Google

P. M. Dydo
prosi dołączać firmy Google do rozdzielnika konsultacyjnego
14.07

Szanowny Pan
Dominik Skoczek
Dyrektor
Departament Prawny
Ministerstwo Kultury i Dziedzictwa Narodowego
ul. Krakowskie Przedmieście 15/17
00-071 Warszawa

Warszawa, 8 lipca 2010

Szanowny Panie Dyrektorze,

Dot.: Konsultacji Ministerstwa Kultury i Dziedzictwa Narodowego na temat przyszłości europejskiego prawa autorskiego

W związku z konsultacją Ministerstwa Kultury i Dziedzictwa Narodowego na temat przyszłości europejskiego prawa autorskiego, uprzejmie informuję o zainteresowaniu firmy Google przedmiotem konsultacji. Google prowadzi działalność innowacyjną i badawczo-rozwojową w zakresie ułatwiania milionom ludzi na świecie bieżącego dostępu do informacji – w tym do treści kreatywnych. W celu oferowania nowych usług i treści, współpracujemy z licznymi twórcami i podmiotami zarządzającymi prawami autorskimi.

Będziemy wdzięczni za możliwość uczestnictwa w debacie o kształcie przyszłego prawa autorskiego w Europie i w Polsce. Prawo autorskie jest zasadniczym czynnikiem warunkującym zachowywanie europejskiego dziedzictwa kulturowego, a także rozwój Wspólnego Rynku Kreatywnych Treści Online. W ocenie Google, europejskie prawo autorskie wymaga dostosowania do aktualnego stanu rozwoju technologicznego. Między innymi, powinno wspierać procesy cyfryzacji treści kreatywnych tak, aby skutecznie służyć interesom zarówno twórców, jak i użytkowników treści oraz umożliwić instytucjom publicznym realizację ich misji zachowywania i wspierania dostępu do wiedzy oraz dziedzictwa kulturowego.

Niezależnie od mechanizmów ochrony praw autorskich, do najistotniejszych zmian potrzebnych w europejskim prawie autorskim należą:

1. **Reforma systemu licencji** z uwzględnieniem potrzeb użytkowników treści kreatywnych; w szczególności uważamy za istotne stworzenie licencji obejmujących terytoria większej liczby państw europejskich (w tym licencji

pan-europejskich) oraz opiewających na całokształt praw potrzebnych do wykorzystania utworu w ramach usługi danego typu;

2. Zmiany w zakresie **zbiorowego zarządzania prawami autorskimi** w celu poprawy transparencji, pewności i efektywności zarządzania prawami autorskimi w Europie;
3. Stworzenie zharmonizowanego, elastycznego i odpowiadającego wymogom nowoczesnego obrotu **systemu wyjątków** od praw autorskich (dozwolony użytek);
4. Wprowadzenie uregulowań dla **dzieł osieroconych**, umożliwiających ich cyfryzację zarówno przez podmioty publiczne, jak i prywatne.

W załączeniu przekazuję dwa dokumenty zawierające uwagi Google na temat poszczególnych aspektów reformy europejskiego prawa autorskiego:

Ad 1 i 2. Dokument *Google's Contribution on Creative Content Online* obejmuje uwagi dotyczące Komunikatu Komisji z 3 stycznia 2008 r. w sprawie kreatywnych treści online na jednolitym rynku {SEC(2007) 1710}, w szczególności dotyczące systemu licencji i zarządzania prawami autorskimi.

Ad 3 i 4. Dokument *Google's Contribution to the European Commission public consultation on „Copyright in the Knowledge Society"* zawiera uwagi dot. Zielonej Księgi „Prawo autorskie w gospodarce opartej na wiedzy" COM(2008) 466/3, w szczególności odnośnie regulacji wyjątków od praw autorskich oraz dzieł osieroconych.

W przyszłości pozwolę sobie również przekazać dalsze materiały dotyczące reform prawa autorskiego w Europie. W razie wszelkich pytań, pozostaję do dyspozycji.

Z poważaniem,

Agata Wacławik-Wejman
Policy Counsel

Kontakt:
agatawejman@google.com
Tel. +48 22 2071900/Faks +48 22 4861009
Google Poland sp. z o.o.
ul. Emilii Plater 53, 00-113 Warszawa

Google's Contribution to the European Commission public consultation on "Copyright in the Knowledge Society"

November 2008

Introduction

Google welcomes the opportunity to contribute to this public consultation. We applaud the Communication's emphasis on the "knowledge economy". This is a very appropriate evolution from the "information society", which informed debate about the Directive's transposition of the 1996 WIPO Internet Treaties. Copyright rules must evolve as the technologies that are used to create and distribute them evolve.

What was not known at that time - although many predictions existed - was the far broader economic and societal changes that the Internet would usher in. Today, the EU is looking to implement a new "Fifth Freedom" for knowledge; new innovation mechanisms based on mass collaboration are reaching macro-economic scale; and a wave of user creativity and free expression have been heralded, for example, under the banner of Web 2.0. Moreover, the Internet has emerged hand in hand with the phenomenon of globalisation: in the knowledge economy, Europe needs to innovate continuously if it is to stay ahead of competitors in this global environment.

Copyright policy is central to this challenge. It is no surprise that the issue that emerges throughout is the balance between incentives for initial creation and those for follow-on innovation. In other words, the central issue for IP policy throughout the ages.

Against this backdrop, the limited scope of the Commission's Green Paper is a disappointment. Google believes that it should be further expanded to address some of the main challenges Europe is facing. The debate started here will inform the decisions of the new College of Commissioners taking office as the Lisbon Agenda process comes to a conclusion and plans are laid for the next decade.

Google's interests

Google is committed to pursuing research, development and innovation in order to connect millions of people throughout the world with information every day. Core to this is providing the best user experience possible. As we continue to build new products, while making search better, Google strives to bring the power of search to new areas and to help users access and use more of the ever-expanding information in their lives. Google also provides platforms for user self-expression and creation such as Blogger, Orkut and YouTube.

I. The value of copyright exceptions in the knowledge economy.

The Green Paper refers to Directive 2001/29/EC pointing at the fact that "a high level of copyright protection is crucial for intellectual creation", since "a rigorous and effective system for the protection of copyright and related rights" is necessary to reward and encourage investment in creative efforts. It presents exceptions to copyright law as a way to balance reward for past creation with future dissemination of knowledge.

It is important to consider that while appropriate level of copyright protection can stimulate investment and production of content, thoughtful exceptions are equally essential to the Knowledge Economy by permitting technological development and ensuring that access to knowledge fuels production of more knowledge. The need to encourage new works has to be put in perspective with the importance of exceptions to provide the appropriate conditions for creation, innovation, access to knowledge and the development of the information society, all supporting European competitiveness and growth.

The debate is, therefore, whether the existing balance remains appropriate in the present day, and whether the Directive as a whole will be a reliable contributor to Europe's innovation capacity and competitiveness going forward. This raises issues about the scope of the existing exceptions, and the appropriateness of adding additional exceptions. In addition, it is crucial for the exception regime to be flexible and forward-looking, so as to anticipate and facilitate changes. Failing to do so will put Europe at a competitive disadvantage with countries providing for such flexibility such as the U.S. with the application of the fair use doctrine.

The 2006 Gowers review of Intellectual Property[1] reflected on the need for a greater balance and flexibility of copyright to allow individuals, businesses and institutions to use information and ideas in ways consistent with the digital age. As a follow up, the UK IP office launched a public consultation on "Taking forward the Gowers Review of Intellectual property" [2] proposing changes to the copyright exceptions.

Four fundamental developments in society and the economy linked to the Internet need to be factored into this reconsideration of the balance between exclusive rights and exceptions:

- **Global reach of content and knowledge**: ICTs vastly extend the ability for people around the world, including developing countries, to build upon the bank of existing human knowledge. Although this is a global phenomenon, the single market is a good place to start analysing the impact for EU players.

- **Users' availability of any piece of information ever created:** ICT Radically expanded access to information, making it far easier to make available vast quantities of

1 http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf

2 http://www.ipo.gov.uk/consult-copyrightexceptions.pdf

information online, and for users to find and access information that is relevant to them. (One specific consequence of this is that while the need to bring analogue content online by digitising it has long existed, but the benefits of such a process are now far higher as we have the tools to search through such content).

- **Users' empowerment with regard to content selection and creation**: Technological change results in a major shift in audience habit, from passive media consumption to active content selection and creation. As pointed out by the Green Paper, the rise of user-created content has taken major proportions in recent years creating opportunities for a more participative Information Society, and an enormous potential for creativity and new content.

- **Users are increasingly co-creating value:** In addition to users creating content, there is also increasing "mass collaboration" by individuals in other areas and resulting in substantial economic value.

With the new opportunities arising from the ways content is accessed and distributed there is a need to rethink the European legal framework for copyright exceptions. It is important not to construe the protection of copyright and promotion of copyright exceptions as contradictory objectives, or the interests of sectors relying on exceptions as opposed to the interest of sectors relying on protection. On the contrary, these are complementary objectives and interests that are both fostering the development of knowledge and creation and their dissemination. In this context, European copyright exception regime has to be reviewed to support:

- **The creation of a single market for Information society** ensuring free movement of information.

- **Innovation and creation** of the sectors relying on copyright protection, but also **of the sectors relying on exceptions.**

- **The promotion of users' fundamental rights** and notably freedom of expression.

1. Free movement of information and the need to create a single market for Knowledge Society.

The Green Paper recalls the need to promote free movement of knowledge and innovation as the "Fifth Freedom" in the single market, referring to the 2007 Communication on "A single market for 21st century Europe"[3]. This Communication pointed at the fact that the "single market originally conceived for an economy reliant on primary products and manufactured goods has to adapt to foster openness and integration in a knowledge-based, service-oriented economy." It subsequently highlighted the fact that with the rapid development of ICT, "there is the risk that Member States opt for

3 COM(2007) 725 final http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0724en01.pdf

different or incompatible solutions, and that new "e-barriers" would emerge for the end users."

The Commission Communication built on an earlier vision for the single market for the 21st century[4] calling for a single market for the knowledge society. In this context the Commission pointed at the fact that "[i]mproving the cost-effectiveness, quality and legal certainty of the system of intellectual property rights and spreading the use of new information and communication technologies on a pan-European basis will be essential to tap our research and innovation potential." It subsequently called on a "regulatory framework that will need to be administratively light, flexible and forward-looking, so as to anticipate and facilitate change."

Google considers that the key objectives identified by the Commission for the development of intellectual property rights perfectly reflect on the challenges to be addressed while reviewing the European regime for copyright exceptions.

However, there is no single market for information society services relying on copyright exceptions, unless the exceptions (and their interpretation) are harmonised. Likewise, there is no free movement of information if content, built upon protected content for the purpose of information, education, parody or criticism, is not protected across the EU. Harmonized exceptions across Europe, providing the level of legal certainty needed to distribute content or deploy services relying on copyright exceptions on a Pan-European basis are essential.

2. Innovation, creation and economic growth of the sectors relying on exceptions.

The tension between incentives for initial creation and those for follow-on innovation have long been understood by economists. In granting exclusive rights, policy makers need always to keep in mind the inevitable economic consequences of the monopolies they create - restricted output and higher prices. The Green Paper identifies this economic consequence for orphan works, but appears to have missed its general applicability.

The extent of the economy now based on follow-on innovation has grown substantially. We have seen the dramatic emergence of new value creation mechanisms based on a very different approach to intellectual property rules. The impact of these is most obvious in the software industry, but examples of have been documented far more broadly in the economy[5]. An IP regime that fails to balance these interests will now be a drag on innovation, jobs and growth.

---

4 COM(2007) 60 – A single Market for citizens: Interim report to the 2007 Spring European Council http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0060en01.pdf

5 http://www.wikinomics.com/blog/

The Green paper rightly points at the economic importance of the European Publishing sector, highlighting its importance in terms of revenues and employment. The figures for the creative industry as a whole are even more impressive. However, no measure of the size of the industry dependent on copyright exceptions and limitations is provided.

Regrettably, there appears to be no European research in this field. However, a 2007 study analysed the economic contribution of industries relying on fair use[6]. The US Fair Use doctrine has underpinned enormous innovation in the US, so the figures calculated probably overstate the situation in Europe. Instead, they could be used to estimate the beneficial impact of copyright reform.

The study demonstrated that exceptions to copyright protection promote innovation and are a major catalyst of economic growth. It pointed at the fact that copyright limitations and exceptions are vital to many industries and stimulate growth across the economy. According to this study, companies benefiting from fair use generate substantial revenue, employ millions of workers, and, in 2006, represented one-sixth of total U.S. GDP. In 2006, fair use industries generated revenue of $4.5 trillion. As for the sector benefiting from fair use the study notably points at manufacturers of consumer devices that allow individual copying of copyrighted programming, educational institutions, software developers, as well as Internet search and web hosting providers.

3. Promotion of users' fundamental rights and notably freedom of expression and access to information.

Copyright exceptions also seek to balance copyright protection with users' fundamental rights, and notably Article 10 of the European Convention on Human Rights (ECHR) that provides for a "right to freedom of expression". This right includes freedom to hold opinions and to receive and impart information and ideas. Exceptions for quotations, parody, or public speeches have been central parts of most member states' copyright regimes.

The Internet revolution is profoundly changing the notion of free expression. ICT is enabling a revolution in the ability for users to create and edit content. The Internet then empowers them to share their views and work around the world. The exercise of freedom of expression is no longer limited to professional journalists or mainstream media. It is increasingly exercised by individual users through blogs, podcast or posting of videos, making reuse of existing content for the purpose of education, information, parody or criticism. Bloggers quoting press articles may nowadays be more influential and have a bigger audience than renowned journalists[7]. User created videos making parody of politics, or showing music lovers how to play a well-known tune, can be viewed millions times. Critics or review of content from users' communities can have more impact than critics in newspaper. In this context the implementation of strictly defined copyright

6 http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf

7 http://www.technorati.com/blogging/state-of-the-blogosphere/blogging-for-profit/

exceptions benefiting only to certain categories of stakeholders are ill-conceived to allow for new opportunities in terms of freedom of expression.

With the exponential amount of information made available online, the ability of citizens to search publicly available information that is relevant for them, is an integral part of their freedom of expression. Some academics argue that Article 10 of the ECHR should be interpreted in the light of its precursor Article 19 of the International Covenant on Civil and Political Rights, which includes 'freedom to seek, receive and impart information and ideas of all kinds", itself echoing Article 19 of the Universal Declaration of Human Rights: "freedom to ... seek, receive and impart information and ideas..."[8].

II. Shortcomings of the European regime for copyright exceptions.

The 2001/29/EC Directive was meant to implement the 1996 WIPO Internet treaties, and harmonise copyright protection at European level. As for copyright exceptions it points at the "direct negative effect on the functioning of the internal market of copyright and related rights" of the lack of harmonisation of copyright exceptions as an issue. However it only proposed to address it through an exhaustive list of strictly defined exceptions, leaving the possibility for Member States to implement any of the listed exceptions in national legislation, but no further restriction to the exclusive rights. Apart from the exception for transient copy (Article 5.1) which is central for the development of the information society and made mandatory, the other exceptions are optional and have not been conceived taking any particular consideration for the new content creation and dissemination opportunities arising in a dynamic information market.

This approach raises concerns with regard to:

- **The lack of harmonisation and legal uncertainty** resulting from very different implementations of the optional list of limitations by Member States.
- **The lack of flexibility** of an exhaustive list of exceptions to take account of technological developments and foster innovation.
- **The need for lengthy legislative change** at both European and national level to allow for new exceptions.

1. Lack of harmonisation of the European exception regime.

The lack of harmonisation results from very different implementations of the long list of optional exceptions provided by Directive 2001/29/EC. In addition, the scope or the conditions for applications of the same exception may greatly vary from one Member State to another. The diverging application of the exceptions by judges as well as

8 See e.g. P. Akester, "The Political Dimension of the Digital Challenge – Copyright and Free Speech Restrictions in the Digital Age" [2006] I.P.Q. No.1, 16.

interpretation of the three steps test, add another level of complexity and uncertainty. This gives rise to a wide variety of rules applicable to services distributed across the Internal Market, and to diverging case law in Member States on similar services. The resulting complexity and legal uncertainty constitutes an impediment to the development of innovative online services across Europe, and in certain cases prevent innovative and creative companies to reap the benefits from the Internal Market.

The IViR study on "The Recasting of Copyright & Related Rights for the Knowledge Economy" commissioned to assess the implementation of the Directive clearly pointed at the lack of harmonisation of the European regime for copyright exception and limitation, and its negative impact, and proposed concrete measures to address this problem[9].

Commenting on the implementation and effect of the non-mandatory list of exceptions proposed by Directive 2001/29/EC, The study on "Conceiving an International instrument on limitations and exceptions to copyright"[10] states that: "[It] has left Europe with a patchwork of incompatible limitations and exceptions, causing legal uncertainty to the detriment of commercial providers of cross-border services, such as online music stores, and of cultural institutions, such as libraries, archives and public broadcasters, offering content across European borders. Directive 2001/29/EC[11] itself highlighted the need for "a coherent application of these exceptions and limitations, [to] be assessed when reviewing implementing legislation in the future."

2. Lack of flexibility to take account and adapt to technological developments.

A long list of strictly limited and applied exceptions does not provide for timely solutions to the challenges and opportunities arising in a dynamic information market. This hinders the emergence of innovative services and business models, the uptake of user-created content or digital preservation and exploitation of European cultural heritage.

This lack of flexibility of the European regime for copyright exception and limitation has also been identified in the IViR Study[12]. It notably called upon the EC legislature "to establish a more flexible and forward looking regime of limitations on copyright and related rights", considering that "a non-exhaustive list of limitations would allow Member States to respond more quickly than the EC legislature to urgent situations that will arise in the dynamic information market".

Google support this analysis, considering that the existing exceptions do not provide sufficient flexibility to adapt to the evolving needs of individuals, businesses and institutions. There is a need to put such recommendations into concrete form by providing for a flexible regime of exceptions, allowing uses that are outside the scope of strictly defined exceptions, but within the three-step test. This should address the current

9 http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf - p.62

10 http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf - p. 27

11 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF - Recital 32

12 http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf - p. 7

need for the public to avail itself of new technological developments, as well as providing for a general, flexible safety valve that can be employed to address future such needs.

III. Solutions to ensure that the European exception regime meets the challenge of the knowledge society.

The key objectives when reviewing the European copyright exception regime should be to ensure through harmonised exceptions that the public can fully utilise new tools provided by ICT to create new works and access knowledge; to ensure that European innovation and competitiveness is furthered and not impaired. This requires Commission attention to the impact on the single market of differing national choices of exceptions; work on transitory measures to improve the understanding of the three step test to ensure that exceptions have broadly similar impact at national level and are interpreted with sufficient permissiveness to promote innovation; and analysis by the Commission on the economic impact of copyright protection and exception on follow-on innovation and on the free movement on knowledge and on online freedom of expression to support reform of the Directive.

1. Transitory measures to improve harmonisation and flexibility of the exception regime.

The Green Paper points at the fact that "[T]he three-step test is [...] part of the international copyright framework which the Community and its Member States are bound to respect [...] and has become a benchmark for all copyright limitations." As for Article 5 (5) of Directive 2001/29/EC, Member States were not required to implement the test into their national copyright laws. As a result the status of the three-step-test, as envisaged under Article 5 (5), varies considerably as between Member States. In academic writing the test is perceived as a matter of legislative compliance with international prerequisites rather than a rule of interpretation of domestic law, and it is unresolved whether the test only constitutes a guideline for legislative action or for interpretation of exceptions by national judges[13]. In addition the three step test is not necessarily applied in a consistent way by national judges, raising additional uncertainties as for the distribution of content or services relying on copyright exception across the single market.

Further analysis[14] on the three-steps test also points at the fact that "[t]he evolution of the three-step test into the overriding norm of international copyright law through its incorporation into the TRIPS Agreement, has attracted criticism from scholars and stakeholders alike. [...] Its focus, as with the entire structure of minimum rights, is geared towards protecting rights of authors or, in the case of TRIPS, "right holders," not the interests of society or the general public."

13 http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf - p. 48

14 http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf - p.17

In order to provide flexibility to the European copyright exception regime, and ensure a balanced and consistent application of the three step test across the single market, the European Commission should issue guiding principles on its application by Member States and national judges when appropriate.

A recent declaration from some of the most renowned European academics in the field of copyright on "A balanced interpretation of the "three-step test" in copyright law"[15] provides clear basis for developing such guidance. The declaration rightly identifies that: "The Three-Step Test has already established an effective means of preventing the excessive application of limitations and exceptions. However, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach. For this reason, the Three-Step Test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions." The Declaration further established a set of basic guiding principles on the interpretation of the three step test.

Google supports the general approach established by this declaration in Europe, and believes that the issuance by the European Commission of guiding principles on the three step tests will ensure its balanced and consistent application across the single market, and partially address the lack of flexibility of the European exception regime to meet the challenges of the knowledge society.

2. Review of the European exception regime.

While a new approach of the three steps test could buy the EU some time in order to remain competitive with third countries, Google believes that only a full review of the 2001/29/EC Directive to introduce new exceptions will ultimately serve the purpose of providing flexible and forward thinking regime allowing free movement of knowledge, innovation and creation in the sectors relying on exceptions, as well as new ways freedom of expression is exercised in the information society.

As explained (See p. 3), the development of the participative web and the uptake of user-created content constitute formidable drivers for users' self-expression, creativity and access to knowledge. The development of the information society leads to users' empowerment for creation and distribution of content. At the same time, there is a need to adapt the existing exception regime to the opportunities offered by the development of the information society and ensure that it provides for the level of flexibility needed for innovative online services to develop across Europe.

In this context, Google supports the introduction of new exceptions to foster users' creativity and online accessibility to knowledge and content, and calls on the European Commission to actively engage in developing and implementing such exceptions in a way that best promote users' creativity and accessibility while preserving the interest of rightholders.

15 http://www.law.qmul.ac.uk/events/docs/Declaration%20Three-Step%20Test.pdf

ANSWERS TO THE COMMISSION'S QUESTIONNAIRE

General Questions

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

(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

Question 1 contradicts the nature of copyright exceptions and limitations as defined in Directive 2001/29/EC. The list of exceptions and limitations established a set of cases in which the exclusive rights of right holders to authorize or prohibit the reproduction or communication to the public of their works do not apply. Contracts are therefore only needed for uses that go beyond these baseline exceptions. For these situations, however, encouragement and guidelines to facilitate efficient contracting may be helpful.

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

In order for harmonisation to be effective and to serve a single market, there must be a core of mandatory exceptions, coupled with a flexible regime permitting courts to adapt to evolving circumstances. As explained in the introductory remarks, Internet technologies allow a global reach for services and content relying on copyright exceptions. In this context, the optional or non-mandatory nature of the exceptions listed in Directive 2001/29/EC has led to different sets of copyright exceptions being implemented in the different Member States. This constitutes an impediment to the distribution of services or content relying on exceptions, and an obstacle to the creation of a single market for the knowledge economy.

But the optional nature of the exceptions is not the only obstacle. The diverging implementations of the same exception or of the application of the three step test, from one Member State to the other may also be a major obstacle. Hence, there is a need to provide for mandatory exceptions, as well as guidelines on the way they should be implemented at national level and how the three step test should be applied.

In addition, the major challenge for the European copyright exception regime to be addressed in the light of evolving Internet technologies, is the lack of flexibility of an exhaustive list of exception. This approach lacks the flexibility needed to provide timely solutions for the development of innovative services or new creative processes.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions? If so, which ones?

The development of the information society has been made possible by the mandatory exception for caching that is central to the functioning of the Internet. In order to provide the level of harmonisation needed for content or services relying on copyright exceptions in the single market, an approach based on non-mandatory exceptions is not appropriate.

Exceptions for libraries and archives

Google firmly believes that digitisation, digital preservation and online accessibility of literary works in Europe is an important objective with far reaching and long term benefits for society. Taking into account the complexity and cost associated with digital preservation, this objective can only be fulfilled with the positive engagement of various parties, including, libraries, right holders and private companies. Google's view is that the copyright framework should provide incentives to the different partners to digitise by reducing legal complexity and costs. Failing to do so, will not permit to digitally preserve and revive our knowledge and cultural heritage through online availability.

As already mentioned the problem of a list of strictly defined exceptions established by Directive 2001/29/EC lacks the flexibility needed to fully reap the benefits that the development of the information society is bringing about. As illustrated by the 2006 Commission Recommendation on the "Digitisation and online accessibility of cultural material and digital preservation"[16], ensuring that public institutions can fulfill their role of preservation in the digital age, by having the faculty of making multiple copying or to migrate digital cultural material, requests legislative changes in different Member States. However, this is a lengthy and complicated process that is delaying or even preventing public institutions to fulfill their mission of digital preservation.

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

No. While it is crucial for publishers to develop online access to their catalogues, this objective differs both in scope and in nature with the objective of libraries and archives. The challenge face by libraries or archives is to digitally preserve and make available their collections of books for the benefits of users and public interest. This calls for adaptation of the exception for libraries to make sure that they can address these challenges in the digital age.

The challenge faced by publishers is to develop online access to their catalogue to fully benefit from market opportunities the development of the information society is bringing about to increase visibility and availability of their products. Google is fully supporting this effort with Google Book Search, and has developed partnerships with more than 20.000 publishers around the world, through its Book Search Partner Programme. Partners (typically publishers) are providing Google their books to digitise and put online. Users are then shown a strictly limited number of book pages that are relevant to their

16 http://ec.europa.eu/information_society/activities/digital_libraries/relaunch/index_en.htm

search. If the book is of interest, they can then click through to the publisher's website, or an online retailer, and buy it.

(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

As pointed out in the answer to question 6, the challenge for libraries or archives is to digitally preserve and make their collections of books available for the benefits of users and public interest. Google is also contributing to the effort of libraries to preserve and improve access to their collections through the Library Project. Libraries across the world have joined Google Book Search as partners, working with us to digitise their books. This means that publications previously only accessible to people searching in those libraries are now searchable on the Internet. If the book is in the public domain it is shown in its entirety, and users can download a PDF of the text. If a book in the Library Project is still in copyright, users can see only two or three short snippets which include the search term, some bibliographic information, and other reference information designed to help the user.

The fair use exception provided the legal basis for Google to engage in the scanning of in-copyright books in the U.S. to make them searchable, and to display snippets for users to assess if a specific book is relevant for them.

With the view to further increased users' access to books in the United States, a broad class of authors and publishers and Google reached in October 2008 an agreement to dramatically increase online access to books in the U.S. If approved by the Court, the agreement, reached after more than two years of negotiations, would resolve both U.S. lawsuits and will be a major step forward in improving online access for books in the U.S. It will notably provide for increased access to out-of-print books, and a solution to allow for the online availability of orphan works[17].

(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to: (a) Format shifting; (b) The number of copies that can be made under the exception; (c) The scanning of entire collections held by libraries;

Yes. Digitising works is essential to preserve them; copies can be lost, damaged, or too fragile to permit access to the pubic at large. The risk to loose works fully justifies the extension of the exception to any act needed to ensure their digital preservation. In this context, and with the view to develop a future-proof approach there do not seem to have any reason to limit the number of copies or restrict the acts of format shift needed to preserve digital copies of protected works realised for preservation purpose. In addition, the scope of the exception should be clarified to make clear that it applies to any type of

[17] http://books.google.com/googlebooks/agreement/

work since different countries have implemented the exceptions by restricting it to certain types of works.

Finally, taking into account the technical complexity and cost involve to ensure digital preservation, the exception for publicly accessible library should provide for the flexibility needed to allow for libraries to partner with private companies to realise copies of work for preservation purposes.

(9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

This question suggests that the exception should only be clarified in a more restrictive way. By doing so, it disregards the possibility to clarify that the reproduction of content for the only purpose of making it searchable, actually falls under the scope of the exception.

One of the foundations of the success of the Internet is the network effect that occurs when information is put online. In this context there is a clear benefit for users, researchers, but also rightholders to ensure that works are made searchable through digitisation. While users benefits from increased accessibility to content and knowledge, rightholders benefit from increased visibility of their works, which offers new opportunities for exploitation and revenues.

Google would support such a clarification that would provide an incentive for private partners to engage with libraries in the digitisation of their collections for the purpose of making them searchable. This would in no case prevent agreements with publishers to digitise their books, to allow for users searching their works to have online access to a substantial part of it and assess if it is relevant for them, before paying to access the full content of the book.

As explained above Google has already developed partnerships with more than 20.000 publishers, which recognize the added value of ensuring that their books are searchable, but also that their users can easily assess if they are relevant for them.

(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

Yes. Orphan works represent an untapped wealth of information that can and should be accessible to the public. It is among the most acute problems preventing public and private actors to preserve and revive an important part of our knowledge and cultural heritage[18]. According to the Gowers review: "Across the spectrum of the creative industries, there is recognition that solving the problem of orphan works is good for everyone. A solution is good for all those who are involved in archiving and cataloguing;

18 Gowers Review of Intellectual Property, December 2006, p. 69: "The British Library estimates 40 percent of all print works are orphan works".

for all those creators who use older works to create new value; for those whose work is restored and who may benefit from remuneration from a new source; and for consumers."[19]

Given the large number of orphan works, Google believes that unless a legislative solution is put in place there is no sufficient incentive to digitise or engage in good faith searches. In most cases, conducting searches to identify right holders is costly and time consuming and the risk of liability for copyright infringement sufficient to deter stakeholders from exploiting orphan works.

Google considers that this is a case of market failure that justifies a Community statutory instrument to provide for the level of legal security and incentive needed to engage in large scale digitisation in Europe. The Gowers review proposed a new copyright exception to "permit the use of genuine orphan works, provided the user has performed a reasonable search and, where possible, gives attribution", and called for amending Directive 2001/29/EC in that way.

Google supports the proposition for such a new exception to allow the exploitation of orphan works under conditions preserving the interest of right holders. Such an exception should apply to situation where after a reasonably diligent search, the right holder cannot be identified or located. The implementation of such a new exception should strike the right balance in providing the incentive needed for the exploitation of orphan works, while preserving rightholders' interests. It should also be coupled with voluntary copyright registration systems to facilitate the identification of rights holders for both existing and future works. The purposes of such system will be to facilitate diligent search, reduce the number of orphan works and simplify and lower the cost of copyright clearance.

(11 & 12) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument? - How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

Taking into account the need to provide for a new exception to copyright, and the implementation of solutions applicable at European level, the problem of orphan works should be addressed through an amendment to Directive 2001/29/EC.

Exception for the benefit of people with a disability

As for the questions related to people with disability Google does not have any detailed position on the issue, but believes that exceptions designed to balance protection with public interest should fully benefit to improving access to content to people with disability notably through the use of new technologies.

19 Gowers Review of Intellectual Property, December 2006, p. 71

Exception for education and research

Exception for education and research should also be adapted to allow for students and researcher to fully benefits from the opportunities the Internet is offering in possibilities to share educational or research material. The Center for Social Media report on the "Cost of copyright confusion for media literacy"[20] demonstrates that in the U.S. many teachers refrain from using copyright protected material, since they fear that they will misinterpret copyright exception. Copyright exceptions should be defined in a way providing teachers with the legal certainty and latitude needed to develop the most effective teaching materials, and to take advantage of new communications technologies.

Article 5.3 (a) should reflect on the potential of the Internet to provide for new forms of educational material, and for the educational institutions to make their material widely available online to any person that could benefit from accessing it. In addition new communication technologies makes it possible to use any type of material for educational and research purposes (text, but also video or pictures). National implementation of Article 5.3 (a), should not restrict the exception to certain institutions or class of content. They should only be limited to the intended purposes of the use of the content, i.e. non-commercial educational purposes.

User-created content

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

Rules on what end users can and cannot do when making use of materials protected by copyright should encourage transformative conduct by the public through a flexible regime. As pointed out in the introductory remarks (See p. 7) such flexibility is needed to allow for creative and innovative developments to take place in Europe.

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

Yes. Such an exception should be included as part of a cohesive scheme of exceptions. The development of the participative web and the uptake of user-created content constitute formidable drivers for users' self-expression, creativity and access to knowledge. As explained in the introductory remarks (See p. 3) the development of the information society leads users' empowerment for creation and distribution of content.

According to the Commission Staff working paper on "Creative Content Online in the single market"[21]: "User-generated content is, in essence, intrinsic to the Internet, and it is naturally developing in tandem with the Internet's growth. [...] [It] has gain momentum

20 http://www.centerforsocialmedia.org/files/pdf/Final_CSM_copyright_report.pdf - p. 17

21 http://ec.europa.eu/avpolicy/docs/other_actions/col_swp_en.pdf

over the past year owing to a transformation of the media environment, with major implications for traditional media and new media companies alike." This movement is also participating in the democratisation of media, enabling a more participative knowledge society, supporting freedom of expression, diversity, cross-cultural communication and enhancing access to and creation of content. The 2007 OECD report on "Participative Web: User-created content"[22], provides detailed analysis on these developments and their impacts on the knowledge economy, notably with regard to culture and education.

Copyright exception regime should be reviewed in a way that provides proper room for user self-expression and user-created content to develop. The 2006 Gowers review notably suggested amending applicable EU copyright law to allow for an exception for creative, transformative or derivative work, within the parameters of the Berne three-step test. Google believes that these developments would benefit from a new broadly defined exception for transformative use for users' creativity and support the introduction of such an exception in the Directive.

22 http://www.oecd.org/dataoecd/57/14/38393115.pdf

Google Contribution on Creative Content Online.

29.08.2008

Google welcomes the Communication on "Creative content online in the single market" (the "**Communication**") and appreciates the opportunity offered by the European Commission to comment and provide perspectives on the different issues it raises.

A great number of promising developments are currently taking place in the field of creative content online, with the emergence of innovative business models for online distribution of traditional content, and the surge of user-driven creation. These offer a wide range of opportunities for innovation, creation and increased user access to a great diversity of content.

As highlighted in the Communication and the Commission's staff working paper, a number of challenges remain to be addressed to make the most of these opportunities. There is a need to facilitate the development of attractive online content services at a European level, by improving access to content and developing multi-territory licensing mechanisms. The development of online content services should also aim at addressing the issue of online copyright infringement, by creating services that meet new users' needs and expectations.

In this context, Google considers the Communication as a timely opportunity for the different players concerned to engage in a constructive dialogue on the best ways to address these challenges. We are willing to be closely associated with this dialogue and to the work of the European Commission in this field, notably through an active participation to the "Content Online Platform".

1. Creative Content Online: A fast changing environment.

As pointed out by the Communication, the online creative content market is an 'emerging' market in which 'developments take place at a rapid pace'. According to the study on "Interactive content and convergence" carried out by the European Commission in the context of its work on creative content online, the interactive content market will more than quadruple from €1.8 bn in 2005, to €8.3 bn by 2010. The traditional content sectors are progressively developing their businesses in the online market, which is representing a growing part of their total revenues. Not only is this an emerging market, it is also a market in flux where new entrants exist at all levels - encompassing small independent content producers as well as innovative distributors.

The progressive move of traditional content sectors in the online environment contrasts with the rapid development of user-created content. The rise of user-created content has been significant in recent years, with user-driven creation attracting a growing number of users eager to access content, and to get involved in its creation. This leads to a major shift in users' habits, from passive media consumption to active content selection and creation. This is also creating opportunities for a more participative Information Society, and an enormous potential for creativity and availability of new content.

Any action of the European Commission should aim at creating and maintaining conditions that ensure a co-existence and synergy between the different creative models and business models for distribution of content. It should support innovation in both content production and distribution. It should not favor traditional models for creation over user driven creation or one business model over another. In this context there is a need to reconcile different interests such as copyright protection with users' self-expression and creativity, while promoting an environment favorable to innovation, creation and diversity.

2. **Developing partnerships and multi-stakeholder cooperation.**

Google fully supports the approach of the Communication considering that self-regulation and better collaboration between rights holders, Internet intermediaries and users, is the way forward to support the development of innovative business models and the deployment of European online content services. Self-regulation initiatives and multi-stakeholder cooperations developed on a voluntary basis to address market needs and developments are better adapted than regulation to provide timely solutions to the challenges arising in a rapidly changing environment.

The existing legislative framework, and in particular the eCommerce Directive (2000/31/EC) is setting the basis to develop such cooperation. The directive has been an important cornerstone in the growth of the varied and innovative information society markets in the European Union. It notably establishes a liability regime for Internet intermediaries representing a delicate balance between the various actors and interests involved in the value chain. By doing so, it provides for the appropriate framework to support the development of online content services, as well as users' creativity and self-expression.

Google considers that the main challenge to be addressed to foster the uptake of online content services and improve respect of copyright in the online environment is to develop content services meeting users' expectations and needs. In this context, Google is establishing a great number of partnerships and licensing agreements with rights holders to provide innovative content services, allowing users to search and access content online.

Google is notably partnering and closely collaborating with rights holders in relation to the development of the YouTube video sharing platform. YouTube is not an "online music service" or "online video service" in the commonly accepted interpretation.

YouTube is an information society service, a creative communications and entertainment platform, which allows users to share content and communicate with each other through the medium of the internet. YouTube's users may be either professional content producers (e.g. BBC, or the European Commission) or private individual users.

YouTube has developed a suite of tools that empower rights holders to fully manage their content on YouTube. YouTube has adopted this approach in line with the eCommerce Directive and gone beyond the legal obligations applying to intermediaries such as YouTube in the context of this directive, to create an environment inviting rights holders to make their content available. We provide here an overview of some of the tools developed:

- YouTube offers an automated notification and take-down tool which enables rights holders to easily search for and identify videos on the site that contain their content, and promptly remove them with the click of a mouse.
- YouTube also uses technology that creates unique identifiers of files that are removed from YouTube for copyright reasons and prevents identical files from being uploaded to the site.
- YouTube informs its users about copyright and strongly discourages infringement (in a "Copyright Tips" section of the YouTube website). It also includes clear and prominent messages concerning rights ownership at the point that end users upload user-created content, as well in its terms of use and via links to YouTube's copyright policies on every page of its web site.
- YouTube also provides a feature called "AudioSwap" enabling users to illustrate their original videos with music that YouTube licenses from music publishers and record labels. The purpose of this is to give YouTube's users easily accessible options for being creative, and use licensed music in their creations.
- YouTube Content Management Tools: YouTube provides technology to enable rights holders to produce unique identifiers of their copyright protected audiovisual works. If such works are then identified, then rights holders are empowered by being able to decide what should be done with this content, including by monetising it.

As you can see from the above, by using innovative applications of services, YouTube is putting management of content firmly in the hands of the rights holders. New models such as the ones developed by YouTube are offering a way for users to be creative, to get access to wide range of content for free, and for rights holders to manage and monetise this access. Such services can only be developed through a voluntary cooperation between Internet intermediaries and rights holders.

3. **Licensing of rights in the online environment.**

As explained, Google is partnering with many rights holders to create new services allowing them to make the most of new market opportunities, at local or global level. YouTube, our most popular video hosting site, is being localised and translated into many

different languages with the intent of providing local content and expanding cultural diversity.

Multi-territory licensing is necessary to help prevent the fragmented European market from being a hindrance to the development and deployment of online content services. In this context, it is important for rights holders to fully collaborate with Internet intermediaries in developing flexible, practical and commercially viable licensing mechanisms allowing the development of online content services at European level.

4. Answer to the specific questions of the consultation.

Digital Rights Management (DRM).

Google is not in a position to comment on the best ways to achieve DRM interoperability, improve consumers' information with regard to DRM systems, or enhance the legibility of DRM end-user license agreement. Google supports interoperability as a general principle and a fundamental basis to create an innovative and competitive market for information society services, offering maximum benefits to consumers.

In this respect, Google considers that any device, application or service, should be designed with the view to achieve the highest possible level of interoperability with other devices, applications or services. Whenever limitations or restrictions of interoperability may affect the use of devices, application or services, consumers should be provided with the appropriate information on any such limitation or restriction, allowing them to make a fully informed decision.

Multi-territory rights licensing.

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

Google believes that there is a need for multi-territory licenses for online services such as YouTube, in order to allow all parties to fully take advantage of the possibilities of the online environment and the internal market. Google expects that with continuous close partnership with rights holders, Collecting Societies will develop solutions with information society services to allow for the provision of multi-territory licenses. The European Commission has ongoing Competition cases in CISAC and CELAS, the outcome of which will help establish the parameters within which collecting societies can operate in establishing new agreements, at least between themselves. If ultimately, through positive attempts by information society services and collective rights managers fail then there may be cause for legislative intervention.

To offer localised services in Member States, YouTube currently approaches each national collecting society individually. It is currently not possible to obtain a multi-territorial licence from a single European society (whether that licence be pan-European – i.e. for all 27 Member States - or a more limited multi-jurisdictional - i.e. only for those

Member States where YouTube chooses to localise its service). This process is extremely inefficient and time consuming, requiring multiple individual negotiations. Moreover, as the licensed rights are only available from one society in each Member State, the current arrangements eliminate competition and impede the development of new downstream markets. Lack of competition leads to less choice and thus consumer harm - it is EU consumers who are disadvantaged.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

As an information society service provider Google has observed the need for a 'one stop shop' when it comes to licensing the rights needed to operate its services in Europe. In other words Google would like the ability to obtain (from one collective rights management organisation in the EEA) a single, multi-jurisdictional license for all the major publishers' worldwide copyright music repertoire, so as to be able to offer services, such as YouTube, in those Member States where it chooses to operate. Google would like the option of a pan-European license which applies in all Member States or a more limited, multi-jurisdictional license, in the event that it chooses only to offer it services in some, but not all, Member States.

The license should cover all the rights which are needed for the licensed services which each society is mandated to license in its own territory. As set out below, in practice YouTube has encountered difficulties because not all collecting societies have mandates for all the rights needed to operate a service in its territory.

For a one-stop-shop to be exactly that, tariffs and other terms applicable under such a licence should be determined on a country of origin rate. To work on a country of destination rate entirely undermines the one-stop-shop principle as a company would still have to negotiate the country of destination rate with the collecting society of each territory in which it wishes to make its services available in. We understand that there has to be some flexibility in the country of origin rule as some slight variation in tariffs may apply due to local application of copyright law and also different rights may be required to offer a service in some member states. Any variations should strictly be limited to and referable to a difference in the rights being licensed and should be negotiable directly with the collecting society granting the multi-jurisdictional license. Otherwise differences would impede the internal market.

Given the current high level of transparency between collecting societies it is impossible to have any level of competition. Introducing the possibility of multi-territorial licensing would at least introduce some degree of competition into the market, provided the collecting societies were mandated to negotiate all terms and conditions that would apply to the licensee. Any other approach - for example, allowing negotiations over own content only, but accepting the rates for the other countries are fixed and non-negotiable -

would simply solidify national pricing and eliminate any negotiation for a significant proportion of the available content and therefore prevent competition.

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

Business, culture and society at large are benefiting from so called 'long-tail' content. Online availability of music, movies or books that are not available through traditional distribution channels anymore, is offering new opportunities for users to access them and creates new market opportunities. Content developed for niche markets also has the opportunity to reach the widest possible audience. Rights holders and license users alike, Google included, seek to enable the most profitable exploitation of such works. The long tail supposes that a great amount of content will reach limited audiences having been made available online at a very limited cost. Licensing the use of content on a country per country basis comes at a high cost and there is a need to lower copyright licensing costs by developing multi-territory licensing. Google considers that such licensing mechanisms should not only be developed for back-catalogue works, but for any type of works.

Legal offers and piracy

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

Google supports effective stakeholder cooperation and development of industry self-regulation to improve the respect of copyright in the online environment. In this context, Google considers that the most effective way to improve respect of copyright in the online environment is to develop innovative content services meeting consumers' expectations and needs. The primary focus of any multi-stakeholder cooperation should be to create the conditions for such services to emerge in Europe.

As illustrated in section 2, Google is already establishing a great number of partnerships with rights holders to increase online access to content. In the context of the YouTube video sharing platform, Google is also working in close collaboration with rights holders in developing a solution to increase users' access to online content, and allow rights holders to monetise this access.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

The Memorandum of Understanding, or "Olivennes Agreement", reflects on the approach developed by representatives from the content sector and certain Internet access providers, together with the French government, to address the specific challenges arising from the development of online content services on the French market.

As for the hosting and sharing video platforms the "Olivennes Agreement", puts forward a principle of collaboration in good faith between the rights holders and these platforms. In this context, the rights holders commit to cooperate with the platforms hosting and sharing content to "make available the information enabling the establishment of the most comprehensive as possible catalogues of fingerprints". Google fully agrees with this approach and already put it in practice, considering that such a voluntary collaboration is essential. Google is already closely collaborating with rights holders to the elaboration of fingerprints database, with the view to put in place a solution allowing rights holders to fully control and have the faculty to monetise the use of their content on YouTube.

However, while the section of the Olivennes agreement on rights holders commitments calls for collaboration, one of its sentences contradicts the very spirit of voluntary collaboration and the ISP liability regime established by the eCommerce directive. The section states that there is an "obligation for [the] platforms to institute any measures aimed at combating the illegal offer of protected content online". This statement is in direct contradiction with the absence of monitoring obligation provided for by the eCommerce directive. By doing so, it not only contradicts the existing legal framework, but also questions a fundamental principle which has enabled the development of the Internet as we know it.

The agreement is based on a change of existing copyright legislation. In this context, Google expects any legislative provisions to be proposed to fully comply with relevant European legislation, and in particular the eCommerce Directive, setting the balance between the obligations and the limitations of Internet intermediaries' liability. The legislative changes to be proposed should not call into question the general principle established by the directive according to which, Member States may not impose on intermediaries obligations to monitor the third party information they transmit or host.

According to the Olivennes agreement, the legislative changes should to put in place the so-called "graduated response" under the control of a new administrative authority. The proposed system of warning and sanctioning users infringing copyright online, with sanctions escalating to the termination of Internet subscription and the prohibition to get a new subscription for a certain period, has far reaching consequences for users' and citizens' rights.

The Internet has gained a crucial importance in the daily life of users and citizens. It is not only used to access entertainment content, this is a central communication means in personal and professional life (email, VoIP, blog, instant messaging etc.). This is also an open gateway for users to access a great diversity of information and public services, and exercise their right to self-expression. Depriving users and citizens from Internet access calls into question some of these rights.

As recently recalled by the European Court of Justice in its decision Promusicae v Telefónica (C-275/06)[1], there is a need for Member States to ensure a fair balance between the protection of intellectual property and the various fundamental rights protected by the Community legal order[2]. In this respect, the court recalled the need for

Member States and judges to take into account the general principles of Community law, such as the principle of proportionality.

In this context, without being able to prejudge on the legislative changes that may effectively result from the "Olivennes Agreement", it is not possible to consider it as an example to follow. Such legislative changes will suppose a thorough assessment of the balance between the different interests at stake, and of the compliance with existing Community law.

Google's view is that, while users' exclusion from the Information Society will have far reaching consequences, it will not serve the purpose of increasing the uptake of online content services. As stated previously, Google considers that the primary focus of any multi-stakeholder cooperation agreement should be the creation of conditions for innovative content services to emerge in Europe. In this context, we note that the "Olivennes agreement", includes measures meant to favor the development of new services, by improving online access to content. However, they are made conditional to the implementation of the graduated response, which may further delay the development of innovative services. Google believes that multi-stakeholder cooperation agreements, aimed at developing voluntary collaboration to improve access to content and respect of copyright in the online environment, will better succeed if these two objectives are pursued at the same time, and not one made conditional on the other.

Google also notes that the report recently adopted by the European Parliament Cultural and Education Committee on "cultural industries in the context of the Lisbon strategy"[3], opts for an approach radically different from the one proposed by the "Olivennes agreement". The report points at the fact that "the solution should not be to criminalise consumers who do not intend to make profit out of their actions", and suggests campaigns to educate consumers and raise awareness of their responsibilities. The Culture and Education Committee "calls on the Commission to encourage and support partnerships between the cultural industries sector and the information and communication technology sectors in order to promote synergies between creativity and innovation within the context of the Lisbon strategy".

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

As previously stated, Google's belief is that the development of innovative content services meeting consumers' expectations and needs is the most effective way to prevent online copyright infringement. In this context, Google considers that business and technological innovation has much more to offer than filtering measures simply meant to block access to content. Technological developments should be used to improve users' access not to restrict it.

The evolution of YouTube illustrates how technological and business innovation can increase users' access to online content and allow rights holders to monetise this access. YouTube makes use of content identification technologies to foster online access to

content, not to restrict it. This approach creates a real incentive for content hosting platforms and rights holders to collaborate. On the one hand content hosting platforms have an incentive to develop and maintain truly efficient solutions to identify protected content. On the other hand rights holders have an incentive to collaborate to the development of such solutions, and to make their content available online.

Such collaboration can only be developed on a voluntary basis, in the context of the legal framework defined by the eCommerce Directive. The use of content identification technologies can at best allow the identification of copyright protected content that have been identified as such by the rights holders. However, they cannot make the distinction between an unauthorised use of a copyright protected content, and the legitimate use of this content by users falling under the scope of a copyright exception or a licence. Accordingly, the use of technologies to identify copyright protected content cannot give rise to a presumption of actual knowledge that would expose the liability of Internet intermediaries. Instead, the legal presumption should remain and ultimately it would be for the rights holder to provide a precise notice to the intermediary of any copyright infringing content that should be removed.

While technologies allowing identification of protected content at the level of services may be used to foster innovative content services, the application of filtering measures at the level of communication networks, may well achieve the opposite result.

The application of filtering technologies would suppose that Internet access providers actively monitor their networks. While the technical feasibility or efficiency of such a monitoring is actually doubtful and contested [4], the use of filtering technologies entails important risks for the development of information society services.

Packet-filtering and analysis is a process that requires a large amount of processing power and network reconfiguration. It risks degrading the quality and users' experience for perfectly legitimate online services, raising serious concerns for competition and innovation. It also risks preventing legitimate uses of copyright protected content, and negatively affects the development of user-driven creation. In addition, filtering risks imposing high cost on consumers and negatively impact on the uptake of broadband access.

Finally, there are reasons to believe that filtering will not achieve much in preventing copyright infringement online, with the ability for users to encrypt their communications rendering filters totally ineffective. Experience has proven that technical systems meant to restrict access to content, have largely failed to address the problem of online copyright infringement.

The feasibility, effectiveness, costs, or real impact of filtering technologies at the level of communications network, is subject of much speculation at the moment. In this context, Google assumes that the European Commission will not take any position on filtering, and its effectiveness to actually "prevent online infringement" before leading an in-depth and well documented analysis on its potential economic, technical and societal impact.

Such assessment should take into account the real costs, effective benefits, and actual risks raised by the application of filtering at the level of network, as well as its likely effects on innovation, creation, and the development of the Information Society in Europe.

****

Should you have any further questions, please contact Antoine Aubert: aaubert@google.com

[1]http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-275/06
[2] The right to privacy in this case.
[3]http://www.europarl.europa.eu/news/expert/infopress_page/037-19264-021-01-04-906-20080121IPR19245-21-01-2008-2008-false/default_en.htm
[4] Etude de solution de filtrage de musique sur Internet dans le domaine du peer-to-peer: http://www.culture.gouv.fr/culture/actualites/rapports/filtrage/charte.pdf