5th January 2010

FEP response to the EU Commission consultation on "Creative Content in a European Digital Single Market: Challenges for the future"

The Federation of European Publishers (FEP) is the association representing national book and learned journal publishers' associations from 26 European Union Member States and European Economic Area. Thus FEP is the voice of the great majority of publishers in Europe. Founded in 1967 FEP deals with European legislation and advises publishers' associations on copyright and other legislative issues.

Executive summary

FEP welcomes the recognition of copyright as the basis for creativity and the important contribution to European economy. As the largest cultural sector, the publishing industry already contributes a great deal to the creation of a single digital market for the written sector. However some sectors in digital publishing are still a nascent market and it is paramount to keep on providing incentives for investment leaving time for the market to develop.

The paper points out **some sector specific trends** mentioning a risk of lack of books in projects such as Europeana for rights clearance reasons or competitive pressure on the EU copyright systems due to developments in other parts of the world. Firstly, regarding the issue of rights clearance, Europe is already at the forefront of seeking solutions to facilitate the identification of works, including orphan works with projects such as Arrow. This EU project will facilitate access to the best rights information available from a predefined set of sources, to determine the right status of any book. Secondly, we consider that the alleged competitive pressure coming from other parts of the world derives from economic mechanisms, rather than from differences in the legal systems, and, above all, from the different level of investment dedicated to those initiatives.

In regards to **challenges and actions** identified by the Commission, FEP considers that: **1) Copyright territoriality** is not an obstacle to obtain access to books in any European country as, in general, books in a given language do not have territorial restrictions attached to their licensing. **2) Extended collective licensing mechanisms** should not be considered as the rule at European level as the concept does not fit into the system of some EU countries. For orphan works, in our view, the EU should foster the principle of due diligent search in the country of publication, support projects like Arrow and encourage mutual recognition of national solutions. For out of print works, any collective solution should only be envisaged if it is voluntary and based upon rightholders permission. **3) In regards to exceptions and limitation,** the EU should continue to support the existing balance achieved in the 2001/29 Directive and not reopen existing legislation. Promotion of trust and collaboration is best to enhance dissemination of content. **4)** An **EU Copyright title** will not bring any benefits to the development of content online. Differences between national copyright laws do not constitute an obstacle to the creation of an online market for the text based sector. **5) Flat remuneration systems** would have a negative effect for cultural industries. The Commission should not favour specific business models, but rather foster an environment in which different business models flourish in a competitive manner. **6)** The introduction of an **extended or mandatory management system** for primary online uses is neither feasible nor desirable in the publishing sector. Rightholders must have the freedom to choose how to manage their digital rights and they can withdraw them whenever they deem appropriate.

FEP suggestions to foster creative content online include, inter alia, maintaining stable legal framework, enforcement online, encourage respect of copyright, public-private partnerships, reduced VAT for electronic publications and foster both open standards to achieve interoperability and consumer friendly micropayment systems.

31 rue Montoyer, box 8 • B-1000 Brussels • TEL. 32 2 770.11.10
FAX. 32 2 771.20.71 • e-mail: omartinsancho@fep-fee.be • website: www.fep-fee.eu

General remarks

FEP welcomes the possibility to contribute to the European Commission call for comments to the Reflection Document on "Creative Content in a European Single Market: Challenges for the future". We look forward to a fruitful debate to continue providing the best high quality and diversified offer to citizens while maintaining the long term sustainability of the European publishing industry.

The Reflection Document acknowledges in its introduction the importance of copyright as the basis for creativity as well as the important contribution of the content sector to European economic growth and jobs. It also stresses the responsibility that European policy makers have to protect copyright. We welcome such statements as a high level of protection for intellectual creation is indeed a pre-requisite for high quality content to be produced both in the analogue and digital world providing authors and publishers with a reward for their efforts and an incentive to innovate. Recognition of the protection of author's moral rights is equally relevant as one of the cornerstones of the European author rights civil law systems.

As the largest cultural sector[1], the publishing industry already contributes a great deal to the creation of a single digital market for the text based sector. Publishers support this goal as they want their books to be read by the largest possible number of readers and to be made accessible through all available channels, including online. Furthermore, they are contributing actively to the promotion of free movement of knowledge and innovation in the single market by providing high quality content and increasingly investing in new business models[2].

The Reflection Document states (section 5.3) that *new media offer rightholders an unprecedented opportunity for disseminating their works* (…) *across different platforms and for reaching out to a larger audience*. This is the reason why publishers look at the evolution of the new markets with great interest. Digital content is to be considered as part of the copyright industry mainstream. However, in our view the reflection paper is too much focused on secondary elements of market development, such as exceptions and collective management of rights. The risk of this approach is that digital content continues to be considered as "secondary", as an "exception" in the normal exploitation of rights by individual authors or publishers. The main focus should be, instead, on the mainstream: how to create the appropriate environment to manage effectively primary rights? How can rightholders be incentivised to create, invest and innovate to provide high quality content in new forms? How can intermediaries and final users access easily such content?

Comments to the sector-specific trends identified in the Reflection Document[3]

When referring to the publishing sector, the Commission document says that *online distribution of literary works and e-books is still a nascent market*. While this is certainly the case for mass market books, it is not so for other text based content, such as scholarly or professional publishing, and somehow educational publishing, in particular for higher education. It is relevant to note that especially in scientific publishing when user needs are clear, the demand is consistent, and piracy is not so relevant, publishers are ready to invest and innovate, so that now up to 90% of the scholarly content is already provided online.

[1] The book sector across Europe currently generates revenues of 24.5 billion € and includes 140.000 full-time employees. According to the June 12, 2009 Livres Hebdo ranking, European publishers are global leaders in their field and 8 out of the 10 biggest world publishers are European.
[2] See in Annex 1 some examples of European publisher's business models in the digital era.
[3] Section 2.2 of the Commission Reflection Document.

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Copyright regulation plays the same role it has played for centuries: through individual management of rights (i.e. offering licenses to users) publishers find incentives to invest. Presumed barriers arising from fragmented copyright legislation are irrelevant.

In the nascent ebook market the focus should be on the mainstream of "in-print" publications. The issue is how to overcome barriers for the market to develop in a way that combines rightholders ability to manage their rights in a fair manner and allow users to access content easily. Current copyright regulation is not – in our opinion – amongst those barriers. Instead, some examples of obstacles inhibiting the market are:
(a) lack of standard deployment reducing content "portability", from one e-reader to another;
(b) creation of a monopolistic or semi-monopolistic position in the distribution of content;
(c) lack of transparency in the ways users are able to search and retrieve content of their in the Internet;
(d) differences in VAT between printed books and electronic publications;
(e) low copyright enforcement online leading to lack of confidence to invest in new products;

In regards to digitisation programmes, the paper points out that *there is also a risk that a considerable proportion of the books in Europe's national libraries cannot be incorporated into mass-scale digitisation and heritage preservation efforts such as Europeana or similar projects for rights clearance reasons, since their rightholders cannot be identified (orphan works) or must expressly consent (out-of-print works).*

First of all, we would like to note that the issue at stake **when dealing with digitisation of cultural content by cultural institutions is not "mass digitisation" but "mass making available online".** This is so because libraries already benefit from an exception to perform certain acts of digitisation of works and make them available within their premises for certain purposes[4].

However, it is paramount that digitising works beyond such authorised uses and making them available online must be done on the basis of voluntary licensing agreements with rightholders. Otherwise this could lead to a situation where libraries would be competing unfairly with rightholders and preventing the development of the market.

Concerning **orphan and out of print works**, we insist that these works are also **in-copyright works which benefit from legal protection and that therefore adequate safeguards to avoid abuses must be observed.** However publishers are aware that solutions have to be implemented to facilitate digital library programmes. Publishers welcomed the EU's digital libraries initiative and in particular the High Level Group conclusions chaired by the Commission stimulating stakeholders consultation and successfully achieving a Memorandum of Understanding on orphan works. Two results from this group's work are of paramount importance: 1. Any initiative to address orphan works must be based on due diligent search in the country of publication before making the works available[5].
2. In the case of out of print works, rightholders agree to support voluntary licensing after prior authorisation of the rightholder for the digitisation (whenever required, which is the case for commercial companies) and for the making available of the work.

[4] According to Article 5(2)c of the Directive 2001/29 public libraries, educational establishments, museums and archives benefit from an exception that allows them to make specific acts of reproductions which are not for direct or indirect economic advantage. Furthermore, by virtue of Article 5(3)n, the same establishments can make works available for the purpose of research or private study to individual members of the public by dedicated terminals on the premises of the establishments. This criterion underpins the Memorandum of Understanding on Orphan Works achieved by High level Group on Digital Libraries and chaired by the European Commission in 2008: http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm

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Out of print works are copyrighted works for which the rightholders are known. The prior authorisation principle is thus relatively easy to implement, also including collective management solutions based on voluntary mandates. Such principle also ensures full respect of authors' moral rights, as there may be justified reasons why a work might be out of print and the rightholder might want it to remain so.

Most importantly, out of print works are often "revived" and have a longer commercial life in the digital era. The possibilities to exploit books are different in the old (printed) and the new (digital) world. The fact that printed books have to be physically stored, entailing a considerable cost, has prevented publishers from keeping books in print during longer periods. In the digital world, where such costs do not exist, and as theories about the "long tail" show, the life of the book will be different and the entire concept of out of print will become obsolete.

Moreover, **there are already considerable ongoing efforts to facilitate the identification of rightholders and works, including orphan works.** A consortium of European national libraries, publishers and reproduction rights organisations (RROs) including authors are currently participating in the EU project **Arrow (Accessible Registries Rights Information and Orphan Works towards Europeana).** Arrow will facilitate access to the best rights information available from a predefined set of sources, to determine the right status of any book, and to redirect libraries to the relevant clearing centres or to individual rightholders contacts. At long term, Arrow aims to create a rights information infrastructure, based on open standards, to provide interoperability between different information sources. This can be seen as an alternative and more advanced solution to the idea of single registry of rights information.

The Reflection Document also points out that *developments in other parts of the world indicate that Europe, and the European way of protecting copyright, could come under substantial competitive pressure if European solutions which ensure legal certainty and a digital level playing field throughout the 27 EU Member States are not rapidly developed.*

We agree that Europe needs to ensure that its citizens have access to their cultural heritage; however, we consider that latest developments - occurred in part after the publication of the Reflection paper- indicate that **the European approach can be a model also for the rest of the world**. For example, the US revised Google Book Settlement has been profoundly amended to take into consideration objections made by different European stakeholders, including two EU Member State governments. The scope of the amended settlement has been significantly reduced, and limited to works published in the US and in some English speaking countries. We believe that this case demonstrates that Europe should promote its own model as preferable, since it steams from stakeholder's agreement, is based on cultural and linguistic diversity and on a distributed approach that better fits the network technologies. These are the prerequisite to provide a diversified and true European high quality digital offer, promoting the European model of digital libraries and respecting the authors' moral rights and the business model of publishers.

Moreover, the "Tribunal de Grande Instance de Paris" published a decision on the 18th December 2009 concerning a case where **Google was sued by a French publishing group, La Martinière, the French Publishers Association (SNE) and the French Authors Association (SGDL)** for the reproduction of books and making available of snippets without authorisation in the "Google Books" program (www.book.google.fr). The French Court ruled that the applicable law was French law and that Google Inc. was responsible for infringing the French Copyright Code due to the unauthorised reproduction and making available of copyright protected parts of books. Google Inc must now stop carrying out the unauthorised acts and has been condemned to pay 300.000 euro for damages to La Martinière and a symbolic sum of 1 euro to SNE and SGDL who acted on behalf of the whole French publishers and author's community. This key decision acknowledges the general copyright principle of prior authorisation.

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The competitive pressure from other parts of the world does not **depend** on different approaches to rights management, which instead are elsewhere less effective than in Europe, but **on the different scale of resources invested**. To remain with the same example, the Google Settlement dedicates 115 million US dollars to rights management, but only one third is for remunerating rightholders. Another third (35 million) is for setting up the body dealing with rights information and management (for e.g., in comparison the whole Arrow project has 5 million euro funds). The last third consists of attorney fees, confirming that the European model based on ex-ante consultation instead of court litigation is much more effective. The investment of 115 million is just to deal with rights, while the total investment on actual digitisation plans is unknown, but surely much higher.

Europe, up to now, has not been capable– neither in the public sector nor in the private one – to commit to the same scale of investment in mass digitisation programmes of cultural heritage. However, Europe owns most of the relevant cultural content and thus has the maximum interest in defending copyright, to avoid diminishing its competitive advantage in this emerging domain.

In this framework, the need emerges to protect publisher's investments, also beyond authors' right. Only in some European countries the typographic arrangement, as a result of typical publisher work, is protected by either a separate typographical copyright, or by competition rules. In digitisation programmes, the scanning of books also implies reproduction of the "form" of the text that publishers paid for. Individual EU Member States could decide to develop this form of protection in their own country to reinforce competitiveness in this environment.

Comments on the challenges and possible actions identified in the Reflection Document

- **Territoriality of copyright leads to additional rights management costs and prevents consumers from accessing content online in another Member State.**

It is important to distinguish between territoriality of copyright itself and territoriality of copyright law. The first is not dependent on the other as any rightholder can decide to license content in a particular territory at their discretion. In fact, copyright territoriality is not an obstacle to obtain access to books, in digital or physical format, in any European country as, in general, books in a given language do not have territorial restrictions attached to their licensing.

- **Extended collective licenses for orphan and possibly out of print works.**

Extended collective licensing mechanisms should not be considered as the rule at European level as the concept does not fit into the system of some EU countries such as Germany, for example. In the case of orphan works, extended collective licensing is indeed one of the mechanisms envisaged at national level (e.g. Denmark), however it is not the only approach proposed (e.g. planned legislative changes in France to establish a compulsory collective management system for orphan works). In our view, the most pragmatic way forward at European level would be to stress the principle of due diligent search in the country of publication, support projects like Arrow and encourage mutual recognition of national solutions which may remain different.

- **Further harmonisation of exceptions and distinction between "public interest" and "consumer" exceptions.**

The Reflection paper criticises the current community rules in the field of limitations and exceptions to exclusive rights and calls for further harmonisation or, at least, a distinction between certain exceptions and targeted harmonisation.

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If the European Union wants to allow the development in the online world of the European book publishing industry (which currently represents over 24 billion Euro of turnover, making it the largest publishing sector worldwide), it should continue to support copyright law in Europe as an enabler for the development of sustainable business models. Even though exceptions and limitations play a minor role for this purpose, these continue to be important to regulate specific situations. The way they are crafted in the 2001/29 Directive already provides a good balance between rightholders' and users' needs.

Extending the scope of existing exceptions is not the way forward to provide effective and quicker access to those that require it. For example, in many countries in spite of the implementation of the exception for the benefit of people with a disability, disabled people enter into licensing schemes with publishers allowing more flexible uses than those permitted by the exception. At the moment, several projects are being developed at national level to find improved solutions providing access to works through trusted third parties or directly with the publishers.

Promotion of trust and collaboration between the parties in such cases (including public/private partnerships) is, in our view, the best way of enhancing dissemination and access to content. However if the Commission were to focus on legislative changes leading to further harmonisation of exceptions, the contrary effect would be achieved. Likewise, a targeted approach to harmonising exceptions is not appropriate as it will be difficult to determine which exceptions have priority over others.

- **Creation of an EU Copyright Law.**

We do not consider that currently an EU Copyright title will bring any benefits to the development of content online. On the one hand, it is highly unlikely that an EU Copyright law that takes precedence over national copyrights would be able to take into account the diverse cultural and legal traditions from the Member States. This seems particularly difficult in view of the fundamental differences between the system of "droit d'auteur" in Continental Europe and the British-Irish Copyright model. The question of moral rights or the different notions of "originality" that give rise to copyright protection as well as the well-established and much-litigated UK definition of 'Fair Dealing' for copyright exceptions are just a few examples of such differences. On the other hand, if such a Community title is construed in parallel to national titles, the risk is to add an unnecessary layer of legal complexity in Europe. It is also relevant to note the risk of lowering copyright protection standards, which would certainly discourage investment in the digital content market.

In any case, we would certainly caution against the importation of a system like the US Fair Use doctrine into the EC legal system. The fair use doctrine provides a statutory defence to what would be an infringement of exclusive copyrights. The test is based on decades of jurisprudence and this jurisprudence would not be readily available to the legal framework in Europe - indeed it would impose an unreasonably heavy burden of interpretation on EU courts as they struggled to reconcile two such dramatically different regimes. In addition, users will lose legal certainty as the whole system will be much more dependent on the circumstances of each case. Cases such as the Google Book Settlement illustrate how big commercial players can exploit the legal uncertainty about the U.S. doctrine to economically exhaust rights holders, who are often not big players, and who can therefore not afford expensive litigation.

Furthermore, it is not fully confirmed whether Article 118 of the new Lisbon Treaty confers competency to the EC for the creation of a single "Community copyright title". Article 118 was foreseen for industrial property and therefore there is a risk of legal uncertainty including a possible annulment before the European Court of Justice for lack of legal basis.

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In any case, differences between national copyright laws do not constitute an obstacle to the creation of an online market for the written sector, which is definitely more hampered by the much bigger lack of harmonisation of taxation or social laws for instance. As the Reflection Paper acknowledges, a general barrier to the content online market is the threat of illegal downloading. However we consider it is a missed opportunity that the Commission paper does not mention the need to enforce existing rules in its proposed solutions.

- **Search for alternative ways of remuneration online.**

The Commission is seeking comments on the possibility that rightholders receive a form of compensation for mass reproductions and dissemination of copyright protected works undertaken by customers alongside legal services, via a flat fee paid by customers ("global licence") or by Internet Service Providers.

In our view, such models would be economically unsustainable for the publishing industry hampering any development of new business models online for publishers. In spite of the fact that the take up of digital reading devices is still in its infancy, publishers are increasingly present in the online world offering the works through their own platforms (e.g. Harper Collins in the UK), through aggregators (e.g. Casalini in Italy or Numilog in France) or collective initiatives (e.g. Libreka in Germany). If instead of favouring models that support publishers in their efforts, any flat remuneration systems were to be favoured, the still nascent market for ebooks or audiobooks would never reach its full potential. Another consequence would be that only bestsellers would survive on the online market to the detriment of cultural diversity, and eventually, to the detriment of consumers choice.

Furthermore such a remuneration system, which was rejected by the French Parliament in 2006, would conflict with International Copyright Conventions and in particular with the so-called three-step test enshrined in the Berne Convention. This test requires that any exception or limitation be only applied in certain special cases which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of rights holders. This test, which takes into account the effect on the current and potential exploitation of a work, encourages publishers to create new electronic publications and services for the public at large.

In fact, the Commission should not favour specific business models, but rather foster an environment in which different business models flourish in a competitive manner.

- **Extended or mandatory collective management system for the administration of the "making available" rights of authors and performers and the provision of an additional unwaivable right to equitable remuneration.**

Individual licensing is the natural starting point for rightholders to manage rights whenever possible and feasible. In the publishing sector, collective management only covers specific situations corresponding to secondary uses, in which it is impracticable or impossible for rightholders to act individually. A basic characteristic of the publishing industry is that RROs were originally established by rightholders to license photocopying, and their mandates have been limited to secondary uses. On the one hand, many rightholders are experimenting and investing in their own new digital publishing models. On the other hand, rightholders might decide that RROs can play a certain role in this market. In either case, the key issue is that rightholders must have the freedom to choose how to manage their digital rights and they can withdraw them whenever they deem appropriate.

It is also relevant to highlight once again that publishers generally grant worldwide licenses for a given language and consequently, direct licensing for primary uses in the publishing community allows for the development of cross-border services.

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For these reasons, the introduction of an extended or mandatory management system for primary online uses is neither feasible nor desirable.

The Commission should encourage individual licensing and contractual freedom in the online environment as this fosters innovation and the development of tailor made business models that ultimately benefit all actors in the book chain including European readers.

FEP suggestions for fostering creative content online

- Sustain emerging business models by maintaining a stable legal framework in relevant areas such as privacy, defamation or IPR legislation.

- Create the necessary tools in order to facilitate the enforcement of rights online and fight against online piracy through legislation, proper implementation of existing legislation or fostering a dialogue between content providers and ISPs or other relevant stakeholders.

- Develop public awareness campaigns to encourage respect of copyright and related rights amongst readers, especially young readers, and stakeholders such as search engines or ISPs.

- Encouragement of public-private partnerships with content providers such as publishers.

- Promotion of literacy in Europe.

- Reduced VAT rates for electronic publications. Disparate VAT rates in Europe between electronic and printed books are one of the hindrances for the development of content online. If discrimination between electronic and paper publications continues, it will inevitably have an influence on the newly-born online publishing market and will seriously threaten the EU's stated objective of encouraging Europe to become a centre for e-commerce. VAT rates for online publications should be lowered while ensuring that printed publications are not in danger of losing reduced rates.

- Promotion of interoperability as the ability of different players in the e-book chain to exist and of different technological systems and devices to interact.

- Help publishers, in particular SMEs, to adapt to the digital world by, for example, providing financial support for the development of digital and digitised contents, as well as helping with the dissemination of information about the necessary open standards and training for publishers to implement them.

- Foster the development of consumer friendly and secure micropayment systems.

- Encourage Member States to dedicate adequate budget for the acquisition of digital content by public bodies, in particular educational and scientific works in collaboration with publishers.

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