the content in question (a requirement for the original content to be deleted being a requirement which may need to be implemented). How this can work in practice is hard to envisage at present.

C. Registration of works and other subject matter – is it a good idea?

15. Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?

YES

16. What would be the possible advantages of such a system?

Content providers spend time and resources trying to find the CSO or the entity managing certain rights. CSOs have been quite reluctant to give access to their full repertoire. This means that some content may, unknowingly, fall out the scope of a certain license. In other cases, content providers may suffer double payments (i.e. through the payment of blanket licenses to different CSOs covering some of the same works).

Registration systems would bring clarity to this purpose and would reduce royalty costs. They would also benefit reporting and distribution activities.

In other words, the main advantage of creating a registry is that security is conferred on the ownership of the rights that are being used and it should be an element to facilitate transfers. The establishment of a registry at EU level would be to assist copyright licensees to find out who owns the rights of each copyright works and thus it would potentially facilitate higher volumes of copyright licensing transactions. Such a registry of rights would also assist with the prevention of the further orphan works.

Currently there are many private initiatives to create databases of works held mainly by collective management organizations which aim to improve interoperability of the existing databases and identifiers.

Finally, it would also be helpful to facilitate trade of niche contents, for instance creating specific Pay TV offers for EU residents in Spain. As far as content rights are clearly managed and content is digitized it would be very simple to make this content available to the customers.

17. What would be the possible disadvantages of such a system?

One of the problems of this system would be to keep pace with the market of content acquisition rights. One of the challenges of such a registry would be to offer up-dated information on who owns what now.

Another disadvantage would be derived from the conditions of registration, in the sense that this depends on how easy, complex or costly it would be for the owners to protect their rights in a registry. Currently in Spain, registration of intellectual property requires a complex process that does not encourage IPR protection. As the consultation document observes, any such system of content registration would need to be compliant with the principle established under the Berne Convention, which states that copyright protection must not be conditional upon compliance with any formality.

We believe that registration would not create an obstacle for the “automatic protection”. The copyright protection should remain linked to the creation itself without being subordinated to either publication, registration or any other action.

18. What incentives for registration by rightholders could be envisaged?

Clear and publicly available information on who-owns-what-rights leads to more business opportunities and to better distribution, managing and control of the rights. This is the major incentive to right-holders.

D. How to improve the use and interoperability of identifiers

19. What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permission databases?

Regarding the identifiers, as it was evidenced in the stakeholder’s dialogue “Licenses for Europe”, the main problems raised in connection with identification of online content are due to the lack of interoperability between the standards available in the market place as well as the fact that the European audio-visual producers have been slow to adopt interoperable identifiers for their productions. These two factors have made rights management, including licensing and remuneration, difficult, which ultimately blocks the availability of content online.

If standardization facilitates interoperability, it would be a positive step as it will allow cross-border access and portability of services available in the country of origin when travelling abroad, cost savings and more effective management. Standardization should be the aim when possible for the improved functioning of the market.

The EU must guarantee that these schemes allow interoperable solutions in order to avoid more fragmentation on rights information. Moreover, EU institutions should favor economic incentives for the use and the development of these databases.

E. Term of protection – is it appropriate?

20. Are the current terms of copyright extension appropriate in the digital environment?

NO.

Since 1710 when the Statute of Anne was enacted, the term of protection for copyrighted work has increased from 14 years for book’s publishing to 70 year after the death of the author. It started with books and now covers films and songs and not only authors but also performers, producers and in some cases broadcasters.

When the Directive 2011/77/EU was being discussed, much economic evidence was presented to show that the extension of copyright terms has no significant positive economic impact. Specifically, the UK Government assessment (IPO, 7 Jan 2010, Impact Assessment of Proposed Directive to extend the term of copyright protection for performers and sound recordings) found it to be economically detrimental.

Moreover, according to an international study (I.P.L. Png and Qiu-hong Wang, 2009, Copyright Law and the Supply of Creative Work: Evidence from the Movies, Review of Economic Research on Copyright Issues) the extension of copyright term provided a very small return, and hence would have little impact on the creation of new works.

This negative effect is even clearer when we analyze it in a digital environment. Some countries may have specific rules which modify the general rule of life plus 70 years. Furthermore, some countries may have different copyright terms that were in effect before adoption of the general rule. Therefore, the copyright duration may be different (longer or shorter) in other countries outside the EU which may imply the fact that in some cases a specific work can still be in copyright in some countries but out of copyright (that is, in the public domain) in others. Thus, differences in how national copyright laws define the duration of copyright and list the categories of works protected, results in different definitions of the public domain on a country-by-country basis. However, through the Internet works are accessible in different countries at the same time; this reality may result in legal and illegal access to the same content at the same time, depending on the part of the world where the access to such content is taking place.

Telefónica believes that any extension of the copyright term should only be done after a detailed analysis of its advantages and disadvantages, not only for right holders but also for consumers and for the market as a whole. There is no doubt that any extension boosts the revenues of right holders but it is also clear that it increases costs to consumers by the additional payments and by its costs of collection. Moreover, the extension of the term to already existing works is a windfall profit that makes no economic sense from a general interest point of view because it may not retroactively incentivize creation, but rather limit the free use of works that would otherwise enter into the public domain.

In our view, whilst the emerging digital environment raises questions as to the ‘fitness for purpose’ of certain aspects of copyright law (as discussed elsewhere in our responses), we do not consider that it requires any lengthening of the current terms of copyright protection. Actually, we recommend considering the effects of shortening the duration of the rights, given the speed of change in the digital era.

III. Limitations and exceptions in the Single Market

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?

YES

The harmonization aimed by the provisions set by the Directive 2001/29/EC related to limitations and exceptions has hardly been achieved. These provisions are mostly phrased in broad and categorical terms, leaving wide discretion to the Member States to choose from the Directive list. The result is a wide range of exceptions and limitations that vary from Member State to Member State, which might seriously impede the establishment of cross-border online content services.

We believe that the differences between countries in the regulation of these limitations and exceptions do not make it easier to create an adequate digital framework to the development of new business. The simple fact of each country having its own legislation creates complexity, discrimination and interoperability barriers.

It is clear that the lack of harmonized rules directly affects legal certainty of market players offering online services across national borders. A serious consequence of the prevailing uncertainty regarding the scope of limitations in the digital networked environment has been to force service providers to negotiate the conditions of use of protected works with every single rights holder, for every territory involved. This, among other things, clearly raises both uncertainty (rendering it almost impossible for service providers to have a full knowledge of the legislation in place and, therefore, whether a content/product can be legitimately distributed in a country and under which conditions) and also transaction costs.

22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonization of such exceptions?

YES

In order to avoid the problem relating to lack of harmonization and territoriality of limitations and exception, we support making all the exceptions mandatory to Member States. The private copyright is one of the most evident examples that should be mandatory to all Member States in order to facilitate, in the digital age, the widest possible diffusion of digital works for the benefit of consumers.

23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

See answer 25

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

YES

25. If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

The sustainability of the list of limitations and exceptions is undermined by its exhaustive character. A fixed and finite list cannot take into account future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework. While an exhaustive list offers more legal security to established rights holders and content providers, it may also hinder the emergence of new services and business models.

It is often argued that the US copyright law system offers a more 'innovation friendly' environment which has played a role in the flourishing of US technology led companies. In particular, US copyright law permits a case-by-case approach to the issue of the uses which may be made of third party copyright works without infringing the rights of copyright rights' holders. The US entertainment industry has also continued to thrive within this legal framework.

There are many reports and studies (among all, we can mention the Hargreaves report <http://www.ipso.gov.uk/ipreview.htm> and the Brenncke study "Is fair use an option for UK copyright legislation) that focus on the potential application of the US "fair use rule" to the EU copyright law system. Whilst the merits and feasibility of introducing a fully-fledged 'fair use' type defense into EU copyright law is a complex subject that would deserve a special ad-hoc study, we would be supportive of the introduction of a new mechanism at EU level to create a built-in adaptability to the copyright laws of Member States. This would accommodate future digital technologies which make certain 'non-consumptive' uses of copyright works, e.g. the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work, data mining, for example.

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

Please refer to question 22

52. What mechanisms exist in the market place to facilitate accessibility to content?

One example is the agreements and tools that allow films to be shown on an innovative integrated access system, which allow those with hearing or visual impairments to enjoy films without restrictions, and to access culture and leisure activities in equal conditions.

These measures are part of Telefónica Accessible, a comprehensive project aimed at the elderly and people with disabilities, which seeks to make the group a company that is fully accessible in all of its processes and to actively contribute to creating equal opportunities through new technologies.

E. Text and data mining

54. If there are problems, how do they best be solved?

Big data is a hugely important trend nowadays. We will see the emergence of many useful services based on big data in the coming months.

Telefónica considers that data mining activities should fall outside copyright legislation but as it is a controversial issue, we believe a new exception must be included in article 5 of Directive 2001/29 to cover it, as they are not harmful to right holders.

IV. Private copying and reprography

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?

YES

Private copying is one of the hottest topics regarding IP. The problem behind the copying levies is economic. We believe the levy system is out of control as historic definitions allow unlimited claims from collecting societies leading to an unreasonable and unjustified accumulation of levies for consumers and industry.

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?

NO

According to the Directive 2001/29/EC private copying exception is permitted on condition that the right holders receive fair compensation. The key in this matter is to decide if the right holders suffer or not any harm when the law allows individuals to make copies for their own and immediate family's use on different media and if, in the case it is established that there is no harm no compensation shall be required.

Digital copies made by end users (alone or with the help of third parties) for private purposes from a licensed service may be considered subject to the private copy exception, but they definitely should not be subject to levies, since the eventual harm caused to the right holders shall be considered minimal.

For that purpose, we believe that the concept of the "private copy" exception should be clarified at EU level.

Firstly, a more clear definition of "harm" should be construed. Secondly, the situations when such harm should be considered "minimal", as it is the case of digital copies, shall also be defined.

Additionally, any payment made in such context would cause a significant problem of double payment, since a price would have already been paid for the license of the work within the service, which includes the possibility of making private copies (in different devices and formats, etc. in the context of the use of such service).

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 Vitorino report clearly indicates that the attempts to broaden the interpretation of the private copying exception are not only detrimental to right holders and legal offers based on license agreements, but are also legally questionable.

One of the main advantages of cloud services is their global nature; therefore, imposing territorial/national levy systems on global services seems unfeasible and absurd, especially considering the principles of the Single Market. We should not forget that cloud services may be provided from anywhere in the world. Companies of all sizes, which are increasingly using cloud services, would also face the negative consequences.

Cloud computing allows easier access to digital content for consumers and provides artists with new distribution models. In the digital era, consumers need to be able to access digital content from several connected devices at all times and from anywhere.

Finally, as we have mentioned previously, Telefónica considers that reproduction right should be absorbed into the communication to the public right in digital services.

V. Fair remuneration of authors and performers

74. If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?

Telefónica firmly supports the granting of fair remuneration to any individual or entity in the content value chain that provides value to the market, especially authors, performers and/or producers. However, we do not believe that the current system, whereby an online distributor is required to obtain the license for certain rights from the right holder and afterwards must clear exclusive and remuneration rights from several collecting societies in each territory, as being the most efficient means of achieving such fair remuneration in the digital environment.

From an economic perspective, the logical way to reward authors and performers is not via remuneration rights but directly through the producer, who gathers all the contributions and has the final decision over the work. It's been argued that authors and performers need remuneration rights due to their lack of bargain power when dealing with producers. If this is true, we believe that the solution is not to grant remuneration rights but to: a) empower authors and performers' collecting societies to negotiate on behalf of its members general provisions with producers' associations and b) set up mandatory harmonized rules to be applied to every contract between producers and authors/performers to ensure the economic benefits of the exploitation is fairly shared among them.

VI. Respect for rights

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

NO

The current legal system in Spain provides mechanisms to protect the intellectual property right-holders that complies with both the Charter of Fundamental Rights of the European Union (2000 (C 364/ 01)), and the European Declaration of Human Rights, in particular the provisions of Article 47 and paragraph 1 of Article 6, respectively , since, under the interpretation that the European Court of Human Rights, the Spanish law contain by ' needs for flexibility and efficiency: [...] previous intervention of administrative agencies [...] "and the establishment of civil processes that facilitate the implementation of the contents of Article 13 of Directive 2004/48/EC on the enforcement of intellectual property. In other words, "the procedural safeguards" that exist in the Spanish legislation on intellectual property are sufficient since they regulate both administrative processes with performance of the Public Administration subject to judicial review, and civil processes that establish mechanisms to compensate damages of infringements in this issue [Judgments of the ECHR Tyvik AS c and Kristiansen Norway, May 2, 2013 , paragraph 51 . Vrabel and Āurica of 13 September 2005, paragraphs 5 and 38-40 , and König of 28 June 1978 , Series A No. 27, paragraph 88, Le Compte, Van Leuven and Meyere , of 23 June 1981 , series A No 43, paragraph 51, and Janosevic v. Sweden , 23 July . 2002 , Reports of Judgments and Decisions 2002-VII , paragraph 81].

In this context, it should be noted that the Court of Justice of the European Union once again highlights the critical role of the national courts for the realization of substantive aspects of the protection measures of Intellectual Property Rights, as indicated in paragraph 38 of the recent statement that ask " the national court " to compare different types of technological measures that protect the intellectual property rights of holders. In other words, in this respect , the interpretation of the Court of Justice of the European Union is considering that current EU rules are appropriate to protect rights-holders , but that should be the responsibility of the national courts to determine the form of protection according to European and national law application . [Judgment of the Court of Justice of the European Union January 23, 2014 (Case C 355 /12)].

Finally, regarding the role of intermediaries mentioned in the preamble of this section ["One means to do this could be to clarify the role of intermediaries in the IP infrastructure"], we are satisfied with the warning comment 67 ("this clarification should not affect the liability regime of intermediary service providers established by Directive 2000/31/EC on electronic commerce, which will remain unchanged"). In any case, any European and / or national measure in this matter must ensure that the "principle of proportionality " is fulfilled as the Court of Justice of the European Union exposed in "Judgment of the Court (Grand Chamber) of 29 January 2008 (Case C 275 / 06)":

“68. That being so, the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, Lindqvist, paragraph 87, and Case C 305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I 0000, paragraph 28).”

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?

YES

Telefónica believes that the current legal framework around ISP’s liability is very well balanced to protect the different rights and interests of actors in the chain. The IPRED Directive has proved a sound instrument and should not be re-opened. The legal system should neither permit nor encourage, on-line intermediaries to indiscriminately eliminate any material from the Internet upon receipt of any virtually notice from third parties. This situation will unduly threaten freedom of expression and fair competition.

The limits on liability as laid down in the eCommerce Directive have been fundamental to the growth of the Internet and its associated services, as it allowed users to communicate in confidence.

Moreover, although the topic is not directly related with this question, Telefónica would like to raise as a major concern the higher cost of implementation that ISP’s are being required to carry around the issue of internet blocking. For example, the legislation in UK does not address this issue, and the Courts have taken the view that such costs are “part of the cost of doing business as an ISP”. Given that we are neither the rights holder nor the infringer this seems disproportionate, and as Court applications in this area increase so will the cost burden.

In our opinion the cost of the blocking measures should be transferred to the owner of the right. In this sense, in case C-314/12 confronting the UPC Telekabel telecommunications company with Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH, the EU’s General Attorney of the Court of Justice of the European Union (CJEU) has stated that, depending on its complexity, cost and duration, a specific measure could be disproportionate, it should be valued if it possible to achieve such proportionality, transferring some or all of its cost to the owner of the rights.”

As another example, we can mention that the Dutch case blocking measures carried out by ISPs (apart from expensive and hard to implement) are easy to elude if citizens keep demanding this kind of content. In this case the Dutch Supreme Court has overturned an order for major Internet providers to ban access to the file-sharing website “the Pirate Bay”, considering the measures imposed back in 2011 as ineffective and disproportionate.

In the context of disclosure of customer details pursuant to a Court Order (where such customers are alleged to have infringed copyright) the rights holders seeking access to such information in UK have been required to make a contribution towards the ISP’s costs, although the time burden on Telefónica UK employees in complying has been considerable. We are strongly of the view that any step towards agreed processes in this area (such as those envisaged under the UK Digital Economy Act) must strike a fair balance and not place undue burdens on ISPs.

Regarding all the previous explanations, we would like point out that they are other factors which make people try to consume digital contents in an illegal way and which should be faced and solved by regulators. For example, people demand content that the industry is not able to offer either because of the timing when content is available to them or by other reasons such as the price of the contents or the difficulties they face to give access to that content (interoperability problems). Therefore, we should highlight that a proper offer that could be adapted to people’s changing demand is the best way for bringing piracy down. Spotify is a perfect example for that.

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

Telefónica considers that the current civil enforcement framework is adequate to balance the intellectual property rights and the privacy rights.

However, Telefónica will support initiatives to develop a co-operational framework between the intermediaries and the judicial authorities within the European Union, for the prevention and persecution of copyright infringements provided that such collaboration remains within the scope of the exceptions from liability established in the eCommerce Directive and of the legal restrictions established in the national legislations, including, but not limited to, privacy and data protection legislation.

Finally, we believe it would desirable to harmonise the rules on injunctive relief against intermediaries in accordance with the EU Charter of Fundamental Rights, in particular Articles 6, 7 and 11 of the Charter, under the application of Article 52. In this regard, it will be prudent to expect that the Court of Justice of the European Union to rule on these rights cases pending completion (C 293/12, C 594/12), since it will influence the subject matter of consultation.

VII. A single EU Copyright Title

78. Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?

As a result of the existing problems, it seems reasonable that a unified copyright title for the entire EU should exist.

Telefónica believes that this measure would strengthen and motivate creators, services providers and, in the end, consumers since it would increase legal certainty while providing the high level of protection of intellectual property that is needed to foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors.

Nevertheless it does not seem an easy task to implement, considering the rights and interests in conflict as well as the initiatives already implemented in this direction with inefficient results. In the complex current situation, the establishment of a higher level of harmonisation allowing a certain degree of flexibility and specificity in Member States' legal systems doesn't seem to be enough. We believe that in terms of innovation, a single copyright law across Europe would enable the creation of new services across the continent, although we know that this would be very difficult to implement.

79. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?

See answer 78

VIII. Other issues

80. Are there any other important matters related to the EU legal framework for copyright?

We recommend the Commission to focus on crowdfunding. Although it is a quite new phenomenon, an increasing number of audiovisual and musical works are financed this way which poses concerns on taxation of the raised funds and also regarding ownership and rights of individual contributors to the final work.

Finally, there is an urgent need to clarify on a European level that the Directive has to be interpreted in a technological neutral way in order to ensure that scenarios (e.g. retransmission via the Internet / Mobile Networks) which are comparable with the traditional cable retransmission are treated in the same way with regard to the acquisition of the rights. Otherwise, it will be difficult to establish cross border TV services.

As an example, we can mention the particular German case, where there is no obvious reason why similar services (the transmission of live TV channels to end user for reception on end user devices) should be treated in different ways. The situation between a traditional cable operator and an Internet Service Provider is identical. The specific transmission path (e.g. Mobile Networks, Internet) should be irrelevant. All cases where a live TV Channel is transmitted simultaneously, unaltered and unabridged should be considered as a “cable” retransmission within the meaning of the Directive.

Telefónica asks the European Commission to apply the licensing of the retransmission right in a technologically neutral way which means to apply the same terms and conditions for all market participants.

February 2014