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Publishers
Council

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Dear Sirs

Taking Forward the Gowers Review of Intellectual Property - Proposed Changes to Copyright Exceptions (“the Consultation”)

The European Publishers Council (EPC) is a high level group of 29 Chairmen and Chief Executives of Europe’s leading media corporations whose interests span newspapers, magazines, periodicals, books and journals, online database and internet publishing and, in many cases, our members have significant interests in private commercial television and radio. A list of our members is attached.

In addition to supporting our own members’ individual submissions, we are pleased to have this opportunity to write in support of the responses to the Consultation submitted by the Publishers Association and Periodical Publishers Association and also to highlight a number of key themes which emerge from the Consultation. We think this is especially important in view of forthcoming developments in copyright law at a European level as well as the follow-up to the Consultation which will take place in the UK.

The Consultation rightly acknowledges the fundamental importance of applying the Berne Convention’s ‘three step test’ to any changes to the copyright exceptions in the Copyright, Designs and Patents Act (“the Act”). That is, they should only apply:-

- ⇒ In certain, special cases
- ⇒ Which do not conflict with the normal exploitation of the work or the subject matter; and
- ⇒ Which do not unreasonably prejudice the legitimate interests of rights holders.

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In our view, there are three key themes that apply in the digital environment and which affect how the ‘three step’ test should be applied to the proposed copyright exceptions:-

1. ‘Digital is different.
2. The relationship between licences and exceptions.
3. The speed of transition from analogue to digital.

‘Digital is different’

This debate has raged in the copyright field since the emergence of the Internet. From one viewpoint, a copyright work is a work irrespective of the medium, whether analogue or digital, in which it is fixed or by which it is transmitted. This is mirrored in the increasing use of technology neutral language in the laws governing copyright and electronic communications networks and services.

Seen from that viewpoint, digital is not different. Certainly, many representatives of consumers and public bodies argue that ‘digital is not different’ and therefore maintain that all existing copyright exceptions should be given their digital equivalences.

However, digital is different from analogue in one fundamental way: the ability to make and distribute limitless perfect copies of works via computers, ‘peer to peer’ software and broadband networks. The content industries are faced with massive losses through counterfeit DVDs and large-scale piracy via P2P file sharing. Interestingly, as the TV industry moves to compete with online videos, television now ranks in the US as the fastest growing category of internet piracy.¹

Accordingly, each extension to an exception which permits new digital copies to be made for specified purposes (e.g. under the proposed format shifting exception) has the potential to result in limitless, unauthorised copies, however circumscribed the exception is expressed to be in copyright law.

EPC would not use this argument as a reason for not updating copyright exceptions. However, we do think that there is a real danger in approaching the issue with the assumption that digital is not different. It is and if this is ignored, the ‘three step’ test will not be properly applied. Bearing that test in mind, we think it is far safer to approach each amendment to a copyright exception from the assumption that digital is different. This applies equally to the introduction of any copyright exception, as is proposed in respect of caricature, parody or pastiche.

Digital is also different for another reason: the ability to grant licences which machines can display on screen and which one machine - a web server - can communicate to another - a search engine. The significance of this is explored in the next theme: the relationship between licences and exceptions.

The relationship between licences and exceptions

¹ According to ‘BigChampagne’ a consultancy that measures online file-sharing, as reported in the FT on April 7.

The balance between private rights and public access continues to be at the heart of copyright and exceptions are one of the means to assure that balance. However, we have already noted that they are subject to the ‘3 step test’. One aspect of how that test applies under current law is the proviso found in a number of exceptions, such as sections 35 and 36 of the Act, that the exception does not apply to the extent that there is a licensing scheme in place (section 35) or that licences are available (section 36). There are, of course, licence schemes and licences available from collecting societies under these sections.

These provisions therefore recognise that the grant of a licence can fulfil the purpose covered by a copyright exception and that therefore there is no need, nor justification, for the exception where a licence is available

One of the problems in the analogue world is locating the rights holder, finding out the permissions under which any given item of content can be used. This is changing in the digital environment.

As the Consultation Team will know, there are a number of collaborative initiatives underway which are developing the technical standards and software tools that make it possible for permissions (i.e. licences) to be communicated electronically so that users can easily see - on the click of a mouse - exactly what they are permitted to do. At the heart of these developments is the possibility of attaching permissions electronically so that they are ‘attached to’ the digital resource.

One example is ‘ONIX for Licensing Terms’ (OLT). OLT is a “family” of XML document schemas which share an underlying data model for permissions and prohibitions. It is applicable to many types of licensor and licensee, many types of licensed content, and many types of usage. Current examples of OLT projects are:

ONIX for Publications Licenses (ONIX-PL): expressing the licenses agreed between publishers, hosting services, libraries and consortia.

ONIX formats for IFRRO (International Federation of Reproduction Rights Organisations): expressing the rights delegated from publishers and authors to an RRO, and from one RRO to another.

ONIX-PL has a number of benefits. It will help libraries comply with licensing terms. It will reinforce trust-based relationships between publishers and their library customers and it will facilitate publishers’ management of licences.

The Consultation Team will also be aware of [ACAP](#) whose goal is to define ways in which publishers can communicate policies for access and use of online content to search engines and other aggregators and business users, built on the existing robot.txt protocol.

For the first time ever, the newspaper, magazine and book publishing and search engine industry have worked together on a joint standard. It is thanks to this collaboration that the necessary high-level resources, skills and knowledge have been available as well as the political will to see this project succeed.

ACAP will enable new uses of works, and increase their visibility, without any compromise to publishers’ commercial freedoms in general, though, publishers make

their content available with the help of partners and third parties (distributors and retailers, for example) who are paid a fee or given a share of revenue in return for the services they provide.

In the context of the current consultation, we would therefore make the following points:-

1. These technical developments demonstrate that, increasingly, electronic licences will enable users to find and use the content they need for the purposes they require, including those covered by exceptions.
2. The availability of these licences also removes the need to extend certain existing exceptions. For example, the availability of on-demand services and the electronic licences associated with them means that there is no need to extend section 35 of the Act to allow educational institutions to record on-demand communications in addition to traditional broadcasts.
3. In drawing up licences, publishers are well aware of the need, where appropriate, to ensure that the permissions granted are wide enough to accommodate statutory exceptions.

The speed of transition from analogue to digital

EPC has been involved in proposed changes to copyright and other laws applicable to the digital environment since 1988 when the Commission published its Green Paper on *Copyright and the Information Superhighway*'.

Our experience is that the transition from analogue is a 'multi-track', 'multi-speed' phenomenon. Technology moves rapidly - witness the rise of the search engines from first appearance on the Internet in the mid 1990's to where they are today. But the development of new business models is altogether different. Here we see rapid change - search engine advertising - and slow change moving at one and the same time. The markets for on-demand audiovisual content are only just beginning to emerge, held back by the continuing losses and threats posed by piracy as well as the challenges of moving from old to new distribution models.

Within the publishing industry, we see similar phenomena. Online services in some areas are developing rapidly, whilst other areas such as e-books are still at an early stage of development.

The overall picture is one of nascent markets. In this situation, it is essential that the growth of this market is not undermined by further uncertainties introduced by over-broad changes to copyright law.

Yours sincerely,



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Executive Director

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