Statement to the public EU-consultations dealing with copyright issues

Draft, March 3, 2014-03-03

The written statement responds to a public EU-consultation:
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

It is provided by:

nestor „AG Emulation“/ GI (Gesellschaft für Informatik) „Arbeitskreis Langzeitarchivierung“ (work group on the theme of long-term archiving)

It is being introduced by their respective branch offices:

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The submitted answer is pertaining to the following question:

A. Access to content in libraries and archives
1. Preservation and archiving

28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?

[X] YES – Please explain, by Member State, sector, and the type of use in question.

Draft for the written statement

One of the essential problems in the context of both preserving complex digital works (such as computer games, multi-media products or dynamic websites) and keeping them accessible is the problematic legal status of these items. Legislation on a EU-scale as well

as in Germany fails to embrace and hence protect artifacts of this type. Rather the individual dimensions of one piece (i.e. texts, pictures and software components) are considered each in isolation. Current legal categories do not cover works of such as it were compound provenance – like a computer game, which by nature is an integration of these different dimensions –as a unified whole. Thus the classification of these works is both open to interpretation and a matter of controversy. Depending on the nature of the work jurisdiction sees different forms of exceptions at hand. But a closer look at the essential qualities of a computer game reveals that it is simultaneously a medium of audio-visual provenance and belonging to the realm of software. But if you cannot assign a binding and unambiguous legal position to the work meant to be preserved and made accessible, then the task to apply any of the exemption or restriction clauses will be impossible.

Recent legislative procedures in both Germany and the EU have almost completely ignored the so-called *born-digitals*; points in case being the Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes vom 1. Oktober 2013 (Law for the Utilization of Orphan Works or those out of print and a further modification of the copyright law from October 1, 2013) and the EU-regulation 2012/28/EU from October 25, 2012. This comes as no small surprise since in the last four decades the sales of entertainment software show this to be an extremely dynamic market plus the share of orphaned works is very high among computer games if compared with any other type of cultural products.
However, the unclear status of the copyrights produces a situation where there are very few contact persons in charge of questions regarding exploitation rights and (due to the fragmented legal situation described above) there are often multiple owners of rights, so that the effort of finding a person qualified and fully qualified to negotiate and represent all involved by far exceeds the possible return. This produces a chilling effect: In the absence of legal certainty works cannot be processed for preservation, let alone any further appropriation such as presenting it as a cultural asset or for research or educational purposes. Furthermore the low durability of digital media requires constant copying procedures, which is – depending on the legal situation – as a rule forbidden. National legislation inhibits an appropriate provisioning of safety copies for long-term archiving both with regard to Digital Rights Management and to copy protection.

From a technical point of view the difference between a digital copy and a born-digital item proves untenable. To the contrary the chain processing yielding a born-digital is sometimes much harder to establish than that of a digital copy. Currently we have no chance of establishing rules for best practice. Thus cultural assets threaten to get lost. It has happened in the past.
In order to resolve this intricate situation it is essential to consider two issues in separation from each other, although it is plain that they are interdependent: mere preservation on the one hand and rendering objects accessible on the other.

1) Preservation
Collections of complex digital works all face an issue increasing in pertinence with the passage of time: they have to react on the decay of the physical media carrying the data.

Today all magnetic media are subject to a severe process of demagnetisation. This requires all data contained on audio tapes, discs or floppy discs to be transferred from their original medium to other media, promising to be safer. As a rule the durability of digital media is much lower than that of analog ones and considerably shorter than the current legal duration of the copyrights.
Since it is quite normal for commercial born-digital works (such as computer games) to be equipped with a copy protection, we are faced with an absurd legal situation in Germany as well as in many other European countries: The user is explicitly given the right by copyright law to provide himself with a private copy, but in doing that he must not bypass technical copy protection.
Both alternatives bestowed in this special case by German copyright legislation on the work of conservational institutions are not feasible: We cannot wait for yet another handful of decades, until the copyright has elapsed, because by then all media will have lost their legibility. The other possibility of acquiring permission from the right holders for transferring the data for the purpose of archiving by bypassing copy protection is impracticable, since we are faced with a high proportion of orphan works and a legal situation that is far from clear.

2) Accessibility
Born-digital works cannot be kept accessible unless both the original hardware systems and operating software programs they were initially designed for are being provided in working order. Only if these components are presented as a functioning system, they will allow the contents to unfold and present a full reproduction. This is where the strategy of emulation enters the picture, because it allows historic and out-dated systems to be kept alive and working at least on a virtual basis. An emulator is a software program, which imitates original hardware on a current computer. This is necessary, since physical hardware has a limited life span (current opinion assumes a maximum of 40 years). And furthermore emulators, if compared with the original hardware, will multiply the accessibility, since they unburden the complex digital works from being only available on hardware systems becoming increasingly rare and precious. Yet another advantage of employing emulators is that they can broaden the functional range for example when it comes to documentation and being quotable. Thus they have become an important element in the preservation of digital works.
Since the production of emulators depends upon the reverse-engineering of hardware and software components protected by copyright, it is essential for binding legislation to be passed soon, that renders these indispensable tools as being legal means for the preservation of our digital heritage. If there is no extant documentation for an antiquated system and no producer or other rights holder can be found, then emulation by employing reverse-engineering (i.e. a reproduction of the mode of operation of a system or a software on the basis of a close examination of the original) will be the procedure of choice for preservation.

A working legislation tackling the issue of orphan works in the realm of digital culture – both on a national and a European scale – is essential. Both preservation and accessibility will benefit, if their legal standing is fortified.