EPC European Publishers Council

European Commission Green Paper
"Copyright in the Knowledge Economy"

Response from the European Publishers Council

28th November 2008

INTRODUCTION

The European Publishers Council (EPC) is a high level group of Chairmen and Chief Executives of leading UK and European media corporations whose interests span newspapers, magazines, books, journals, online database and internet publishing as well as in many cases significant interests in private television and radio. A full list of EPC's members is attached.

The European Publishers Council welcomes this opportunity to contribute to the debate around copyright and the knowledge economy and the European Commission's acknowledgment of the need to approach the issues dealt with in the Green Paper in a "balanced manner". We also welcome the Commission's recognition that a *"high level of copyright protection is crucial for intellectual creation"* and that *"copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large".*

At the conference held in Paris on 'Creative Content On-line' on September 18th and 19th under the auspices of the French Presidency, the key message was this: in order to realise the full potential of this market, two interdependent goals must be reached: firstly, the taking of effective measures to combat illegal file sharing and other forms of copyright theft and secondly the development of more and more legitimate services where users are offered legal means to access and enjoy copyright materials while creators and producers can obtain a fair reward for their creativity and investment. These goals can only be met on the basis of sound copyright protection and enforcement whereas at present there is inadequate collaboration from ISP intermediaries in removing infringing material or action to stop unauthorized re-use.

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When considering the current economic and legislative environment for copyright industries the EPC would ask the Commission to bear in mind the following:

- *Keeping the incentive to develop new services*

The development of legitimate business models and services by the creative industries is indispensable to achieving the Green Paper's main goal, namely: widening the dissemination of research, scientific and educational materials in the internal market. The knowledge economy will be safeguarded only by giving adequate protection to publishers' investments in "good quality" content.

Whilst, of course, EPC members acknowledge the role played by exceptions and limitations in maintaining the balance inherent in copyright law, there is a real danger that overbroad and unbalanced copyright exceptions will hold back development of the nascent market for 'creative content online' by removing the incentive on the part of creators and producers to develop new services. 'Free riders', who would rely on overbroad extensions to re-use copyright materials, would be able to compete unfairly with rights holders. As one speaker put it at the recent conference on 'Creative Content On-line, *'you cannot sell something at the front door if it is being given away free at the back door'.*

In addition, overbroad exceptions would lead to ever weaker offerings of versatile "good quality" content products and services, especially in smaller member states with small markets and language areas. It is the market for local language, national cultural goods which would suffer the most.

- *Maximising access*

In this context, the EPC endorses the views expressed in the 'Joint Position' issued by a coalition of NGO's representing the publishing and other industries in respect of the WIPO Standing Committee on Copyright & Related Rights, 17th Session. We have attached a copy as an Appendix for ease of reference ("the Joint Position").

In particular, we share the view stated in the Joint Position on behalf of the signatory NGO's that "*We all aspire to give everyone the greatest possible access to the best possible content, both local and international. This is one of the overall goals of the copyright system. However, to provide free access through mandatory exceptions would sacrifice long-term sustainability for perceived short-term gain. Local industries that directly support the growth of the information society rely on the copyright system."*

Accordingly, any consideration of copyright exceptions must be set in this context. Furthermore, it must be remembered that exceptions are privileges, not rights.

- *Licensing: the way to unlock the potential for new services*

We think that it is important to 'accentuate the positive'. In other words, to highlight how new services which are being created give consumers and citizens legitimate, licensed access to research, scientific, educational and indeed other materials. The publishing industry is at the forefront of developing new services. The EPC wishes to reiterate the point that it makes consistently during the ongoing debate about copyright i.e. that publishers' raison d'être is to produce, publish and disseminate a wide range of materials through all available distribution channels in order to inform, educate and entertain users in the public and private spheres.

A recurring theme throughout our response is that licensing, not overbroad exceptions, is the right way forward. A good example of this in practice is the licensing strategy now being pursued by Financial Times, publisher of 'FT.com', who focus on 'direct to customer' licensing. In their words: *"Essentially what we are offering through the licence strategy is an intellectual property licence. As long as we have a direct relationship and the customer has paid for the rights, then we are far more liberal with those rights than we ever were through an indirect relationship."*(Caspar de Bono, **Financial Times** (Information World Review, October 2008)

It is particularly interesting to note how the existence of the direct licensing relationship encourages FT to take a 'liberal' approach to the rights granted. This is true generally; publishers can be more liberal with their rights when they have a direct relationship with the customer (e.g. teacher, school, other public institution, any member of the public) and, in case of paid content, the customer pays for the rights. Therefore facilitation of the acquisition of copyright (e.g. employer's copyright) would help publishers to provide the public with better and wider access to "good quality content" as well as help guaranteeing publishers' financial independence in the online environment as well as in print.

The Commission will no doubt be receiving, in response to this Green Paper, many other examples of licensing solutions which are being provided today by publishers across the entire industry spectrum, including the STM, book, magazine, journal, newspaper, database sectors. All these serve to reinforce the point that licensing is the key to meeting consumers' needs in the digital age.

We would also cite the increasing variety of licences which are available, including the use of 'machine to machine' tools expressing terms and

conditions of access to and re-use of content through for example ACAP[1]; as well as licences managed via collecting societies. In a nutshell, licensed solutions are the way forward, whether in the form of automated machine readable or displayable permissions, licences individually between users and rights holders, or collectively with collective management organisations, when appropriate. As the Joint Position notes, "*in this area, access by citizens is improved all the time, though a variety of pragmatic solutions which include voluntary agreements.*"

There are many examples where useful developments in individual *and* collective licensing can be seen. In many countries, publishers, producers and authors' collecting societies have entered into agreements with their National Libraries for access to a wide range of copyright works from scientific journals, books, databases, newspapers, periodicals and film. Some of these arrangements extend to digitization programmes and contracts for use of the content for research purposes. End users, for example universities, take out licences accordingly.

Regarding the use of works by educational institutions there are discussions ongoing regarding possibilities and terms for extended collective agreements for the use of works for purposes of teaching and scientific research. In some cases these agreements already extend to digitising the works and distributing the works to the public, according to the licence terms and fees.

It is also important to add that whilst collective licences have a clear role to play in providing solutions to meet the needs of users, they should complement, and not undermine, publishers' online business models that provide licensing solutions directly to the end user, such as that used by FT.com as noted earlier. Direct licensing by the publisher to the customer (to the user of the rights) should be always encouraged and supported as a priority, as there are challenges in finding a reasonable scope for collective licenses in online environment.

- *Maintaining the balance*

It is important to recall that the issue of copyright exceptions, and the way they are balanced with exclusive rights, was considered in detail during the debates on the harmonisation of exceptions under the Copyright Directive of 2001and during the passage of that Directive into law. Whilst there have been technological and business developments since the late1990's, the fundamental building blocks of the 'knowledge economy' were already in place at that time.

[1] Automated Content Access Protocol www.the-acap.org

The EPC considers that the provisions of Articles 5 and 6 of the Copyright Directive remain valid today as a fair and reasoned balance between rights and exceptions in copyright law. There is no need to re-open the Directive. It is also important to remember that any discussion of copyright exceptions must be framed within the three elements of the Berne '3 step test' as follows:

- (1) 'certain special cases' means that scope must be known and particularized, limited in its field of application and exceptional in its scope.

- (2) 'no conflict with normal exploitation of work' means that a conflict with normal exploitation of the work will arise when the privileged users enters into "economic competition" with the right holder concerned. The "economic competition" should be capable of preventing the right holder from "normally extract[ing] economic value" from his copyright, thereby depriving him of "significant or tangible commercial gains".

- (3) 'no unreasonable prejudice to rights holders' legitimate interests' – this may occur if an exception or limitation causes or has the potential to cause an unreasonable loss of income" to the right holder; also, note that 'legitimate interests' is broader than economic rights (e.g. moral rights).

For example, when applying the second and third elements of the test to exceptions for libraries, it should be remembered that whilst libraries are publicly funded, they contain collections of works whose creation has been privately funded by the intellectual and financial investment made by authors, publishers and others. In view of that, public funding does not result in a 'right' to free access or to access and re-use of content which would have an adverse impact on commercial exploitation of that content or the development of new markets for new services.

- *Digital is different*

'Digital is different': digitisation and the distribution power of the Internet/World Wide Web mean that limitless, perfect copies can be made and distributed globally. The current concerns regarding illegal 'P2P' file sharing illustrate the stark reality of the dilemma faced by the content industries generally as they struggle to develop viable, revenue-generating business models for online content, underpinned by copyright. So any proposals for extensions of copyright exceptions must be subject to prior scrutiny under the '3 step test'.

Of course, that is not to deny that copyright exceptions remain a fundamental part of the social contract underlying copyright. But it does

mean that copyright exceptions must not be extended in a way that goes beyond the '3 step test'. The EPC rejects the argument that the '3 step test' has a chilling effect on access to knowledge. We would call for empirical evidence to support such an assertion if ever used to justify new exceptions.

For all these reasons, the EPC does not consider it necessary at this time to re-open the exceptions and limitations to copyright contained in the Copyright Directive. This view is widely held among the creative and media industries and accordingly the EPC wishes to draw the European Commission's attention to widely supported and co-signed *"Content Sector Common Submission on the Green Paper on Copyright in the Knowledge Economy"* which we endorse fully.

2. GENERAL ISSUES

Questions:

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

Encouragement and guidelines can be useful ways of explaining and gaining consensus about the scope and interpretation of legal exceptions to copyright e.g. "**PA GUIDELINES for meeting the permissions needs of disabled people"** and **"Joint Guidelines on Copyright & Academic Use"** published jointly by British Academy and PA in April).

However, contractual arrangements are, by definition, consensual and should be market-driven. Well-drawn contracts between rights holders and users will accommodate uses that are covered by exceptions or limitations.

The Copyright Directive already sets a clear framework within which contractual solutions and legal exceptions co-exist. Recital 45 of the Directive provides that "the exceptions and limitations referred to in Article 5(2), (3) and (4) [of the Directive] should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law." Furthermore, recital (35) mentions that a licence fee may include fair compensation due to right holders under certain cases of exceptions or limitations. Recital (35) envisaged giving effect to an exception or limitation by contract.

(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

It is important to remember that many business models, especially for content online, are still in the early stage of development. Revenues from these sources remain small. Voluntary, market-driven solutions remain the correct way to develop the appropriate contractual arrangements. These may be in the form of contracts granted directly by rights holders for the exploitation of 'primary rights' and/or through collecting societies for 'secondary rights'. Indeed, it is also important to remember that the categorisation of rights as 'primary' or 'secondary' is still evolving in the nascent market for content online.

(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

This question seems to imply three questions: (1) Should we continue with an approach based on a list of individual exceptions rather than a US style 'fair use' approach; (2) is the current list of exceptions sufficient; and (3) should the list be non-mandatory (apart, of course, from the single mandatory exception).

As regards the first question, the first limb of the Berne Convention's 3 step test requires that scope of each exception must be known and particularised and limited in its scope of application. Compliance with that necessarily results in a collection (or list) of specific, particularised exceptions, rather than a generalised exception or exceptions. For example, an EP Opinion issued in June 1998 noted that the list of exhaustive exceptions is linked to compliance with the provisions of the Berne Convention.

As regards question (2), the answer is "yes". The current regime for copyright exceptions provides a flexible and therefore low cost way of reacting to rapid technological change. For example, the UK 'fair dealing' exceptions (for non-commercial research or private study, reporting news and current events and for criticism and review) provide flexibility in that the test for 'fair dealing' can evolve in the light of technical and commercial developments. Similar exceptions for parody and pastiche as well as criticism and review existing in other EU member states.

There are also other developments which will, over time, lead to a reduction in the variations of in the scope of exceptions from one Member State to another. These are likely to be:-

- The use of guidelines to encourage uniformity of interpretation e.g. such as the PA British Academy Joint Guidelines.

- The increasing use of cross border contracts and 'machine to machine' permissions such as ACAP which will drive uniformity in view of cross border nature.

As regards question (3), See **(4)** below.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

Again, we would refer back to the discussions about exceptions which took place during the passage of the Copyright Directive into law. Extensive debate resulted in a single mandatory exception only for 'transient and incidental copies'.

We would repeat the point that nothing has fundamentally changed since the late 1990's. Business models are still in the process of development and should not be 'de-railed' by over broad exceptions. So our answer to this question is "no". We need to continue with the current regime which allows Member States to implement copyright exceptions from the 'permitted list' in Article 5. In that way, we can continue to accommodate national and cultural variations and differences. For example, there are differences between Member States about what is to be regarded as a 'disability' and it would be wrong to impose a single interpretation.

Application of the three-step test by national legislatures and courts has shown time and again that its inherent flexibility allows for appropriate national solutions. This flexibility is vital to equilibrium at national level.

(5) If so, which ones?

Please see our answer to question (4).

3. EXCEPTIONS: SPECIFIC ISSUES

3.1. Exceptions for libraries and archives

Questions:

(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

In short, "yes". A great deal of time was devoted to this issue during the passage of the Copyright Directive. We consider that the principal reason why these exceptions should remain unchanged is that, in our view, Articles 5 (2) (c)[2] and 5 3 (n)[3] have got the balance right and meet the 3 step test.

EPC members are focused on increasing the availability of content online. As the Green Paper notes, there is an increasing number of examples of publishers digitizing their catalogues (see, for example, footnote 11 in the Green Paper regarding Elsevier's service). According to STM (International Association of Scientific, Technical & Medical Publishers), over 90% of journal articles are available today for digital download from publishers' websites or their licensees.

The fact that those services are being developed is proof that those Articles, and the carefully crafted limitations they contain, are providing the necessary incentive for authors, publishers and other rights holders to invest in the development of new services.

In particular, the limitation in Article 5 (2) (c) that the "specific acts of reproduction…which are not for direct or indirect economic or financial advantage" is essential to ensure that publicly funded bodies are not able to act to the detriment of the legitimate interests of authors, publishers and other rights holders.

As regards Article 5 (3) (n), there are two important safeguards built into the exception that maintain a fair balance between rights and exceptions. First, that the dedicated terminals must be located on the premises of the library or educational institution and access must be delivered vai devices under the relevant institution's control, or across a secure intranet, within the confines of the premises. Second that the exception only applies to not subject to licensing terms, remains essential if we are to encourage the development of commercial online services.

Without that exception, the nascent market for e-book services would be threatened by the augmentation of library services. If one compares the position with analogue world, if a library lends a physical work, there are two transactions: (1) the library's purchase of the book from a book supplier and (2) the subsequent lending of the book. Both transactions would result

[2] "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage."

[3] Use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

in remuneration for rights holders: the first transaction involves a sale and purchase and the second under the relevant Member States' provisions which implemented the provisions on the public lending right contained in Council Directive 92/100/EEC on rental and lending.

However, in the digital world both transactions would be combined into one any extension of the exception to permit 'e-lending' would eliminate any possibility for developing the nascent market for e-books through libraries by removing the need for the relevant licence provisions between the publisher and the library for the onward e-loan to the public.

(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

"Yes".

There are many examples throughout the EU when publisher's licensed online products include also digital learning content that can be used by the teachers, pupils and parents when using various learning and teaching facilities provided by the publisher under the license. Referred content can include works in various form e.g. articles, short stories, exercises, tables and schedules.

Take Finland where there is a good example of licensing to schools. There, online learning environments and services for comprehensive and upper level schools have been available for some time. These online learning environments/services are licensed to educational institutions by Sanoma Learning & Literature, group division specialised e.g. in learning.

Another example is the license available in the UK from 'ERA' (Educational Recording Agency) which, from 1 August 2007, offers its licensees under its 'ERA+ licence' the opportunity to take out an additional licence which will enable licensed ERA Recordings to be accessed by students and teachers on line whether they are on the premises of their school, college or university, or at home or working elsewhere within the UK.

(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

(a) Format shifting;

(b) The number of copies that can be made under the exception;

(c) The scanning of entire collections held by libraries;

As regards format shifting and numbers of copies, EPC considers that Article 5 (2) (c) sets the appropriate framework, leaving member states free to implement in accordance with national requirements and practices.

For example, changes to UK copyright law are under discussion following the 'Gowers Review' in order to amend the library and archives exceptions for preservation purposes, by extending the exception to allow copies of sound recordings, films and broadcasts for preservation purposes, including numbers of copies.

In our view, some variation between Member States is appropriate to reflect national cultural differences. Codes of Practice can be used if flexibly promoted on a cross border basis to achieve consistent standards of best practice across the EU.

In terms of (b) and the making of copies, it should remain the case that copies in print can only be made for the limited purposes of private study and non-commercial research. We would oppose any move to extend such exceptions to incorporate permission to download or save.

As regards (b), insofar as the exception applies to educational establishments, we would observe that, generally speaking, teachers or schools do not need to digitise offline content as there is already "good-quality" learning content available through publisher's online offerings.

As regards (c) above, this is a wholly different matter. Indeed, this question (c) exemplifies our concerns about the Green Paper and the threat posed to the creative industries by unwarranted broadening of copyright exceptions.

Article 5 (2) (c) does not apply to the scanning of entire collections held by libraries. If the term of protection of works contained within the collection has expired, then copyright is a "non-issue" (save insofar as any right to protect the typographical arrangement and the database right is concerned). If the works are in copyright, then the scanning of entire collections is not within the exception's scope. Indeed, the Green Paper acknowledges this.

(9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

No. The Green Paper's analysis of this issue is correct (see page 8: "It must be stressed that…."). We see no need for clarification.

(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

The Green Paper refers to the High Level Expert Group on Digital Libraries work, including its Final Report and MOU on orphan works. As noted, it proposes detailed solutions being developed at a national level. The EPC endorses the notion of mutual recognition by member states of each other's sector-specific Codes. This is the right approach.

(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

N/A. See answer to Q. (10).

(12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

See answer to Q.(10).

3.2. The exception for the benefit of people with a disability

Questions:

(13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?

There are many examples of such licensing schemes throughout Member States. For example, in the UK, the Copyright Licensing Agency offers a licence to organisations such as the RNIB (Royal National Association for the Blind) to enable them to make multiple copies of works for their members.

(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?

In view of the rapidity of technological change, we do not think that mandating a particular format is appropriate. Voluntary solutions developed by rights holders and users are preferable. For example, the RNIB, NLB, publishers and trade associations in the UK have been working on a Scoping Project to investigate the potential for bringing about a significant increase in accessible book products for visually impaired persons.

There are also other initiatives being taken to improve access to materials by persons with a disability. For example, publishers in Portugal are involved in the following initiatives:

- The development of an exhibition to raise awareness of the general public to the difficulties faced by blind people. The exhibition visited 12 different shopping centers across Portugal.

- Together with a sponsor they offered 100 fiber canes to the national organization of blind people for usage amongst the more impoverished members of the association.

- The purchase of computer equipment to promote the communication and interaction of hospitalized cancer patients in the Children's Ward of the Portuguese Oncology Hospital.

- The purchase of equipment for the conversion of books in the Portuguese National Library into audio books and Braille books for usage by the Blind or visually impaired Portuguese community.

(15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?

We do not think that harmonisation at the EU level is appropriate.

(16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?

Please see our answer to question (15).

(17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?

Not in our view. There can be a case for remuneration where conversion of the work into an accessible format results in a permanent copy of work being available for use by a person with a disability, as distinct from the case where the work is only available for reading or listening to by that person.

(18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?

No. We have seen no evidence that an exception to the copyright in a database, which protects only the selection and arrangements of a database's contents, is necessary as regards people with a disability. It should be remembered that copyright in the selection and arrangement of a database's contents is separate from the copyright in any works contained in a database e.g. a book, video, photograph. The latter is already subject to copyright exceptions.

As regards the sui generis right, that protects the database producer's 'substantial investment' in the obtaining, verifying and presentation of the database. It is difficult to see how an exception can be justified to that investment right. Put another way, we cannot envisage how, in practice, the exercise of the exception under Article 5.3(b) in respect of a an individual copyright work would be prevented on the grounds that to do so would infringe the right to prevent unauthorised extraction or reutilisation of the contents of a database of which that work formed a part. The database right only protects the 'substantial investment' made by the database producer in the database as a whole, not in the individual works (or other materials) which it contains.

3.3. Dissemination of works for teaching and research purposes

The Green Paper points out a number of anomalies between member states' copyright laws as regards relevant exceptions. As the Green Paper illustrates, there are, for example, anomalies in the way that this exception is implemented across member states e.g. regarding students from one member state enrolling in distance learning courses provided from another member states.

However, the issue is not the existence of these anomalies per se but whether they act, or are demonstrably likely to act, as a barrier to the free movement of education or other service. This should be determined by reference to empirical evidence. In their absence, we would caution against changes of the kind referred to in the Green Paper.

If, there are any such barriers, we consider that there are more appropriate ways of eliminating them than through a revision of the Copyright Directive. These may be through changes to national copyright law, via contract (e.g. well-drawn contracts or collective licences for distance learning courses) and/or Codes of Practice, but all within the existing framework of the Copyright Directive.

Also, we would like to remind the Commission of the risks of extending the exceptions without going beyond the boundaries laid down by the 3 step test. In particular, the 2nd limb of the 3 step test means that any broadening of the exception that could cause harm to rights holders where it could result in educational institutions being allowed to provide services under exceptions which substituted for publishers' commercially available online services.

(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

Yes. Indeed they are already doing so. Please see our comments in answer to questions (6) and (7) above and to our comments in our Introduction regarding other examples of licensing solutions which will be provided by other respondents to this Green Paper.

We also endorse the points made in the Joint Position Paper that: *"In the publishing sector, research and educational communities constitute the most significant audiences and markets for some authors and publishers. The very essence of normal exploitation is to offer publications and information services to these non-commercial communities. The interest of research and education is best served by encouraging the creation of new works, publications and information services that serve the communication within these communities.*

Innovative partnerships[4] between publishers, libraries, governments and UN organisations not only provide access, but also training on how to make use of resources voluntarily made available."

[4] HINARI (Health InterNetwork Access to Research Initiative), AGORA (Access to Global Online Research Agriculture), OARE (Online Access to Research in the Environment)

(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

The first point we would make is that it is important to distinguish between education and research. They are not the same thing in terms of users or uses.

Generally, the EPC endorses the approach of the Copyright Directive which, as the Green Paper notes, gives Member States "a large amount of freedom in implementation." We would reiterate the point made earlier as to whether any inconsistencies in the teaching and research exception between member states about whether national inconsistencies act, or are demonstrably likely to act, as a barrier to the free movement of education or other service.

As an illustration of the complexities, we would highlight publishers' concerns in the UK regarding the recommendation to extend s.35 of the Copyright Designs & Patents Act 1988 to allow educational establishments to record on-demand communications in addition to traditional broadcasts.

Generally, publishers opposed this extension on the basis that, by definition, an on-demand service will already be available through the open market. An exception removing any obligation to buy existing on-demand services must, of necessity, conflict with normal exploitation, and will therefore unreasonably prejudice the legitimate interests of the rights holders.

Publishers are developing innovative services which, under licence, provide their users with the ability to use that content in the way they want to use it. They are in the business of providing solutions, not imposing restrictions. They are also well aware of the needs of distance learners.

The risk with this extension is that it could be over-broad, because this type of use is precisely the type of use licensed via an on-demand service.

Accordingly, our answer to this question is "no".

Rather than statutory clarification, we endorse the use of Guidelines useful (e.g. "**PA GUIDELINES for meeting the permissions needs of disabled people"** and **"Joint Guidelines on Copyright & Academic Use"** published jointly by British Academy and PA in April). These can be developed and shared on an international basis.

(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Please see our answer to question (20). Also note that care must be taken here because it could overlap/conflict with any permitted exceptions regarding private copying.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

No. As qualitative as well as quantitative criteria are relevant, any prescribed rules that specify that Member States must allow at least "X%" of a work to be copied under this exception will not be workable. We would again refer to the use of Guidelines as a much more flexible approach.

(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

There may be a case for removing inconsistencies about the scope of the exception (e.g. "research" v. "scientific research") but great care needs to be taken.

3.4. User-created content

We would make the following points by way of general comment on the issue of user-created content:

- First, great care must be taken in the use of the phrase "User-created content". The Green Paper uses an OECD definition and draws the distinction between someone else's content that a user uploads and content which the user creates. The risks of confusion and damage are obvious.

- There are no issues arising from wholly original content created by a user. For example, if a user shoots a video, they are free to share it on YouTube or do anything else with it.

- We would stress the availability of licensing tools – Creative Commons, ACAP etc.

- The issue is where a user wants to create a work which "re-uses" parts of an existing work e.g. a re-mix of a song.

- We would point out that 'transformative use' is an element of the USA's fair use exception. A distinction must be made between US style 'transformative use' and the specific exceptions that EU Member States have adopted e.g. fair dealing for the various purposes permitted under UK law.

- Introducing a 'transformative use' exception into Member States' copyright laws would conflict with these specific exceptions.

- Unlike the US, there would be no 'acquis communautaire' to be used to interpret such an exception. This would create major problems.

- We would also stress the problems of crafting such an exception to meet the '3 step test'.

Questions:

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

This is the wrong question. Instead we call upon the Commission to focus on encouraging the deployment of 'machine readable permissions' e.g. ACAP and other forms of '21st century licensing' for re-use of copyright protected content. If re-use of snippets and excerpts of content is permitted through a new exception to the law, rightsholders no longer have any basis upon which to develop licensing models, and no longer any clear grounds upon which to sue in court for copyright theft.

(25) Should an exception for user-created content be introduced into the Directive?

No – for the reasons given above. In fact, introducing a "transformative use" exception in Europe would easily lead to legalisation of competing search engine based content aggregators' news and similar services. Therefore the Berne "3 step test" plays very important, safeguarding role.

In conclusion, we would draw on the *"Content Sector Common Submission on the Green Paper on Copyright in the Knowledge Economy"* which we endorse fully. In this paper we collectively summarise our joint position as follows:

I. There is no need at this time to revise the Directive - the interests of all stakeholders in the value chain of the knowledge economy are adequately reconciled in such a manner that the final outcome continues to function well;

II. There is no need, and indeed real dangers in upsetting this fine balance of interests by narrowing the scope of copyright protection by means of new exceptions and limitations or restrictive rules which hamper development of revenue-generating business models;

III. It is vital that, in considering the range of issues and options set out in the Green Paper, the Commission focuses on how best to create a genuine knowledge economy whereby financial investments in the content business are effectively safeguarded and rewarded, rather than pursuing ways to facilitate uncompensated use of copyright-protected material through new exceptions;

IV. The Internet has created opportunities for new players as well as new routes to market for established players, all of which is to be welcomed. But some of these new players have established businesses which ride on other companies' creative works without those companies' consent. It is vital that EU legislation should neither promote nor facilitate illicit Internet based "free-riding" services. The Directive's provisions with regard to exceptions should not therefore be broadened beyond their present scope.

The European Publishers Council

28th November 2008

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