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Submission of the  
European Newspaper Publishers' Association (ENPA)  
concerning the  
Public Consultation on Creative Content Online  
in the Single Market

February 2008

## EXECUTIVE SUMMARY

- ENPA - the European Newspaper Publishers' Association - recognise the Commission's Communication which aims at promoting the development of innovative business models and the deployment of cross-border delivery of diverse Creative Content Online services.
- We would like to express our disappointment at the fact that the scope of the Communication is rather narrow; it focuses on certain industries and does not address the larger and broader issues of the Information Society. In this context, we would like to remind the Commission that facilitating the availability and protecting the creative content of newspapers should not be forgotten.
- More than 2500 newspapers are available online in Europe and offer a wide variety of services, mostly free of charge. They attract a considerable number of visitors on a daily basis, often being the most visited internet sites and regarded as a trusted source of information. Printed and online newspapers have a complementary role and there is no substitution from one media to another. Online newspapers are also enablers of democratic debates with their interactive services.
- Freedom of commercial communication, especially in the form of advertising, is very important in building a profitable business models.
- ENPA draws the Commission's attention on the three following challenges and issues that newspapers are facing in the digital environment, in the context of this consultation:

*(1) Digital Rights Management:* despite that the use of DRMs are not widespread in the newspaper sector, in the future our industry may develop protective measures which reflect changing needs and consumption habits. However, "one-fit-all" industry solutions and/or policies cannot be applied in this respect as creative content industries have very diverse business models.

*(2) Legal offers and piracy:* monitoring data-streams on the internet, done by access-providers with a view to identifying illegal content is a threat to freedom of information and media freedom. Rules allowing access providers to monitor online content would overrule the principle of 'no responsibility of mere conduit' and of 'the ban on any general obligation to monitor', as regulated in Articles 12 - 15 of the so called e-Commerce Directive.

*(3) Copyright and employment:* In order to be able to offer newspapers' content in different digital platforms and services, publishers as employers should be entitled to exercise employed journalists' economic rights of copyrighted works without legislative or practical obstacles. Existing legislation in some Member States such as in the UK (work-for-hire) should be promoted as best practice model in Europe.

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## **PART I - Important elements that are missing from the consultation**

ENPA is concerned by the fact that the scope of the Communication is rather narrow and fails to address the larger and more broader issues of the Information Society. ENPA would like to remind the Commission that facilitating access and protecting the creative content of newspapers should not be forgotten. Newspapers are extremely important contributors to the Information Society and add significantly to the variety and diversity of content online available.

Furthermore, ENPA would like to stress that in order to facilitate the availability of newspapers' content for European citizens, there should be an inclusion or recognition of 'work-made-for-hire' type legislation. As this has not been the line of thinking inside the current EU Commission, we would like to see a strong **recommendation** from the Commission supporting newspapers' demands at national level to have this type of legislation introduced into national legislation.

Therefore, ENPA expects that the Communication acknowledges the challenge of rights clearance and administration in the management of content. When a publisher as an employer is forced to request consent from employees to re-use and re-utilise copyrighted works that the employees have created in the course of their employment, this imposes a heavy burden from a management and organisational point of view. The statutory system that is in force in the UK, Ireland and the Netherlands should work as best practice example for new national level legislations.

In other industries it would be unheard of if the employer could not be able to use the output of the employees. In addition, labour laws do not allow employees in our sector - nor in any other sectors - to use their work for their own or other secondary uses and purposes.

ENPA notes that there is already a model in the EU copyright *acquis* in the so called computer programs and database directives. Both of these could be used as models when the Commission is making its strong recommendation to the Member States.

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## **PART II - ENPA's detailed responses to the questions**

### ***Digital Rights Management***

**1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?**

(1.1) In the newspaper sector, the use of DRMs is not widespread as the general intent and current tendency is to ensure easy and free access to content. When applicable, publishers rely on contractual agreements for licensing the use of newspapers' content (e.g. in online business newspapers). Access systems in use today are more or less conditional access systems with password/username for accessing online archives, press clippings and other similar commercial services. Since online newspapers' content changes everyday and there is no specific economical or practical need for protecting each article, photo or other content with DRMs or TPMs, it would be unnecessary and hence very costly and difficult to set up DRM/TPM or similar systems. This is especially true for SMEs which the majority of European publishers are (over 95%).

(1.2) The newspaper industry has developed necessary protective measures reflecting the needs of the publishing sector. It is important to note that "one-fits-all" solutions cannot be applied in this respect as creative content online industries have very diverse business models.

(1.3) It is also important to note that ENPA has a supporting role on the ACAP standard project (Automated Content Access Protocol) which is a stakeholder collaboration with search engines and other technical and commercial partners. In the first instance, ACAP provides a framework that allows any publisher, large or small, to set the conditions and policies for access and especially for the secondary use of publishers' online material. Thanks to the enabling nature of ACAP, publishers will be able to make more content available to users who are using search engines, and to continue to innovate and invest in the development of business models for network publishing. ACAP is a practical solution to the problem where some existing practices of search engines are considered to undermine the initial financial investments made by publishers in high quality online content.

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## ***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?**

(6.1) Cross-border activities are quite marginal for newspapers compared to national, regional and local sales and subscriptions because of the nature of our products and services. Readers typically connect themselves to their own language, culture and events even though the cyberspace is full of other material that could be accessed. Because of this, there seems to be no particular demand for multi-territorial licensing of newspapers.

(6.2) However, when multi-territory rights or similar right management issues arise, publishers should always be free to choose between individual or collective rights' management systems and/or mechanisms also in the digital environment. This means that as the cultural context and the commercial and digital development is different from one country to another, it is unwise to intervene at EU level with EU wide licensing conditions or models for different sectors as it would not take account of differences between sectors (music, films, newspapers, books, magazines, etc) and cultures in different countries.

(6.3) Some publishers, spin-offs, consortiums or similar joint ventures may want to develop multi-territorial licensing, for example for press-clipping services. However this decision belongs exclusively to the publisher(s) in question. ENPA's view is that there is no need for a recommendation as the markets and licensing models should be allowed to develop freely.

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## ***Legal offers and piracy***

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

(9.1) As explained above, we have a supportive role in the ACAP Standard (Automated Content Access Protocol) development project together with search engines, other technical as well as with similar commercial partners. However, ENPA would like to reiterate that despite the ongoing work within ACAP, the existing EU and national copyright legislation which includes the necessary legal mechanisms, should remain unchanged. The temptation of policy makers and legislators to tackle questions of piracy by increased stakeholder cooperation has its appeal because the policy makers and legislators would only have the roles of facilitators.

Furthermore, it should be clearly stated that stakeholder co-operation shall not lead to such co-operation between access providers and right holders which would impose

on the former an obligation to cut off access, for example to editorial content, in the case of infringements of personal rights as explained below in answers 10 and 11.

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

(10.1) We are not against any practical and functioning co-operation between stakeholders, providing that the end result is that the publishers have proper, effective and enforceable means to fight the illegal use of newspapers' content by third parties such as unlicensed companies utilising newspapers' content for their own commercial aims (e.g. reselling our content to governments, institutions etc.) or search engines who have developed commercial services by leveraging our brands and material without asking for consent from publishers.

(10.2) In this context, it is thus essentially important to note that Internet Service Providers (ISPs), which have the power to stop online services, must respect the fundamental principles such as press freedom in their operations. Newspapers do not want to find themselves in a situation where, for example, the automated system of an ISP takes down an online newspaper site or sites when someone claims that there is infringing material available on newspapers' sites.

(10.3) In addition, ENPA would also like to highlight that adding any rules allowing access providers to monitor online content would overrule the principles of 'no responsibility of mere conduit' and of 'the ban on any general obligation to monitor', as regulated in Articles 12 - 15 of the e-Commerce directive.

(10.4) The e-Commerce Directive is namely regulating the liability of access providers in the situations prescribed in its articles. It guarantees freedom of flow of information which should be preserved at all costs. In our understanding, the Memorandum of Understanding in question (Olivennes), could overrule these principles of 'no responsibility of mere conduit' and of the 'ban on any general obligation to monitor'.

(10.5) Moreover, the Olivennes agreement seems not take into account the interests of news media such as the online press. Any responsibility of access providers for content online filtering or monitoring would constitute a threat to the right of freedom of expression for all editorial content providers.

(10.6) The responsibility imposed on access providers would force them to cut off the access in any case of an infringement of law in order to prevent their own liability. Alas, an access provider would be obliged to cut off the access to online newspaper content if for example a person is claiming an infringement of personal rights such as defamation through a publication directly to the access provider.

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

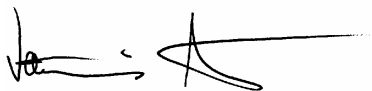
(11.1) ENPA's viewpoint is that filtering content online could have serious implications to freedom of expression, as explained above under question 10.

(11.2) The main challenges - and ultimately problems - lie in the fact that neither man-monitored nor automated filtering measures can take into account the content of all the material filtered. To put it simply: the inherent danger is that the filtering is done so effectively or ineffectively that legal material is also "filtered away" from the internet. For this reason ENPA has serious reservations as to whether filtering measures should be used. If any measures would be proposed and implemented, they would need to be balanced with the possibility of judicial review by competent courts.

(11.3) Furthermore it is important to note that filtering measures by access providers can also act as censorship and as such would be contradict to the fundamental rights of freedom of media and expression.

(11.4) In addition, access providers should not be forced to apply filtering and monitoring measures to content contributions (e.g. postings on forums, bulleting boards, blogs). It should be made clear that a responsibility of e.g. a forum provider to delete alleged illegal content contribution from a forum, can only be done on a case by case basis.

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