**"What Exactly am I Buying? Ownership vs Licensing in the Digital Age"**

Workshop co-organised by the International Federation of Library Associations and Institutions (IFLA), Copyright For Creativity (C4C) at the WSIS +10 Review Meeting at UNESCO Paris on 26th February 2013.

**Short Description:**

This workshop explored the expectations of consumers, creators and cultural custodians in the digital age, and the effects of licenses and terms and conditions on pre-digital notions of ownership. Who benefits most from a shift to a licensing culture? To what extent are people aware that they don’t really own their iTunes library of over 10,000 tracks? Do people understand that licenses can cause access to digital content to be revoked at any time, with little to no explanation? And when it is not uncommon for the terms and conditions relating to the purchase of a 10,000 word eBook short story to be longer than the story itself, what chance is there of any Internet user in the world ever paying attention to what they can or cannot do with the information they ‘purchase’ online?

**Moderator:**

Stuart Hamilton, Director of Policy and Advocacy, International Federation of Library Associations and Institutions (IFLA) (Civil Society)

**Panelists:**

1. Nick Ashton-Hart, Computer Communications Industry Association (CCIA), Business

2. Gerald Leitner, International Federation of Library Associations and Institutions (IFLA), Civil Society

3. Helienne Lindvall, The Guardian/Freelance journalist/Songwriter, Business (Musician)

4. Helene Messier, Copibec, Canada, Business (RROs)

5. Mokhtar Warida, Government, Egypt, Government

6. David Hammerstein, Trans-Atlantic Consumer Dialogue (TACD), Civil Society

7. Nico Perez, Mixcloud, Business (IT/Music)

8. Natali Helberger, Institute for Information Law, Netherlands, Academic (information law and consumer dynamics)

**Recommendations:**

* The the implications of a shift to a licensing model of accessing digital content should become a topic of the WSIS work programme as it has profound impacts on access to knowledge.
* Develop a legal model that ensures that consumers benefit from the same rights and privileges when it comes to the consumption of digital goods as they do in the analog world.
* Promote the development of national and international digital copyright exchanges to facilitate licensing of digital services that is frictionless and low cost for the licensing activity to spur development of innovation in use and maximise the proportion of revenue that goes to creators.
* Promote copyright reform to legalize certain uses to bring the law in line with our digital reality - such as allowing non-commercial uses of works by end-users to be free of licensing.
* Promote transparency to ensure consumers know what proportion of the fees for access they pay actually go to creators - and how their personal information is being used.
* Develop best practice for terms and conditions for the purchase/licensing of digital goods
* Prominence should be given to alternative licensing models (e.g. Creative Commons) that provide greater flexibility and usability in the digital environment.
* Libraries, archives, and memory institutions should have access to all commercial and non-commercial works, and licensing issues should not obstruct their activities nor require them to invest in burdensome compliance costs given their inherently public service functions.
* The administrative costs for commercial and non-commercial copyright law compliance need to be dramatically reduced and existing rights management infrastructures need to become more open, so anyone can find basic information on who controls or owns what rights and what creators are associated to all their creations. This would greatly improve market access to creators from developing countries but also allow all creators to be more visible and able to understand who claims to be their economic representatives (and who, therefore, they should be seeing payment from).

**Summary:**

**Part 1: Stakeholder perspectives on the shift towards a licensing model**

Stuart Hamilton from the International Federation of Library Associations and Institutions (IFLA) thanked UNESCO for hosting this workshop and briefly introduced the panelists. He noted that the main purpose of the workshop was to explore the occurring shift from ownership models of copyrighted works to a licensing model where consumers would pay to get access to works instead of owning them. The intention of the workshop was to shed light on the challenges this shift implies for consumers, creators, digital service providers, policymakers and cultural custodians.

Natali Helberger from the Institute of Information Law (IViR), Amsterdam, started the discussion by outlining the main legal differences between owning a work (e.g. a book) and getting a license (e.g. an ebook). The main difference is the exhaustion doctrine which only applies to physical cultural goods: once the book is sold, the rightsholder can no longer control access to it and the book may be borrowed, re-sold etc. The fact that this does not apply in the digital world changes the relationship between rightholders, authors and users, making it unclear where the control of rightsholders begins and where it ends. However, in a recent court case the ECJ decided that exhaustion rights also applied to software so the digital license model may be about to change. The big question going forward is: How to give form to the relationship between seller, owner, authors in the digital world?

Helene Messier from the Canadian collecting society Copybec summarised the three different types of licenses currently in use in the digital environment: 1) Digital ownership, e.g. an ebook. In principle you own the book or the song just as you would with a book or CD, at least on your device. 2) Subscription type licenses such as Spotify which give the user access to a large catalogue of works which he or she is free to access but does not own. 3) Licenses for large scale uses by institutions such as libraries or universities. These licenses are typically administered directly by collecting societies. Helene explained that the current model, where the number of limitations and exceptions is growing at same time as Technical Protection Measures (TPMs) are increasing, shifts benefits from small sellers to big publishers because while the former receive less money the latter are better able to fence off their content through technical means including where limitations and exceptions would normally apply.

Nick Ashton-Hart from the Computer and Communications Industry Association built his intervention around two key themes: the commercialization of cultural goods and the distribution of benefits. With regards to the former, digital services seek legal certainty and maximum flexibility for creating an attractive product offering while minimising operating costs. With cultural goods these basic needs are frustrated for several reasons: a) It is impossible to be sure that rights you are licensing are really owned by their claimants; b) Licensing remains a hugely resource-intensive process, with different rights holders for the same works in each country and no authoritative source of information on who owns what; c) the different licensors of different rights restrict what can be done with their rights in different ways limiting the options for overall creativity in service design. With the advent of digital services, it has become much more difficult for artists to verify their royalty statements. It is unclear where exactly the royalties from digital services come from and how they were derived. This opacity benefits the middlemen at the expense of artists and digital services, as creators think services don’t pay properly even where the service is paying out in excess of 50% of their revenues to the middlemen. He made a few recommendations to improve licensing for the digital environment: 1) recognize exhaustion of rights online - once a consumer gets legal access they can do what they want with the works for personal use; 2) copyright owners need to be more transparent about their rights management systems and make all creative works in copyright commercially available; 3) User-generated content (UGC) and any other entirely non-commercial use by end users of copyrighted material should be an inherently legal activity not subject to rent-seeking. While creators should be able to ensure they can be identified as part of a compound UGC work, (or decline to be so identified if they dislike the use made), that shouldn’t frustrate UGC creation.

Nico Perez, the co-founder of Mixcloud, an Internet radio platform offering DJ podcasts, explained that for this service to be viable a new licensing model was necessary as it would be impossible to license the content of the podcasts - largely works by third parties - individually. On a more global level, the traditional licensing model involving collecting societies is increasingly challenged by direct commercialization e.g. through YouTube and other revenue-sharing models between platforms and artists. To fully unlock the potential of digital services, however, an effective, international copyright exchange will be necessary. Nico also noted that Internet consumers are getting more comfortable with the “access model” as opposed to the ownership model, perhaps because many of them are both creating and consuming content on the web. However, the recent controversy over Instagram’s modified terms of reference suggested that users may pay more attention to the ownership of digital content in the future.

Helienne Lindvall, a songwriter and freelance journalist for The Guardian, noted that she remained cautiously optimistic about the potential of streaming services despite the currently low levels of royalties they provided. As a songwriter, she has a key interest in a functioning licensing model because unlike performers, her income depends entirely on royalties. Helienne hoped that songwriters could get a higher percentage of royalty distribution, one that is more similar to radio (where they get 50%). She agreed with some of the previous speakers that licensing should be improved (particularly in Europe where the licensing models are still largely territorial) through copyright exchanges that provide a central source for metadata on rights. This will make it easier to license and make sure the right people are paid.

Gerald Leitner, representing IFLA, then presented the issue from the perspective of libraries. He noted that library users were not interested in the legal and other mechanisms that prevented them from accessing digital books at the library. They only thing they care about is access. The current environment poses enormous challenges and opportunities to libraries. In principle, the technological progress made it possible to make 24/7 digital libraries a reality but the legal framework makes it impossible. There are several problems. One is that some of the major publishers do not license ebooks to libraries. Another one is that the exhaustion principle does not apply to ebooks which means libraries are unable to carry out many of their traditional functions such as preservation, inter-library loan or even basic lending which instead has to be mandated by publishers. Gerald said that it was unacceptable that publishers could dictate library acquisition policies. Unfortunately, policymakers are not aware of this problem. Without copyright reform we will not be able to mitigate the social and scientific implications of this shift to a licensing model.

Mokhtar Warida, a diplomat from Egypt, continued to examine the issue from the point of view of a developing country. He noted that there are basically four challenges in developing countries: 1) Supply-side constraints - essential tools of a thriving digital market such as widespread access to credit cards and broadband are not available. 2) Demand-side constraints: prices for digital goods need to be compatible with local income levels for a functioning digital market. The exhaustion doctrine allows parallel imports but this does not work in the digital environment. 3) Structural considerations: access in developing countries relies on lending services and secondary markets, neither of which effectively exist in the digital environment .4) Librarians are the custodians of our cultural heritage and should remain that in the digital environment. Models in which libraries depend on subscription fees for access undermine this model.

Governments can and should intervene in the event of market inefficiencies which is why the African Group at WIPO is supporting an international treaty on limitations and exceptions for libraries at WIPO. Essentially, limitations and exceptions should not be overwritten by licenses or TPMs.

“Considering you don’t actually own an electronic book and can only use it for a limited set of purposes, aren’t these goods overpriced?”, Stuart asked David Hammerstein from the Trans-Atlantic Consumer Dialogue.

David agreed and explained that consumers were caught in the middle of a double standard. On the one hand, digital services bind us with complex legal agreements that greatly limit what we can do with a digital work while on the other hand, they freely use, copy and share our personal information. There is no informed consent what they can do with our personal information and what consumers, in turn, can do with their books. Another thing that’s missing is transparency. Consumers assume that by using services such as Spotify or Amazon they are compensating creators but they don’t know how much goes to the actual creator. Creators are also hurt by this: many consumers would like their money to go directly to artists instead of intermediaries but they have no way of knowing what services pay fair remuneration. This is what we need: 1) Clear conditions for consumers (to know what you get etc.). 2) Transparency: know how digital services use information and remunerate artists; and 3) Copyright reform: UGC and other uses need to be legalized to make the law compatible with our digital reality.

**Part 2: Discussion and question from the floor**

Simon Phipps from the open network initiative explained that policymakers missed an opportunity to set the rules for a just digital environment. “Accidentally”, he explained “we allowed the media industry to set the rules for us”. Those rules, which are constantly changing, do not strike a balance between the needs of consumers, rights-holders, digital services and creators. Culture and commerce, in Simon’s view.

Helienne replied that she strongly supported copyright because it enabled her to make music. To give an example, if she needed a loan from a bank to support a year-long project, copyright is the only liability the bank would accept. Further, Helienne noted that she was not a supporter of compulsory licenses, which many people think would promote licensing in the digital environment. For her, the danger is that it would lead to a race to the bottom. Overall, there are some encouraging signs as legal access to music is growing in the developed world and the music industry is finally serious about making metadata, a prerequisite to licensing, more widely available.

Mayara Dos Santos from the Brazilian Government explained that Governments always tried to find balanced solutions. To give an example, Governments are not against TPMs per se as long as they do not impede legitimate uses protected by limitations and exceptions.

Nico suggested that more prominence should be given to alternative licensing models such as Creative Commons.

Natali explained that the real problem was not TPMs per se but how copyright is exercised. While market failures are prevalent in many areas, the copyright system would be sufficiently flexible to deal with them.

Gerald noted that publishers will have to find solutions with the libraries. Otherwise, users will find other, illegal channels to access digital material.

Nick agreed with Natali that technically, copyright has the flexibility to deal with many of the identified market failures. However, many incumbents in the commercial sphere who will not give way until they are forced by lawmakers. One thing that needs to change: we should stop

assuming that all uses need to be subject to a license. Non-commercial uses do not necessarily need to require a license and commercial uses should be subject to low administrative fees. Creators all over the world would benefit from this because it would provide them with better access to the developed market. Right now, if you are a musician in New York or London, you have far greater access to markets. The music industry needs to move from a model of scarcity to a model of abundance in line with user expectations in the digital environment.

Helene did not share Nick’s opinion. According to her, some non-commercial uses should continue to require a license. More generally, she thought that the current regime of limitations and exceptions was unbalanced and detrimental for creators. The problem of artists didn’t have to do with copyright, in her view, but with unbalanced power relations that saddle creators with unfavourable contractual obligations.

David opposed this notion and said that in fact limitations and exceptions were fair and balanced. He agreed with Mokhtar to elevate the issue of access according to the development agenda and with Nick on the need to move towards an abundance model for cultural goods in the online environment. In summary, consumers ask for fair uses, fair dealings and fair prices online.

Stuart then thanked the panellists and the audience for their participation.