Copyright – What's broken and how to mend it
18 October 2012

Thank you to the Progressive Alliance of Socialists and Democrats Group for the invitation to speak to you today. For those of you who don't know EDRi, we are an association of 32 digital civil rights organisations from 20 European countries.

The questions that this session is meant to answer are:

- “Can a predictable regime be built on the three steps test – for the good of citizens and creators and;
- “Can we agree on a list of "legitimate uses"?

The three step test covers “special cases” which

1. do not conflict with a normal exploitation of the work or other subject-matter and
2. which do not unreasonably prejudice the legitimate interests of the rightholder.

Citing Professor Bernt Hugenholz in a way which, I believe, does not damage his interests in either of these two ways, he argues that WTO case law is that:

- “Normal exploitation is, firstly, all what a right holder may – empirically – expect from exploiting the work.”

- Secondly, that right holders are not protected in their expectation in that they may exploit their economic rights to their full extent, i.e., to the very last drop.”

This makes sense, he argues, because, otherwise, nothing “would survive the test and the three-step test would become an empty shell”.

This approach seems useable, without being ideal. Copying should be permitted as long as it does not interfere with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rightsholder.

I would argue, however, that we have completely lost sight of these simple principles, resulting in damage for citizens, for culture, for innovation and for the very creators that are supposed to be protected. I would like to give just four examples among many of what this means in practice:
1. Google image search, 2. Cloud-based video recording, 3.ancillary copyright and 4. private copying levies.

1. Google image search

In both Germany and France, Google was sued for the provision of thumbnail copies of images as part of Google image search. The facilitation of finding creators' works is the very opposite of conflicting with the normal exploitation of the work and it supports rather than prejudices of the

legitimate interests of the rightsholder.

Even though there is obviously no damage to the rightsholder, the legal system is sufficiently unclear that it is worth the risk for the rightsholders to “chance their arm” in court in a few jurisdictions, just in case they might be successful. In any event, a few costly and time-consuming court cases will probably be enough to intimidate innovative companies to stop new services being launched that use exceptions and limitations.

2. Cloud-based video recording

It is environmentally and financially more efficient for people to have their personal video recorders in the “cloud” rather than each individual having their own machine. In other words, a consumer would record whatever they wanted to record on their providers' servers rather than their own computers and download it when they wanted to watch it.

Encryption can be used to ensure that only one person could access each recording, meaning that the cloud-based service is functionally identical to the technology that is already completely accepted, home video recording.

Again, as soon as the services were being rolled out, the rightsholders attacked. In the US, a decision was made for the whole of their “single market” that this technology was acceptable. Innovators were free to innovate – with a huge single market to exploit.

In Europe, the situation is far more patchy. In France, the court ruled that it was indeed the same type of use but, because it was financed by advertising and therefore a separate economic use, it was not permitted.

In Germany, Landgericht München gave a broadcaster a temporary injunction against the recording company, the Oberlandesgericht München decided that online video recording was a separate type of use, since there were technical and economic differences compared to traditional video recorders, particularly in terms of financing and, in another Land, the Oberlandesgericht Dresden decided that the service was legally possible, but under certain restrictions.

In politics, it is difficult to develop strategies that don't disadvantage somebody – but it takes a special talent for Europe to have developed a legal environment that disadvantages *everybody*. This approach destroys incentives to innovate. This approach reduces the attractiveness of legal online content.

It can be more credibly argued that the obstructionism of the rightsholders is undermining their own interests than it could be argued that the new services are interfering with their normal exploitation of their works.

3. Ancillary copyright

And it gets even more surreal. Germany is currently working on a proposal for “ancilliary” copyright – because ordinary copyright wasn't silly enough. Rightsholders put their material online. The do so in the apparent hope that their material is then accessed by the public. Search engines facilitate this, by providing a snippet of information from the web page in question, to allow people to know if it is worth reading the page or not.

Do rightsholders complain about not being indexed fast enough by search engines? No, they complain that search engines make money out of..... search. How dare they make money out of

helping to find the rightsholders' material? Come to think of it, how dare taxi drivers make money out of taking people to the theatre – maybe they should pay vehicularly silly copyright.

Consequently, the German government is proposing that rightsholders be paid an ancillary copyright fee, to “compensate” them for this nonexistent loss. What other business in the world gets compensation from companies that provide services that benefit them?

This new level of bureaucracy increases barriers to entry to the search market for European businesses. It further fragments a broken internal market – a broken market that prevents legal services being made available to European citizens. A broken market that unreasonably prejudices our rights, their rights... your rights.

4. Private copying levies

And then there are the private copying levies. In every other area of life, people are allowed to use the products they buy in the way that seems reasonable to them. In the audiovisual world, you pay for the product and then pay to use it and pay even if you don't copy it. And pay using the single most inefficient and costly, bureaucracy that Europe currently supports.

This not sounding quite absurd enough, the French rightsholders leapt out of the balloon and broke the absurdity barrier. They asked for, and received, a private copying levy for unauthorised files – imagine, you pay the levy and you get... oh, absolutely nothing in return. The unauthorised file would remain unauthorised. This insanity was ultimately overturned by the Conseil d'Etat.

Fixing what is broken

What is broken is that we are building fences between citizens and their culture faster than we are taking them down.

For heaven's sake, we need to create a real single market for European content and stop listening to people who say there is no market. The EU is strongly encouraging worker mobility and yet facilitates a copyright system that forces them to leave much of their culture behind – they can't get access to their own national TV stations for example, even public service TV that they have paid for through taxation.

Ask the Netflix shareholders about the wonderful ease with which rightsholders say content can be licensed. Netflix shares dropped 27% on the day that the cost of entering the UK market was announced.

We need a coherent, rational approach to the two steps of “normal exploitation” and “unreasonable prejudice”. This will enable more innovation, more competition and move copyright from being a barrier to being an enabler.

Yes, a more predictable system can be built on the three-step test... any system would be more predictable than what we have at the moment. This should not be in the form of a list of legitimate uses, but in the form of very clearly understood principles.

In basketball parlance - “no harm, no foul”.