

**Creative Content in a European Digital Single Market:
Challenges for the Future
A Reflection Document of DG INFSO and DG MARKT**

Joint Submission by ENPA and FAEP

5 January, 2010

ENPA – the European Newspaper Publishers' Association – and FAEP – the European Federation of Magazine Publishers welcome the public consultation organised by DG MARKT and DG INFSO on the reflection document on Creative Content. Since the beginning of the discussions on Content Online in 2006, ENPA and FAEP have been closely involved in the reflection process within the European Commission.

ENPA and FAEP have thoroughly analysed the reflection document and would like, herewith, to share the following perspectives from the press sector in Europe.

- **European policymakers and legislators should not forget the role of the press publishing sector when the future of creative content online is being discussed.**
- **The press sector is facing profound structural changes.**
- **Press publishers have developed business models based on both copyright protection and advertising as well as circulation revenues.**
- **A balanced copyright protection as it currently exists is essential for the viability of digital and printed press.**
- **The future of the press also depends on fair and balanced business and regulatory relations between the different players, including ISPs, telecom operators, search engines etc.**
- **Publishers must have the choice to use collective management in the digital environment. Collective management should always be voluntary and not mandatory through regulation.**
- **The creation of a “European Copyright Law” will not be the right approach to foster European creativity.**
- **The introduction of a principle of exhaustion of rights for virtual goods would entirely jeopardize digital business models of publishers.**
- **ENPA and FAEP oppose the creation of a European repository that would oblige right holders to deposit copyrighted works in order to be entitled to effective protection.**
- **Multi-territory licensing for the press sector does not need to be fostered as the press sector is national by nature.**
- **ENPA and FAEP are in favour of better rights' management conditions within the publishing companies.**

1. The press sector is an indispensable actor of the content industry

The first reaction is that the press publishing sector has completely been omitted as if it would not be part of the creative content industry. This exclusion is even more surprising considering that newspapers and magazines are essential actors and contributors to the creative industry and in a wider perspective to the knowledge economy.

Although the reflection document refers to the publishing sector in some parts, these references only focus on the book publishing sector without further considering the impact of what any policy considerations could have on the magazine and newspaper publishing sectors.

As will be explained in the subsequent sections, the press sector in Europe is going through a profound structural change and publishers are trying to develop the best solutions to ensure the distribution and availability of content for the benefit of the readers, the future of their activities and the sustainability of their business models in the short, medium and long term.

In this context, the press in Europe faces different structural and economic changes and challenges:

- i. on the one hand, publishers invest heavily in the production and the dissemination of their editorial content on various platforms, whether in the printed or in the digital area;
- ii. on the other hand, they are facing a decrease of advertising and circulation revenues, a stronger competition with other players and also an increasing use of their content by third parties such as news aggregators. These aggregators use newspapers' content for their own commercial services without payment to and without prior authorisation from the publishers.
- iii. Publishers are also trying to develop new ways to finance online content, in particular through paid for combined offers and/or services.

For an appropriate development of the press sector in the digital environment, publishers need to rely on appropriate market and legal conditions which include in particular:

- A strong copyright protection
- The respect of freedom of expression
- No restrictions or bans on advertising and fair competition

- Zero VAT rates
- A proper balance between publishers and the different market players, including ISPs, telecom operators and search engines.

Without prejudice to other similar legal and regulatory issues, all these different conditions are indispensable to ensure a sustainable and healthy press sector.

In some countries publishers argue that in view of the technical changes of the last years it is no longer sufficient to rely only on copyright protection as the basis for the activities of the newspaper and magazine publishing operations. In order to secure an appropriate protection and hence remuneration for the investments of publishing houses, they point out that it is necessary to further improve the rights of publishers. The discussion at European level about this topic has also already started. ENPA and FAEP would be glad to provide further information on the views and experiences of their members in this area.

Copyright protection for online press (as well as for printed press) is a central element for the future of the press sector.

ENPA and FAEP therefore urge the Commission to ensure that the policy on the future of online creative content but also the new EU digital agenda include the press publishing sector in all its specificities and challenges.

2. Towards a European Copyright Law?

ENPA and FAEP noticed with a particular attention that the Commission refers to a more profound harmonisation of copyright laws and to a “European Copyright Law” established by means of an EU regulation and based on Article 118 of the Lisbon Treaty. This article not only refers to a uniform protection of IP rights throughout the EU but also refers to the setting up of centralised European Union -wide authorisation, coordination and supervision arrangements. On the basis of this article, the Commission shows interest in a “European Copyright Title” as a tool to streamline rights management across the Single Market.

Both associations oppose to the idea of a Regulation or a European Copyright Law based on Article 118 of the new Treaty. First of all, the reference to this article as a legal basis for a full harmonisation of copyright is disputable as this article was originally intended for industrial property protection, in particular patents and was not meant to cover copyright or related rights.

Furthermore, a proper assessment of the real need for such an important reform would have to be done considering the economic impact it would have on a fundamental economic sector compared to the benefit of such an instrument as well as the cultural

aspects which have justified so far that, except for some aspects, copyright is still better dealt in a more efficient way at Member States level.

A European Copyright Law would mean a complete reopening of the seven existing directives which compose the current EU *acquis* and would therefore lead to difficult discussions on all the topics and issues that have been so far covered by these directives with a risk to jeopardize the current balance reached.

Publishers have also developed their business models and their licensing schemes on the basis of the EU legislation currently in place. Reopening this *acquis* completely or in some parts would therefore disturb the market conditions and the existing revenues of publishers.

In conclusion, ENPA and FAEP seriously question the real need for a reform of the EU *acquis*. So far, the current *acquis* has provided sufficient legal certainty and a fair balance of interests for the different stakeholders. This equilibrium has to be maintained.

In any case, prior to a reopening of the current EU *acquis* in the field of copyright and related rights ENPA and FAEP strongly recommend an in depth impact assessment taking into consideration the different needs, specificities, challenges and objectives of each creative sector.

3. New business models - alternative forms of remuneration

Newspapers and magazines have rapidly embraced the opportunities offered by the internet. They are amongst the very first media that were present on the internet and available to users on various platforms. The digital age has brought tremendous opportunities for publishers to make available and deliver content on various platforms as well as difficulties for developing successful online business models. Electronic communication, digital advances and online publishing have led publishers to progressively adapt their organisations and processes and to develop new business models.

The sector continues to invest heavily in online content for Europe's citizens. Publishers offer journalists and citizens the chance to blog, introduce forums, provide online databases of content, make their archives available online, offer video content in addition to text and photos, and offer interactive features to engage with their readership. Newspapers' and magazines' websites are both very popular and successful thus they are among the most visited websites in their national, regional or local markets. However, the popularity (unique visitors for example) does not necessarily result in higher revenues.

Virtually all newspaper and magazine publishers have developed online offers which are sometimes complementary to the printed version or identical to it, differing from the printed version or totally replacing it (especially in the professional press sector).

Developing viable online businesses is a challenging process for all publishers. The development of successful online business models is very much dependent on being able to protect content and to recoup the investment made in it - facilitated to a large extent through copyright protection and advertising revenues.

Next to a “free” model, publishers have also developed paid offers based for example on subscriptions to pdf version of their print products, paid-for digital archives, news alert services on mobile phones etc. In this model, advertising plays an important role in order to finance part of the digital version of the newspapers and magazines. In some cases the users are willing to pay for the content too.

However, the advertising market is under extreme pressure and many publishers' websites remain unprofitable relying instead on cross-subsidies from the sales of printed products. The paid-for content and other services offered online by publishers do not in most of the publishing companies finance these online operations.

In some countries, publishers are investigating further the development of micro-payments directly on their websites or through mobile phones. There are also interests in bundled subscriptions and services where different offers would be combined altogether and offered to the consumer in one package. But further analysis is needed to analyse how much users are ready to pay for these different types of offers.

In short, to recoup the investments publishers have two main options:

- a) Sell content either directly (through single issue sales or subscriptions, or on a pay-per-view/use basis) or through licensing deals; and
- b) sell advertising space or running third party promotions and adverts.

Aside from the fall in overall advertising revenues associated with the current economic crisis, advertising revenues are increasingly moving online - and that revenue is often picked up by aggregators and search engines rather than content creators themselves. Competition for advertising revenues is high and prices for classical display-ads are low.

Producing quality and exclusive content is essential in order to attract readers to publishers' websites - and consequently make the space surrounding the content attractive to advertisers. Creating quality content costs a lot of money. Underlying the production of all high quality creative content is the law of copyright which is crucial for creators and publishers by allowing them to protect their content and obtain a return on their investment. Already commercial operators exploit the content of others (for

commercial gain) without paying any kind of licence fee or other remuneration to the creator of that content thus diverting readers and hence advertising revenue away from the publisher of the content.

Although content can be accessed by readers without payment, it does not mean that publishers have not made substantial investment producing that content.

Competition in the advertising market has become even stronger with the arrival of new players, including search engine companies such as Google. This competition has been even tougher for press publishers since some of these new players are using publishers' content to attract more users on their websites in order to maximise their own advertising revenues.

In some countries, publishers have questioned this situation through legal means. In Belgium, the Copiepresse v. Google case which is now pending at the appellate court level illustrates the need for respect of copyright legislation by news aggregators, including prior authorisation by the publisher and remuneration for the content used. Recently in Italy publishers have complained to the Italian competition authority against the possible abuse of dominant position of Google in the advertising market.

What is needed is an online environment which fosters healthy competition and a fair framework amongst different creators of content and those that deliver content, to the mutual benefit of online businesses and consumers, European knowledge economy and cultural diversity. Where some players or industry wields a disproportionate amount of influence over search results, prices and practices, this is ultimately in no ones' interests. **Fair search, fair share and transparency must be guaranteed online.**

In this context, ENPA and FAEP believe that it is time for discussions and negotiations among the different market players to agree on fair and balanced conditions in terms of respect of copyright and in terms of advertising revenues and revenue streams generally speaking.¹

ENPA and FAEP strongly believe that copyright protection based on exclusive rights is and should remain the main and basic approach for EU copyright legislation. As we explained in section 1, the “traditional” copyright licensing model based on the EU *acquis* has been a good basis for publishers' evolution in the online and offline world and for the establishment of different offers/services, contracts and licensing schemes with the users.

¹ ENPA has adopted a statement on 18 May 2009 (Stockholm Resolution) which underlines these concerns.

Nevertheless, the ICT industry (internet service providers, telecoms operators, search engines, etc) benefits to a certain extent from publishers' content through their platforms and services. When these players have invested massively into networks and infrastructures, the same players should have also developed their services to the users either on the basis of the content that is provided by press publishers or by proposing their own competing content offers to users. At the same time, the ICT industry have also increased their market shares in the advertising market.

The reflection document refers to the introduction of alternative forms of remuneration which would either exist alongside traditional copyright licensing schemes (national or EU wide) or replace such licensing models between right owners and commercial users. One idea discussed at national level is that ISPs could pay right holders monetary compensations for those mass reproductions and disseminations of copyright protected works undertaken by their customers i.e. consumers.

Considering what has been explained above, ENPA and FAEP consider that there are many different ways to improve the relationships between content providers and the different market players including ISPs. A possible compensation to right holders by ISPs can be part of the discussion. Nevertheless, a form of compensation applicable only to unauthorised file sharing and reproductions is not the right way to foster the use of content online by users.

ENPA and FAEP would urge EU and national decision makers to engage press publishers in the discussion about alternative/complementary forms of remuneration which would ultimately lead to a acceptable solution for right holders, ISPs and consumers.²

4. Consumer access

The reflection document refers to the need to raise consumers' confidence in online businesses and foster access to culture and knowledge across the EU. This has always been the aim of the press publishers. The document recommends extended collective licensing for orphan works and out of print works after a diligent search as well as further harmonisation of certain exceptions and limitations which should become mandatory.

On the use of extended collective licensing for orphan and out of print works, ENPA and FAEP consider that the following points are essential:

² In Belgium for instance, newspaper publishers have asked the government to apply to internet the same remuneration system as for broadcasters through cable operators (remuneration of content producers through intermediaries which transmit the content to the users).

Copyright provides vital incentives and opportunities for publishers and for society at large. It is the recognition of copyright which fundamentally underpins investment in editorial content and enables publishers to make works available whilst providing a framework for publishers to secure remuneration for their investment and the sustainable delivery of creative content. Publishers' investment in collecting information and delivering it to the public plays an important role in democratic societies. Creative content is the true value of the information society and the knowledge economy. This has been recognised in a study on “The Economy of Culture in Europe” prepared for the European Commission and published in October 2006 and in the Directive itself.³

The fundamental point here is that publishers and creators should always be able to decide whether or not to grant permission for the use of their work.

Also the concept of out-of-print work is very sensitive in the case of newspaper and magazine publishing as this covers most of the works almost as soon as they have been published. We would then urge the Commission to be very cautious in the use of this concept as it clearly does not have the same implications for example for books and for the press.

If new or expanded exceptions to copyright are introduced, this trend is likely to increase and inhibit the production of quality creative content and development of magazine and newspaper publishers' online business models. Ultimately no one benefits as there will be a decrease in the amount of quality content available to consumers (as publishing becomes unviable).

On the issue of orphan work, the work developed within the High Level Group on Digital Library is a good starting point, especially in the field of due diligent search. Publishers have always argued that Member States, following those guidelines, could adopt their own solutions. These solutions should not change the overall system of prior authorization for the use of copyrighted works. Some are working on it. It has not been proven that extended collective management and/or any EU legislation would be necessary in this area.

Regarding further harmonisation of certain exceptions and limitations which should become mandatory, it is important to remember that copyright exceptions and limitations are applied in law only in special cases which do not conflict with a normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of a right holder. This flexible test has worked well to enable and accommodate recent rapid technological developments. It should continue to be recognised and observed.

³ Recital 11, Directive 2001/29/EC

ENPA and FAEP are of the view that the approach chosen in the InfoSoc Copyright Directive to not make exceptions (other than the single exception provided for under Article 5.1⁴) mandatory reflects the diversity of Europe and is the result of long tradition that has enabled flexible interpretation to cover:

- application to rapidly evolving technologies;
- reconciliation with experience under different Member States' national laws;
- recognition of legitimate cultural differences and languages within Member States
- operating for the benefit of society; and
- lower legislative costs in terms of legal review against the above issues.

Subsidiary is an important principle in culture related fields of policy. More harmonisation would not bring any improvements.

For further input, ENPA and FAEP have already indicated their position in the response to the Green Paper on Copyright in the Knowledge Economy.⁵

In conclusion, ENPA and FAEP believe that neither extended collective management nor mandatory exceptions would solve the issue of access to content for consumers. Publishers are already active in putting forward practical solutions through licensing schemes and other voluntary means which have achieved concrete and positive results for the users' community.

5. Commercial users' access:

The reflection document proposes:

- to foster a streamlined pan-European and/or multi-territory licensing process;
- to identify ownership of rights and the creation of an online database; containing information on rights and their owners;
- to extend the scope of the Satellite and Cable Directive of 1993 to online delivery of audiovisual content, paralleling the scope of the new AVMS Directive.

⁴ Article 5.1 Temporary acts of reproduction referred to in Article 2, which are incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable

(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided in Article 2.

⁵ http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm#greenpaper

ENPA and FAEP are concerned with the economic success of their member companies. Online editions in particular offer the possibility to provide content and services to the single market. It is therefore necessary that publishers have the *right* to grant multi-territory, even pan-EU licenses but this cannot become an *obligation* as that would prevent different types of other cross-border partnership options that publishers might prefer. The contractual freedom of companies must be maintained.

ENPA and FAEP are highly concerned by the reference to the ECJ doctrine of exhaustion of rights in tangible goods as it seems that the Commission considers applying this principle to virtual goods in order to open up the possibility to license rights by territory. Such a solution would directly destroy any business models already developed as rights holders would no longer be able to control secondary licensing of their online content. It would overrule the consent that any author has to give for the use of its work.

Moreover, ENPA and FAEP do not think that multi-territory licensing needs to be fostered. In our sector, apart from a few well-known international 'brands' edited in one of the major languages, most magazines and newspapers in Europe are read at national, regional and local level. The majority of the press in Europe does not have transfrontier features.

Different languages and cultures as well as interests for national or local news limit the attraction of publishers' content across borders. No EU-wide law will have an impact on this specificity of the press. Instead, it is not uncommon in the case of magazines to see a brand style and sometimes content licensed to publishers (or merely a subsidiary) in other countries who then adapt to readers preferences.

International recognition for the principle of territorial licensing of copyright remains a cornerstone for effective copyright licensing even within the EU. Licensing by territory is fundamental for publishers as content differs depending on the country and language of distribution.

Nevertheless, in order to respond to a recent demand of the market, especially of international institutions or companies, publishers are working on the establishment international cooperation between press-owned databases and licensing organizations which will lead to more efficient international licensing of press articles worldwide both for content owners, intermediaries and users.

This is the main objective of a project called PDLN – Press Database and Licensing Network – which has been established by publishers' rights management organisations and press database companies (in BE, DE, UK, IE, DK etc.). At national level various services and offers have been established to respond to these demands. They have been developed by publishers either on an individual basis or jointly: Mediargus and Press

Banking in Belgium, InfoMedia in Denmark, Clip in the Netherlands, NLA in the UK etc. are some of the press clipping licensing services that have been set up by publishers in their respective countries.

The issue of ownership is relevant in the press publishing sector as it is linked also to the question of management of rights between publishers and employees within publishing companies. The management of rights within a press publishing company has become more and more important with the development of online offers and other digital businesses.

In the digital environment, users want to have access to information and news on various platforms at any time and from different places. Publishers therefore aim at responding to these users' demands by ensuring that digital content is accessible to all users. To achieve this objective, publishers as employers should be able to publish content on various platforms without obstacles.

In some countries, publishers would like to change the legislation in order to ensure that publishers as employers are entitled to exercise employed journalists' economic rights attached to their works unless otherwise agreed by contract.

The idea developed in the reflection paper to create a European repository for rights goes against the philosophy of copyright. Its underlining principle seems that if a work is not included in this database, it would mean that right holders have renounced to their rights. Right holders should never be obliged to make any formalities to benefit from the full protection of the copyright regime.

6. Protection of rightholders

The discussion paper proposes different options to combine easier access to content whilst providing adequate protection of rightholders:

- extended collective or mandatory collective management system for the "making available" rights of authors and performers;
- measures on governance and transparency of collective rights management organisations;
- more collaboration with ISPs and other companies providing access technologies;
- financial incentives for online multi-territory offers of audiovisual works.

ENPA and FAEP consider that most of these measures to protect right holders have been tailored for the audiovisual or the music sector but have not been examined at the light of the concerns of the press publishing sector.

ENPA and FAEP would therefore like to reiterate the points that have already been mentioned in this paper and that needs to be taken into account by the Commission in its overall reflection on EU copyright policy:

- **A strong copyright protection is essential for the viability of digital and printed press:** the Commission's reflection on copyright should ensure that there is no weakening of the level of protection of publishers' content and guarantee that publishers can easily rely on EU copyright legislation. Since publishers have to enforce their rights against big market players, including search engines and/or news aggregators, the level of this protection is even more important to sustain the newspaper and magazine publishing industry in Europe. In some countries, publishers are interested in strengthening copyright protection through the application of neighbouring rights to press publishers' content.
- **The future of the press also depends on fair and balanced relationships between the different players, including ISPs, telecom operators, search engines etc.** Press publishers in Europe would like to be closely associated to the discussion with these different players in order to evaluate the different solutions which would lead to the sustainability of the sector by increasing the current revenue streams.
- **ENPA and FAEP want publishers to have the choice to use collective management in the digital environment. Collective management should always be voluntary and not mandatory.** Publishers need to have direct contact with their users which is even more important in the digital environment. Mandatory collective management would add more administrative burden and cost on right holders and would not provide sufficient transparency in terms of price and usages.
- **ENPA and FAEP are in favour of better rights' management conditions inside the publishing companies** as this would also ease external right management between publishers and users. In some countries, publishers call for a transfer of rights from their employees as it would ease the dissemination of content on various platforms without obstacles.

ENPA is a non-profit organisation of 5200 titles from 25 European countries representing the interests of newspaper publishers to the European Institutions. More than 120 million copies of newspapers are sold each day and read by over 235 million people in Europe. Newspapers online have a significant number of unique visits on their sites on daily basis.

FAEP -The European Federation of Magazine Publishers- is the representative trade association of the European periodical press. We represent 28 national magazine trade associations from EU Member States, as well as 24 corporate members from all over Europe. In total, we represent the interests of 15,000 publishing companies, turning out more than 50,000 titles per year, in print and online.

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