

Creative Content in the European Digital Single Market

Challenges for the Future

A Reflection Document of DG INFOSOC and DG MARKT



**Response
From
Periodical Publishers Association
(PPA)
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To:
avpolicy@ec.europa.eu and
markt-d1@ac.europa.eu

1. PPA and its role

PPA is the trade body for UK magazine, journal and business media publishers.

PPA's membership consists of some 250 members who publish consumer, customer (for example magazines produced for third parties such as retailers, TV companies or airlines) and business magazines, journals and directories in addition to conducting research, organising conferences and exhibitions.

PPA members offer both electronic and online services, including websites, online and electronic versions of print publications and publications only available online or through electronic transmission.

Online publications encompass consumer, customer and business to business journals, magazines and media and increasingly involve the use of new electronic rights management systems to help improve the provision of publications and services to subscribers.

PPA publisher members have a direct interest in debates concerning:

- (a) availability of content;
- (b) improvement of clearance mechanisms;
- (c) development of multi-territory licensing; and
- (d) management of copyright.

A full list of PPA members is available at:

<http://www.ppa.co.uk/cgi-bin/go.pl/ppamembers/index.html>

PPA welcomes the opportunity to respond to the Reflection Paper.

In view of the interest of our members in the publishing sector, we shall refer to the aspects of the Reflection Paper which particularly address this sector. We shall also address the "Possible Actions" outlined in Section 5.

2. Comments

Magazines and the publishing sector

- a) Magazine and periodical publications form a significant part of the Publishing sector as a whole. Whilst the Reflection Paper picks up on issues relating to the online distribution of books and e-books, the development of magazine distribution from paper formats to dissemination online is significant.
- b) Within the magazine and business media sector, publications are increasingly moving from tangible goods to embrace online services.

- c) In particular many business media publisher members have moved to adopt new business models whereby more traditional licensing of editorial and other content to users in print form is being replaced by the provision of access to editorial, data and other content online.
- d) Such online access is enabled in a variety of forms including interactive electronic publications, audiovisual material and access to databases.
- e) The way in which copyright supports investment in new publications in both traditional formats and new online services is therefore of vital importance.

Copyright as the basis for creativity

- f) PPA welcomes the recognition in the Reflection Paper of the role of copyright as the basis for creativity. Copyright and other intellectual property rights are central to the economy of the magazine and business media industry. Without them the industry would be unable to recoup its investment in the copyright works within magazines and business media publications, the improvements in presentation and development of new products and services.
- g) The shift to multi-platform publishing of magazines and periodicals (including electronic) is being driven by publishers. It is publishers who are investing in the development of new services enabling consumers and citizens to access their chosen publications in formats and using technologies that suit those consumers.

Digitisation and the role of libraries

- h) Any drive to "digitise all publications" needs to take into account the purposes for which digitisation is being carried out. In copyright terms, "digitising to preserve" needs to be addressed alongside the wider implications of the way in which digitisation will enable consumers and citizens to better access and enjoy the magazine and periodical publications and services of the future.
- i) The role of libraries and archives needs to be considered. Access to works within libraries must be limited to ways which are complementary to the work of publishers. Such access should not compete with publishers in the digital world. Publishers should continue to be in a position to consent to access to their works (on terms decided by the publisher). Libraries should not be able to offer such content in competition with the publisher and thereby remove the incentive to create new works.

Tangible goods and the provision of online services

- j) The principle of exhaustion of copyright restricted acts should continue to apply only to tangible goods sold within the European Union.
- k) Copyright, particularly the right of communication to the public, must apply to enable payments linked to use of online magazine and periodical services. Such payment should be made in ways that reflect not only the permission for material to be included within a particular service and made available to consumers, but also levels of use within a particular service, and value to those who choose to retransmit such services for the benefit of consumers.
- l) It is impossible to predict relative value for the inclusion of publications within different online services, or archives, at the time of first inclusion within a service. It will be to the benefit of both rights owners and consumers if the option of different price levels for different types of online access can be preserved, reflecting other market forces such as levels of use and linked value added services.

User-created content

- m) Magazines have been part of the front line within the creative industries in promoting interactivity between publishers and their consumers. The concept of consumer contributions to magazines, described in the Reflection Paper as "user-created content", is not new to the industry. However the way that technology is opening up the number of ways in which such interactivity will add to, and shape many new publications and online services based around them in the future, is central to the strategic thinking of companies working in the sector.
- n) User-created content may be playing a new role in the digital world. However it would be wrong to deprive the creators of such work with the freedom to choose whether or not to assign, waive or exercise the copyright that exists in new work.
- o) If all new work starts with the same rights, owners can make their own choices over how to deal with such rights.
- p) Creating new barriers for a creator to establish "professional status" or "commercial intent" before being entitled to authorise use of their work, based upon the principles of copyright, will not encourage creativity and innovation in the future.
- q) Instead it will create a division within society that will ultimately make copyright more "exclusive" rather than copyright works being made more available through transparent licensing regimes.

Copyright exceptions and limitations

- r) PPA welcomes the finding in the Reflection Paper that a “nuanced” (or flexible) approach to application of copyright exceptions and limitations may bring greater benefits for rights-holders and consumers than a strict programme of harmonising any exceptions or limitations.
- s) Any harmonisation must continue to recognise that copyright exceptions and limitations are linked to rights and are not “rights” in themselves.
- t) The type of copyright work, and the most likely audience for its appreciation, must be taken into account to assess the impact of any changes to the scope of copyright exceptions within each EU Member State.
- u) Publications created and marketed specifically at those working in areas where copyright exceptions may apply, such as education, will be more likely to have “legitimate business interests” adversely affected by any widening of the scope of linked copyright exceptions, than publications primarily targeted at, for example, the tourist market.
- v) Costs and benefits of all exceptions and limitations must be considered in the context that many permitted exceptions apply only to non-commercial use. Defining “non-commercial” in a realistic and practical way whenever “non-commercial” use is relevant is vitally important.
- w) In addition to retaining genuinely non-commercial aspects of use falling within such exceptions, it will remain important to consider how any use permitted within any exceptions affects the commercial licensing opportunities that exist for different genres of copyright works.
- x) For example, when considering the application of educational copyright exceptions relevant to literary and other works published within magazines, it is important to remember that such works include:-
 - i. works which have a commercial existence and use **entirely independent** of use by or within any form of educational establishment;
 - ii. works which are **created for people working in, or connected to, education**, where use within an educational establishment is likely to be the main area through which the creators of the work can charge for the use of their material, or exploit the material in any realistic commercial form;
 - iii. works which are **created by people working in or connected to education**; and

- iv. works which have a **commercial existence that is enhanced as a result of the educational nature** of the work or the context within which the work is used.
- y) It is also important that any exceptions reflect the careful balance recognised within International Treaties between the rights of copyright owners and access to works for the purposes of general concepts such as education and teaching. This balance took much time and effort to establish. It resulted in a flexible compromise. It is one which has worked and should be maintained.
- z) This balance reflects Article 10 of the WIPO Copyright Treaty 1996¹, which reproduces the so-called "Three Step Test" from the Berne Convention². It also recognises that similar provision is made within Article 16 of the WIPO Performances and Phonograms Treaty³. These provisions were in turn reflected in the provisions relating to permitted copyright exceptions and limitations set out in Article 5 of EC Directive 2001/21 concerning harmonisation of certain aspects of copyright and related rights in the information society.
- aa) As under the WIPO Treaties, the provisions of Article 5(5) of the EC Copyright Directive must be taken into account, namely:
 - i. "The exceptions and limitations provided for in paragraphs 1,2,3 and 4 (of Article 5) shall only be applied in 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 the rightholder".
- bb) Whilst it will remain important that all exceptions recognised within EU Member States continue to respect the Three Step Test, the flexibility available within the Three Step Test should be preserved. Such internationally recognised flexibility has generally assisted in promoting the application of copyright exceptions and limitations in ways that promote the cause of cultural diversity and accessibility of works within individual EU Member States.
- cc) **Introducing a "European Copyright Law" will not assist in providing a unified legal framework whilst national laws linked to International copyright treaties continue to exist.**

¹ WIPO Copyright Treaty 1996 – Article 10 (1):

Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights of authors of literary and artistic works under this treaty **in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author**".

² Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (as revised)

³ WIPO Performances and Phonograms Treaty 1996 – Article 16(1):

Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

- dd) The concept of a new European Copyright Law would need to introduce a new layer of legal obligations at Community level operating between International Treaty obligations and national rules.
- ee) As such, the new law would be likely to introduce new rules with which both rights holders and consumers would need to comply. This would potentially increase the complexity of copyright rules, reducing transparency for users just at the time when greater clarity and practical harmonisation of rules, where possible, is the stated aim of the Commission.

Orphan works

- ff) Defining what amounts to an "orphan" work must be a prerequisite to licensing any such work. Diligent search criteria to ascertain whether or not a work can be licensed through existing sources must be carefully developed. In addition, in any circumstances where a work satisfies a definition of being "orphan" at the time a licence is granted, recognition must be given to rights owners coming forward and showing that they have title to the work in question and that the work is not able to continue to be treated as "orphan".
- gg) Subject to the caveats in (ff) above, licensing of orphan works may benefit from extended collective licensing. However, any other form of extended collective licensing is undesirable and incompatible with the principle that an identifiable rights holder's permission is required before a copyright work may be used.
- hh) Clear checks and balances will be needed when developing any system for extended collective licensing of orphan works. This will include establishing a clear definition of when a work amounts to an "orphan work" and a fair system to ensure that a "diligent search" for the possible owner of a work thought to be "orphan" is properly undertaken.
- ii) The work already undertaken by the High Level Expert Group – Copyright Subgroup is valuable and will hopefully be taken into account for the purposes of developing any future licensing proposals.

Notes for "diligent search"

- jj) The High Level Expert Group has previously addressed the issue of cross border licensing of orphan works, recommending sector specific Codes as applied in Member States on the basis of interoperability.
- kk) FAEP (The European Federation of Magazine Publishers) participated in the sectoral working groups which led to adoption of guidelines for the Text sector (including newspapers and magazines).

ll) Looking at the Guidelines themselves it can be seen how application in individual Member States could operate on an interoperable basis.

*"1. Contact first of all the newspaper (magazine) publishers;
2. Contact the RRO if it has been mandated by the publishers;
3. If the newspaper (magazine) has disappeared, contact the newspaper (magazine) publishers' association;*

*1. Consult any databases of works that have been established and
2. Consult the publisher of the work to discover who they say owns the work and
3. Consult relevant collecting societies to see whether they have an address of the author [or heirs] or a record of the work and
4. Consult all other relevant sources, including but not limited to associations of authors' agents, internet service providers and world wide search engines.*

It is recommended that a search be made through the following resources (this does not reflect a priority order and may be cumulative if relevant)

- Contact the publishers association in the respective country and the authors and journalists associations*
- Check the judiciary source to see whether the publications has changed hands*
- Check the legal deposit*
- Check with the collective management organisation (CMOs) including Reproduction rights organisations whether the rights holders are listed*
- Check the European Digital Library whether the work has already been digitised*
- Additional sources to be named depending on the country."*

mm) **Introduction of an extended or mandatory collective management system for the administration of the "making available" rights of authors and performers would be unlikely to recognise the different value which the right may have for different types of work in the context of different online services.**

nn) The proposal would work against the development of online licensing opportunities for rights owners, who may wish to license rights to niche or specialist services, valuing rights within a service in different ways.

oo) Such flexible licensing opportunities reflect potential for rights owners to use the making available right to underpin new primary markets for innovative publications.

pp) Mandatory collective management systems might remove the development of primary licensing markets, reducing all online exploitation to the level of “secondary markets”. This in turn could have a detrimental effect upon invest in new work within EU Member States.

Other comments

qq) PPA supports and encourages adoption by the Commission of the Six Principles advocated within the response to the Reflection Document made by the European Publishers Council:

Principle 1: We must cherish the fundamental role of copyright in providing the incentive to invest in the production and dissemination of creative content.

Principle 2: We must respect the entitlement of copyright holders to choose how their content is made available, accessed and used.

Principle 3: We must promote freedom of choice in licensing solutions.

Principle 4: We must make sure that our system of rights management always carefully balances rights, exceptions and limitations.

Principle 5: We must take a balanced approach to the challenge of digitising Europe’s analogue print legacy.

Principle 6: We must uphold the publishing industries’ unique economic, cultural and social contributions to the future of our digital Europe.

For further information about issues raised in the response please contact:

David Hyams
Legal Director
Periodical Publishers Association

Queens House
28 Kingsway
London WC2B 6JR

switchboard: +44 (0) 20 7404 4166
fax: +44 (0) 20 7404 4167
direct: +44 (0) 20 7400 7520
email: david.hyams@ppa.co.uk