Compensating Creativity in the Digital World: Reconciling Technology and Culture

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ABSTRACT
New proposals on compensatory mechanisms and viability of traditional practices for online environment is currently being considered by the European Union and are subject of heated academic debate. Simultaneously new business models for distribution of intellectual property online are emerging rapidly. The paper focuses on the failures of the current compensatory mechanisms, as well as new proposals to compensate the creative in the online environment, including current online distribution practices, universal levy proposals – Internet access and traffic levies, blank media levies, voluntary compensation systems, as well as traditional practices of the collecting societies, effects of the content protection technologies (DRM) on the accessibility and fair use of information online. The paper suggests the set of features for the new compensatory system, including socio-economic aspects of the different societies, and the need of uniform and worldwide compensatory system. Conclusions support the necessity to revise current compensatory mechanisms, centering on the proposed features, rather than just technological mechanisms, which dominate the current political agenda.

KEYWORDS: intellectual property, creativity, DRM, levies, alternative compensation systems

1. INTRODUCTION
Right to receive compensation for the use by others of fruits of one’s intellectual labor traditionally is one of the central issues of most intellectual property regimes [1].

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Right to receive compensation emphasizes the value of and effort required for the intellectual labor, and therefore acts as an economic incentive for the creative individuals to pursue new creative endeavors [2]. Although compensation is not the only reason for creativity, it is not to be renounced as one of the key factors contributing to it. New proposals on revising the current intellectual property regimes are commonly criticized for lack of account for this issue. Assuming that the intellectual works form the center point of the knowledge economy, it is therefore extremely important to ensure that creativity is equitably compensated.

With the emergence of digital technologies, and especially broadband wide area networks, the uses of intellectual virtues have increased tremendously, however the mechanisms to compensate the creators and right holders have not caught up with the pace of technological development. Most compensatory mechanisms existing to date are based either on private bargaining or collective implementation by the collecting societies. Most common implementations come either in the form of direct royalty payments between the user of the works and creator thereof, or levies imposed on standardized uses, such as broadcasting, public performance, private copying, or even items pertinent to such standardized uses – blank media or digital equipment [3]. On the other hand, wide accessibility and emerging selective use of intellectual works has explicitly uncovered the inefficiency and inflexibility of the traditional all embracing levy based compensatory mechanisms backed by the collecting societies [4].

Technological response developed and employed mostly by corporate holders of intellectual property rights came in the form of technical protection measures, or as they are commonly referred – digital rights management (DRM) systems. Current DRM
systems at least in theory make it increasingly possible to control how individuals use intellectual property items, set forth permissible uses, establish prices according to the market valuation of a particular work, and grant licenses directly and automatically to individual users.

It is crucial to emphasize that levy systems have been premised on the assumption that private copying of protected works cannot be controlled and exploited individually or it is inefficient to implement such controls [5]. With the advent of DRM, this assumption must be re-examined. Unlike levies, DRM makes it possible to compensate right holders directly for the particular uses made of a work. Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems.

Unfortunately, DRM systems frequently introduce total control over the managed intellectual property, excluding any uncompensated uses thereof, including uses that otherwise are available to the lawful licensees or society at large – so called fair uses of intellectual property. Thus, DRM somewhat compromises the societal benefits of intellectual property, in particular reuse thereof for derivative creations, or even educational uses [6]. Newest research also suggests that DRM technologies may contribute the pricing of the intellectual property products and drive consumers away from more restrictive services [7].

Coexistence of such conflicting systems is highly undesirable, since where levies coexist with such technical measures, society may end up paying twice for rights to make a private copy of a work – once by paying the levy, and once again by paying the right holder for the right to copy the work, or even may end up paying a levy for a work that cannot be copied, for example, a motion picture on a copy-protected DVD. Moreover inefficiency of the collecting societies as well as lack of any clear methodologies on measuring the uses of intellectual property in the digital environment and distribution of levies collected for such uses, further messes up the system, resulting in unfair and inequitable compensation to one right holders on account of the others, or even society at large. Significant argument may also be heard that inefficiency of the current systems sums up by compensating not the creative, but the intermediaries in collecting the levies and collective royalties [8].

In view of the above situation, the new proposals on compensatory mechanisms and readjusting of traditional practices for online environment are needed, especially in view of current policy agenda, which focuses on DRM technologies. The first part of this article surveys the failures of the current compensatory systems, and current replacement proposals and initiatives of the right holders themselves. Second part provides insights into the requirements for the new compensation systems, emphasizing the need for the uniform and worldwide compensatory system. Conclusions support the necessity to revise current compensatory mechanisms, centering on the proposed set of features, rather that technological protection mechanisms, which dominate the current political agenda.

2. ACKNOWLEDGING THE FAILURE AND NEED TO CHANGE THE EXITING SYSTEMS

The EU Commission has recently issued the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market (COM(2004) 261), which somewhat acknowledges the crisis of current compensatory systems for intellectual property online. Although the Communication recognizes that collecting societies have an important economic, cultural and social role, it emphasizes the need to make their operations more transparent, accountable, flexible and efficient. One of suggested considerations is the Community-wide licensing, which shall have a positive impact on the development of markets for digital cultural goods. Another consideration It also provides doubts whether DRM is likely to achieve the required balance as the solution for compensating creators online. It might well end up stifling the development of the Internal Market, rather than encourage it. Although the said Communication leans towards DRM, by stating that DRM systems “clearly are an important, if not the most important, tool for rights management in the Internal Market of the new digital services”, the DRM technology shall be critically assessed and other alternatives must be analyzed prior to making any policy choices.

Tremendous success of online P2P file-sharing networks demonstrates the stark economic reality of the digital world: distribution of information, as well as of creative works, has become such a low value service that Internet users can effortlessly provide it themselves. The current situation is that protected content is widely available and accessible to end-users, regardless of DRM and legal means directed to
stop online piracy, thus, demonstrating the limitations of the current DRM technologies and weaknesses of the policy agenda. The lack of compensation for creators, not the lack of availability of content, is the problem that needs solving.

First of all, it is important to emphasize that technology in itself does not secure any equitable compensation to the rightholder, however it may provide tools for abuse. DRM systems present a danger of enforcing technology monopolies and creating an oligopoly of major distributors whose volume of business can sustain the costs of converting to and operating a cross-border DRM system. Current DRM systems also are not tolerant of the fair uses of information, thus compromising the accessibility of works, freedoms of education and research, furthermore they, raise privacy concerns. Feasibility of DRM largely depends on interoperability of different systems, as well as user friendliness, which currently are future objectives, rather than reality [9]. As it was already noted, research of consumer behavior with the current online creative content confirms that users prefer not the only least expensive, but at the same time least restrictive content [10].

It must be recognized that the markets for the delivery of intellectual goods online are still extraordinarily dynamic and new business models are emerging. Recent success cases of private online music distribution services, such as Apple iTunes, RealNetworks Rhapsody or even MSN Music clearly demonstrate superiority over the traditional – hard media based – distribution systems for the audiovisual works, by offering price efficiency and better selectivity for the users. In such situation it is very important not to foreclose as-yet untested models.

In view of the current situation, as described in the introduction, it is obvious that collecting societies at least need to become more flexible, transparent, and democratic, if not adopt completely new models for their work. One of the key aspects of such change shall be removing the de facto representation of all right holders and all their rights, by allowing rightholders the possibility to manage certain of their rights individually.

Another emerging proposal to compensate creativity online is the Alternative Compensation System (ACS) [11]. One of the reincarnations of the ACS may be the Content Flatrate [2]. Content Flatrate ideas, rather than relying on 'pay-per-use' fees collected directly by commercial producers from end users based on pervasive use of DRM technologies, promote extending to the Internet the practice of indirect compensation through collecting societies. Under the proposed system, rights holders would license their on-line rights to a collecting society for collective representation, as they already do for many off-line uses today. This on-line collecting society would oversee the measurement of transfers of protected works over the Internet and then compensate the right holders based on the actual use of their files by end users. The funds from which the rights-holders are compensated could be raised through any of a number of sources: voluntary subscription payments by end-users or proxies for them or levies on relevant associated goods and services, such as broadband Internet connections or traffic, MP3 players and others, in addition to the levies on blank media, photo copiers, and so on which are already collected today. It must be noted that ACS proposals are rather new and immature, none of them so far provides any exhaustive argument on the clues of equitable distribution of the compensations, also they fail to stand part of the same arguments against current levy systems, in particular fairness of payments in case on non-use.

Yet another option is new open-access, non-commercial licensing models pursued by the projects like the Creative Commons project [11], which already has millions of subscribers. The main idea of such alternative models is that the authors shall have the flexibility to publish their works under licensing agreements of their choice including the freedom to license for use without payment. Unfortunately the Creative Commons themselves do not provide any tools for establishing and collecting the compensation for the provided content. Although compensation may still be provided on voluntary and user-discretion basis, there are significant concerns over sustainability of such systems, especially in specific limited user interest fields [13].

3. DESIGNING THE NEW COMPENSATION SYSTEM

Most current proposals to compensate creativity in the digital environment focus on the criticism of the existing systems, rather than the actual needs of the digital society. Based on the conducted analysis, we suggest that coherent set of requirements for the new system shall be developed, mould together and fine tuned prior to pursuing new proposals or even more importantly prior to making policy choices. Some of the important requirements for the new compensation system are outlined below.
It is rather obvious that designing of efficient system to compensate creativity in online environment shall assume cross border nature of the Internet. Implementing such system within one single jurisdiction may not be beneficial to the creators, and under certain circumstances may even serve the contrary by inducing perceptions of free intellectual property, questioning valuation thereof and possibly causing abuse of the system by the users in foreign countries [2]. It is equally obvious that differences in economic development may cause substantial distortions on the attempts to internationalize compensation system. For example, uniform amounts of compensation would be impossible to implement in different countries – appropriate compensation for developed and developing countries shall be differentiated. The best illustration of this argument is provided by the recent research on correlations of CD pricing to the online piracy levels [14]. On the other hand small and relatively underdeveloped countries may be the most suitable test beds to implement the new compensation systems. One main reason for this may be relative unimportance and very limited commercial market for the national creative production abroad (at least when it comes to audiovisual production), what would offset the disadvantages of leakage of national intellectual property to the foreign jurisdictions. Implementing the system within the national jurisdiction, would also allow avoiding the problematics of the dependencies of compensation and abuse on the level of the economic development in the country [15].

Second major consideration is objectivity of the new system in both determining the “levy” and distributing it to the right parties. This requires certain objective measurement system for the creativity, which is the common “weak spot” for existing levy systems, and the ACS proposals. Download counts are too susceptible to abuse, while radio charts or earnings off line are not a direct indicator of online use. This suggests that completely new measurement system shall be developed for online environment.

Another important consideration is psychological perceptions of intellectual property. During their existence, P2P file-sharing networks have created the whole generation of users, who are used to download content for free, have little respect for the intellectual labor, and do not recognize the importance of intellectual property. Such perceptions are especially persistent in countries, which do not have long standing traditions of intellectual property. Based on existing criminological research in this field [16], it may be argued that current perceptions are likely to persist, thus further undermining the successfulness of crucial initial period of introducing any new compensation system.

Further important aspect is the role of the collecting societies in the new compensation system. Given the current failure of the collecting societies to respond to the reality of the online environment, it is not clear that collecting societies have retained enough credibility with the society, the creators and businesses. It is therefore doubtful that the collecting societies will be appropriate as the central actors of the new compensation system. Ability to maintain infrastructure for the new system, may also be important issue, especially in small countries, where such system would not be economically plausible. From this point of view it may be appropriate to consider privately administered systems modeled after government or other publicly administered compensating systems, similar to the social and medical insurance systems of today, or premium based systems, as they were implemented in the former Soviet Union.

Furthermore it is obvious that the new system can not be instantly introduced, therefore certain coexistence period with the current compensation systems will be inevitable. Such coexistence requires that switching to the new systems shall bring inevitable benefits not only to the society, but also to the creators or rightholders themselves. This context may suggest that the new compensation system shall be voluntary, rather than compulsory. Compulsory introduction of the new system shall only be viable after majority of the creators and rightholders adopt the new system. As it was mentioned above, voluntary acceptance may depend on prevailing perceptions of the intellectual property.

Finally, the new compensation system shall be open ended, so that it would allow expanding the compensation system to other types of intellectual property. This is especially viable in view of the ongoing convergences of the different types and forms of the intellectual property, which all can be brought to plain information.

Summarizing the above, the new compensation system shall bring together the following features:

- implementability on cross-border basis;
- objectivity in distributing of the compensation;
- adaptability to countries of different level of economic development;
- capability to provide new perception of the intellectual property;
• incentives to switch to the new system on the voluntary basis;
• adaptability to any form of the intellectual property;
• new infrastructure, as opposed to the existing collecting society infrastructure.

4. CONCLUSIONS
The debate on developing viable alternatives for compensating creativity online is ongoing. Analysis of current situation supports the necessity to revise current compensatory mechanisms, however proves that technological solutions, such as DRM, are not the only way to ensure compensation for creators in the digital environment, and are prone to numerous shortcomings. It also emerges that the new system shall embrace the Internet’s advantages for the delivery of intellectual goods, as well as other realities of the global online society, rather than seeking to bring down online piracy at any cost.

Suggested set of common features for the new compensation models may serve as the rough direction of the new system and a test for the new proposals. They also confirm the need to reconceptualize the intellectual property paradigms for the global online world, and highlight the far reaching effects the current policy proposals, that are not currently ascertained.

5. REFERENCES