



PUBLIC CONSULTATION ON CONTENT ONLINE IN THE SINGLE MARKET

SUBMISSION BY THE EUROPEAN PUBLISHERS COUNCIL (“EPC”)

13th October 2006

The European Publishers Council (EPC) is a high level group of Chairmen and Chief Executives of leading 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 the EPC’s members is attached.

INTRODUCTION

The right approach to formulating policy

The EU market for online creative content is developing rapidly and new business models are being developed, tested and put on the market all the time. As the Public Consultation document points out, Western European online content-sharing frameworks and markets already account for 8% of EU GDP today and are expected to triple by 2008.

The fundamental question posed in the Public Consultation is *“How EU policy should be designed so as to stimulate the creation and legal distribution of creative online content and services in Europe?”*

In the face of this rapid and often unpredictable business and technological change, the risk with regulatory intervention is that it may undermine or distort this process of rapid growth by seeking to impose regulatory solutions to problems that the market may solve without intervention.

The EPC, therefore, urges the Commission to formulate policy in the light of the following guiding questions and principles:

- ⇒ Is the problem widespread and pervasive; is it having a significant impact in the ‘real world’?
- ⇒ Has the market had sufficient time to provide a market-based solution to any problem?
- ⇒ Is self-regulation already in place?
- ⇒ If regulatory intervention is appropriate, what is the ‘lightest’ form of regulatory intervention that may be used, beyond self-regulation, and consistent with the approach to ‘Better Regulation? An example of the latter is the European Charter for the Development and Take-Up of Film Online.



The Vital Role of Copyright

“Copyright”¹ is the fundamental building block of the creative economy.

⇒ At the Helsinki Conference in July this year, Mary Beth Peters² said *“Copyright is the key prerequisite for the online world.”*

⇒ At the Creative Economy Conference which took place during the UK Presidency of the EU in October 2005, one of the working groups – ‘Value for All and More of It’ - concluded that *“Copyright is crucial. In this new era, everything becomes a subset of IP. We believe that copyright has been a highly effective mechanism to generate creative wealth in the industrial mechanical age, and the concepts of copyright will continue to do this as they adapt to the online era.”*³

The EPC agrees wholeheartedly with these views. Our members’ online businesses are continuing to grow and a strong copyright framework is fundamental to that further development. Our members see copyright as a true enabler of business growth. It makes it possible for them to provide the new services their customers want within a certain legal framework which enables them to secure a fair commercial return.

The key point is that change and adaptation of business models to meet the needs of consumers and other users is happening within the context of the existing copyright framework. Accordingly, the EPC cautions strongly against any change to the copyright acquis which would weaken copyright’s role as the key enabler of the market for online creative services. In particular we would oppose strongly any new mandatory exemptions from the exclusive copyright and database rights.

Responsibility of players in the chain of online distribution

In the online world, the creation, distribution and consumption of digital content revolves around the trading of rights. Accordingly, the EPC endorses initiatives such as the European Charter regarding Film Online because it demonstrates that one of the cornerstones of EU policy is encouraging all players to accept – to an appropriate degree, responsibility for their activities within the existing legal framework⁴. This duty extends to all players, including consumers. The recent acquisition by Google of ‘YouTube’ has focused attention on the need for consumers to respect copyright when incorporating third party copyright material into audio-visual works which they create and

¹ “Copyright” is used as an umbrella term to denote the economic and moral rights of authors and the holders of neighbouring rights

² US Registrar of Copyright, Library of Congress

³ The Papers produced by all the Working Groups can be found here -

<http://www.creativeeconomyconference.org/Documents/FinalConferencePapers.pdf>

⁴ i.e. as provided by the InfoSoc Directive subject to the exemptions from liability in Articles 12 (‘mere conduit’), 13 (‘caching’) and 14 (‘hosting’) of Directive 2000/31/EC of 8 June 2000 – the “E-Commerce Directive”.



upload to online services such as 'YouTube'.

In that context, the EPC urges the Commission to disregard those voices which seek to invert the current position under copyright law whereby an act restricted by copyright requires the prior permission of the rights holder to one where a restricted act can be carried out unless the rights holder indicates otherwise. This argument has been put forward by Google in the context of its library digitisation programme.⁵

The solution is not to invert the established principles of copyright law which have proven their ability to be applied in the online world within the framework of the Copyright in the Information Society Directive⁶. Instead, the correct solution is to develop and implement 21st century rights management solutions to 21st century rights management requirements.

A good example here is the ACAP (Automated Content Access Protocol) project which was announced at the Frankfurt Book Fair on October 6 and presented by the EPC at the Content Online hearing on 11 October in Brussels. ACAP is an open and automated enabling system by which the providers of content published on the World Wide Web can systematically provide permissions information (relating to access and use of their content) in a form that can be readily recognised and interpreted by a search engine "crawler". In this way a search engine operator (and ultimately, any other user) is enabled systematically to comply with such a policy or licence. Effectively, ACAP will be an open technical solutions framework that will allow publishers worldwide to express use policies in a language that the search engine's robot "spiders" can be taught to understand.

See www.the-acap.org for further information.

Copyright v. contract

Furthermore, copyright law and contract should not be confused. Frequently, criticisms are aimed at "copyright" when, in fact, the criticism should more properly be directed at contractual terms which govern the downloading and use of content. The appropriate legal framework for dealing with issues about contracts is contract law and competition law and, in the area of 'B2C', consumer protection law. It is not copyright law.

⁵ See also our comments on search engines in reply to Question 3.

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society



QUESTIONS

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

The answer is “yes”. As well as offering text-based services online, an increasingly integral part of these services is rich media content e.g. audio and video podcasts. Also, there are many interactive tools and features being added all the time, including online forums, access to archives and user-generated content.

The raison d’être of EPC members is to disseminate content in a variety of formats in print and electronically on digital platforms. Indeed EPC members were amongst the ‘early adopters’ of online services. We favour wide dissemination of our works provided that our rights are respected. Our members are at the forefront of new media services, for instance:

- Newspapers were amongst the earliest media groups to develop websites, either on a free at point of access – supported by advertising revenues, subscription or per-use payments or on a hybrid basis.
- In the scientific, technical and medical field, Reed Elsevier, with its ‘ScienceDirect’ platform, offers its customers access to a huge range of information sources with a variety of payment models, both subscription and pay per use.
- The same is true of Reuters in the field of online financial information.
- In the book industry, Macmillan (owned by EPC Member Holtzbrinck) recently announced its ‘BookStore’ project - a searchable repository of digital book content, with e-commerce technology for purchasing titles.)

2. Are there other types of content, which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.

The types of creative content and services identified by the European Commission make up an exhaustive list and other forms of content do not need to be added to the scope of the future Communication.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price



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systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

Regulatory intervention – a further threat to our members’ advertising revenues

EPC members face major challenges and threats in making the transition online as well as remaining competitive in traditional markets of print and TV. They face competition not just from other media, including publicly funded broadcasters who are extending beyond TV to online, but from new content providers whose core business may lay elsewhere.

Our revenue base is challenged in terms of advertising, but also now in content provision as “cover price” is often not transferable to online offers. This means that any threat to advertising from new restrictions damages our ability to remain profitable. Any threat to our ability either to build new content services on internet or mobile platforms (e.g. threats through changes to the TV without Frontiers directive), or to protect content from piracy or parasitic models from third parties, will undermine our ability to invest in content creation.

Search engines – trying to reverse the permission-based copyright model

The new models of Google and others reverse the permission-based model of content trading built up over the years, which is challenging the legal copyright protection of our content. Some companies help themselves to copyright protected material, build their own business models around what they have collected, and parasitically, earn advertising revenue off the back of other people’s content. This is unlikely to be sustainable for publishers in the longer term and must not form the basis of any new model of copyright harmonisation which the European Commission might seek to develop in order to pursue other policy objectives, such as the Digital Libraries project. The ACAP project will to a large extent address this problem obviating the need for regulatory intervention.

The legal environment and user-generated content

One of the most important and ground-breaking shifts in newsgathering techniques and technologies in recent years has been in the field of "citizen journalism". This is matched in other, non-journalistic fields by an explosion of user-created content in various media including blogging in text and sites such as *YouTube/Google* for amateur video. The launch of ventures such as *Oh My News* in South Korea and of user-generated journalism websites such as *Backfence*, *Bakoptopia* and *GetLocal* in the US has stimulated public debate, political engagement and extended the local reach of journalism in the relevant communities.

It is, therefore, essential that the rules governing liability for user-generated content do not act as a disincentive to media owners’ making this important new content source available online. The EPC, therefore, considers that the exemption from liability contained in Article 14 of the E-Commerce Directive is a significant safeguard for media owners against making them responsible for the content produced or posted by



members of the public. Any review of that Directive should take account of the fact that any change which imposed an obligation on media owners to *moderate* that content would make them uncompetitive relative to ventures based outside the EU. Specifically, any duty of media owners rather than users for the comments of users, and for policing those comments for defamation, breach of copyright, discrimination etc, would make UK and other European-based media companies far less competitive than their US counterparts in the user-generated content space.

In EPC's view, this would be injurious to public creativity and stifle the social benefits of political engagement and local citizen journalism enjoyed elsewhere.

Defamation and 'jurisdiction-shopping'

The EPC's members are concerned about the apparent facility for the allegedly-libelled to engage in "jurisdiction shopping" throughout Europe is also unhelpful and unrealistic when content originators publish globally online.

In its review of 'Brussels 1', the Commission will no doubt wish to achieve consistency with Rome II. The EPC's concern is to ensure that the rules of private international law as regards applicable law and jurisdiction do not perpetuate the practice of 'jurisdiction shopping' or impose rules which adversely affect the way in which journalists carry out their day to day operations by having to anticipate laws outside their country of editorial control.

VAT

High taxation levels make it difficult to compete internationally. The levels of value-added tax (VAT) applying to e-commerce should notably be trimmed for European creative media businesses to be able to compete on the global marketplace.

The EPC considers that the present legal environment could be usefully improved to help unleash the full potential of new creative content services online. In this regard, our comments in reply to question 17 focus on the areas in which the legal environment could be improved.

Employers' copyright

The EPC considers that there is an urgent need to provide through legislation a proper recognition of the research, development and investments made by publishers and their need for commercial flexibility to move and develop their content in a highly competitive environment. This can only be done by tackling the question of ownership of rights in content created under employment contract to bring European content producers into line with their US counterparts. This issue is dealt with in more detail in response to Question 17.

Barriers to news reporting through abuse of accreditation processes

There is great consumer demand for news reports about sports events via broadcast, print and online media including mobile. There are many examples of sporting



organisations using their control over venues to impose unacceptable limitations on news reporting via the accreditation process by specifying the terms on which reporters are allowed access to the venues. This is an issue of contract as well as intellectual property rights and can seriously and adversely affect our members' rights to meet consumers' demands for sports related news reporting. The EPC, therefore, considers that the Commission should include this issue of improper use of the accreditation process in its analysis of the market for the provision of content online.

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

The EPC agrees that the legal framework must achieve a balance between private rights and the public interest. But the EPC considers that the courts have demonstrated an ability to maintain this balance. For example, the UK High Court recently dismissed the copyright infringement action brought by the authors of *The Holy Blood and The Holy Grail* against the publishers of *The Da Vinci Code*, based on claims for non-textual infringement of a copyright work. By doing so, it demonstrated that copyright does not protect against the borrowing of an idea contained in a work and thereby struck a fair balance between protecting the rights of the author and allowing literary development.

Also, it is important to recognise that the public interest is not synonymous with 'content for free'.

Data Protection law

Whilst the EPC fully accepts the principle of protecting consumer's personal data, we consider any examination of current data protection laws should focus on making them more workable through general rules rather than the current detailed prescriptive provisions. Current national laws based on the existing directives suffer from a number of problems in an increasingly online, cross-border world. They are

- (i) hard to understand and overly technical;
- (ii) in many cases, unworkable and unnecessary costly for businesses and thus lead to non-compliance
- (iii) subject to different sanctions and rules of enforcement between member states.

These problems also result in EU businesses being put at a competitive disadvantage in a global economy. Privacy/data protection should, therefore, be fundamentally re-thought so that it provides an appropriate level of protection for individuals' personal data which is workable, respected and not as restrictive and burdensome on EU businesses as the current rules.

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?



EPC members want to offer content across a range of platforms or devices in order to fulfil their customers' requirements. For example, consumers want to be able to see or hear sports results in the papers, on television, radio, on PC's, mobile phones and other mobile devices.

In certain cases, cross platform distribution has to be balanced with the ability of rights holders to use technical measures to protect their content, particularly in the face of the threat of piracy.

Rights holders should be free to decide how to licence their content which is protected by copyright and related rights across different technical platforms, taking account of technical measures, where appropriate. This is the position taken by France when it recently updated its copyright law (known as 'DADSVI') in July this year to bring it into line with the 'InfoSoc Directive', following extensive debate about the issue, centred on the effect of i-tunes 'Fairplay' DRM.

The impact of convergence has brought this issue into prominence. The EPC considers that the market must be left to develop and find solutions to the question of interoperability. However, the Commission should actively encourage initiatives in this field e.g. the 'ACAP' initiative which will facilitates the expression of permissions in machine readable ways.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

Cultural diversity in content production would normally be representative of the cultural diversity of our populations rather than being imposed arbitrarily or by dictat from the centre. The more that can be done to democratise content-creation and facilitate content creation by "the people formerly known as the audience" takes us closer to that ideal. The most efficacious step towards achieving greater representation in the field of online content production would therefore be any measure that makes it easier and less hazardous for media owners and the providers of content-creation tools to provide those tools and publish the content created with them. See (3).

Competitiveness of European online content industry

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

As regards the EU publishing industry, please refer to the points made in the EPC's response to the Commission's Consultation Document '*Strengthening the*



Competitiveness of the EU Publishing Sector, a copy of which is attached as an Annex to this document. EPC would urge the Commission to take full account of the points made in that document in assessing competitiveness of the European online content industry.

We would also make the following points:

- ⇒ One of the industry's strengths is self-regulation. In a fast changing environment, this is often preferable to primary or secondary regulation which can quickly become irrelevant or inappropriate. This is particularly true in the field of content regulation, including advertising and the protection of minors.
- ⇒ The EU should look closely at social costs in the creative industries in order to stimulate employment.
- ⇒ IP crime remains a major threat to the growth of the creative industries in EU. We encourage the Commission to match the US stance in terms measures designed to promote IP education including through media literacy programmes, respect for IP and the ease of enforcement of legal measures designed to reduce IP crime.
- ⇒ We would reiterate our comments made in the Introduction about the principles which should underpin regulation in this area. This is still a nascent market and there is no 'one size fits all' business model for the creative industries.
- ⇒ Markets and services for online content operate at a global, regional and local level. In some cases, a service may be truly global in scope and in other cases it may be local owing to language or other local requirements. Regulatory policies at global, regional and local levels have to be consistent to match this reality.

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

EPC members see opportunities in potentially all of these areas. EPC members have been active in developing new or adapting their existing business models to meet the needs of consumers and other users in the digital environment.⁷

⁷ See the examples we gave in response to Question 1.



In addition:

- ⇒ The range of licences available from collecting societies operating in the UK publishing sector, including scanning licences, continues to grow. For example, in the UK the Copyright Licensing Agency has developed a licence with the Association of the British Pharmaceutical Industry (ABPI) which permits scanning and e-mail delivery, in addition to photocopying, of articles from books, magazines, journals and periodicals.
- ⇒ In the music industry, there are an increasing number of online services that offer music downloads. These include services offered by the major record labels, i-tunes and a large number of services offered by independent labels. A list of online services has been produced by IFPI and can be accessed via this link - <http://www.pro-music.org/musiconline.htm>
- ⇒ In the film industry, Hollywood's largest studios announced the 'Movielink' service on April 3 2006, which offers US consumers the ability to download and own films from the internet on the same day that they are released on the internet.

In short, EPC members are continuously striving to extend the content offering. In the online environment, the Press can offer an extended service to their readers from press articles to online communities, moving pictures, and thematic forums. Also, variations of services can be offered which are not linked to the press such as games, and personalised services such as horoscopes, stock market information and so forth.

EPC members will offer some services at a national level whereas others may be offered at an international level. However, one concern which applies at all levels is the blurring of the boundary between the public and private spheres. For example, public libraries are looking to expand the range of services which they offer online. In this environment, in order to protect the nascent private sector, it is essential that all regulatory initiatives respect and acknowledge the Berne '3 step' test.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

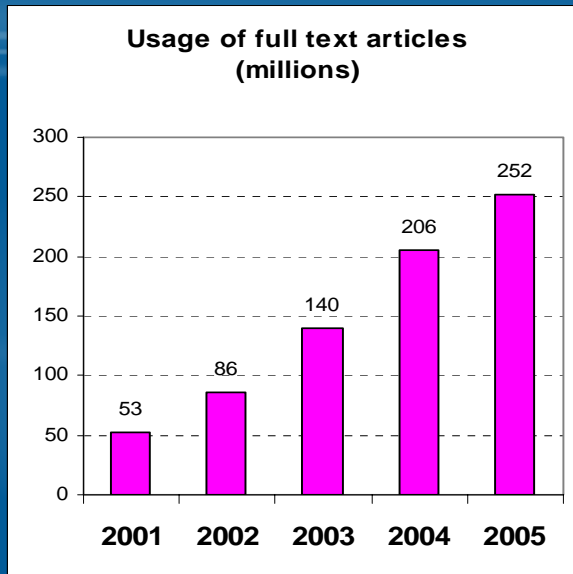
Please refer to the attached Annex.

As an example taken from the scientific, technical and medical publishing sphere, the following table illustrates the growth of usage of online articles.⁸

⁸ Reproduced with permission from Elsevier



Overall ScienceDirect Usage of Articles/Year



10+ million researchers
4500 institutions
180+ countries
252 million downloads

Target 2006 =
300 million downloads

6

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

Consumer demand drives the growth of online content. Increasingly, that content is audio-visual e.g. videos. Accordingly availability of bandwidth and communication services at competitive prices remains crucial to this growth.

At the same time, measures need to be taken to counter the threat posed by cyber-criminal activities such as identify theft, piracy, and hacking of 'secure' payment systems.

Consumer education about the risks they face, and the measures which consumers can take to reduce these risks, is also of vital importance.

The debate about 'net neutrality' is also one which should be watched with care. The issues are complex and fall primarily within the arena of the regulation of electronic communications networks and services. However, this debate is relevant to content online because any developments which resulted in electronic communications services providers offering a 'two-speed' - or 'multi-speed' - network access services may have a detrimental effect on parts of the market for content online.



11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

As already noted, digital piracy remains a major threat as does the more insidious yet equally damaging threat from the “content for free” lobby.

EPC members may choose to make certain content available without direct charge, whether because they are supported by advertising revenue or otherwise. However, the fact that content may not be paid for at the point of consumption is not the same thing as all content being freely available. The Commission has a role in educating consumers about this distinction.

It also ties in with two other points:

1. All players in the chain of online content – from creators and distributors to consumers – have responsibilities in respect of that content.⁹
2. One of the keys to promoting the availability of online content is the development of machine readable permissions. Indeed, many of the criticisms aimed at copyright are related to rights permissions and clearances, rather than the subsistence of copyright. It is therefore vital that the creation and deployment of policies governing the expression and use of machine readable permissions becomes an essential part of the process in creating and distributing content online. As an example, the ACAP project to embed terms and conditions of access and use of publishers’ content will help encourage publishers to make more content available online.

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

EPC members use various payment methods and therefore security of online payment systems is of vital concern. Consumers need to be able to trust that their credit card details are protected against theft.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

EPC members use a variety of pricing systems and strategies, including the provision of content without payment in order to create an interest in the paid for content e.g. via games and other sales promotion techniques.

⁹ See our comments in the Introduction to this paper



As online markets are still in an early stage of development, players should be free to experiment without intervention so long as they remain within the existing boundaries of law.

Micropayments

Micro payment implementations are usually, if not always, connected to one or more operators across countries, for there is not a single technical solution. For clearing banks and credit card companies, low cost transactions do not offer sufficient margins to process, although potentially greater, they are not enough to guarantee the expected industry (banking) margin level.

The US have a clear advantage here for the size of the market and a much easier way to balance accounts from state to state when compared with the different countries of the EU. Some thought should be given by the Commission to see how competitiveness in this area can be improved.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

In view of the relatively early stage of development of the market for creative content and services online, the market should be left to experiment with a range of licensing models. According to the particular market and/or service, either 'one to one' licences and/or collective licences are appropriate. Also, in the field of search engines and other automated uses of content, machine readable permissions of the type envisaged by the ACAP project are appropriate.

Accordingly, EPC is opposed to a harmonising directive in this field at this stage as new technology presents the opportunity to look at the issue of collective management as well as individual management of rights in a new light.

New technology enables authors, publishers and other rights holders to manage rights, which previously were only exercisable in practice through collective management. Although there will certainly be a continuing role in the future for collecting societies that role as far as digital content is concerned should be founded on voluntary contractual licensing arrangements between rights holders and collecting societies. The onus should be on collecting societies to show that they can and will add value to rights holders by being able to exploit rights more efficiently and profitably than individual exercise of rights.

However, technology now presents the opportunity for rights holders to manage rights directly, to make their own decisions about which content they wish to licence, to whom and at what price. They can decide for themselves whether to appoint an agent to help them with this or they can choose to do it themselves.



EPC therefore urges the commission to invest time in researching the development of systems which would provide a decentralised structure for rights management and release rights from the restrictive and anti-competitive environment in which many of them are currently managed. The aim should be to move control back into the hands of rights holders (be they authors or publishers or a combination of the two) and make collecting societies into mere agents, competing with each other to provide effective and fair services to rights holders and users of content.

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

The key feature of content online is the ability of the content provider to distribute and communicate directly with the end user. In this context, we would like to make some comments regarding the role and amount of administrative intermediaries (e.g. collecting societies).

The EPC considers that their role should not as of right be extended to the online environment. In an online environment any licensing of published works should take place only on voluntary basis involving always the publisher, as the publisher's investments in the development, production, branding and marketing of the works are the actions that bring among other things the added-value to the works.

Licensing by these intermediaries must not endanger the basis and core of publishers' online business, i.e. packaging and distribution of online content and services. In an online environment the licensing by collecting societies has to be limited to real mass use situations where the sale of use rights does not form any essential part of publishers' businesses.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

In the online world, the traditional, clearcut boundary between the administration of primary rights by rights holders, and secondary rights by collecting societies or other intermediaries, has become blurred or is being re-defined.

For EPC members, the starting point is that rights holders should be free to set prices for the exploitation of their rights, whether they choose to exploit those rights themselves or through their agents. These prices will be market-driven and will vary according to the nature and use of the content concerned.



Role of levies

To ensure remuneration to the rights holders in return for the application of agreed exceptions to the exclusive rights of owners, many EU member states have implemented one or more levy systems. Other Member States have applied licensing rules to enable rights owners to secure “fair compensation/remuneration”.

The reasoning behind implementing levy systems is that individual rightsholders are usually not in a position themselves to enforce the rights relevant to the exception(s). In the analogue area, publishers have had difficulty in controlling reproduction by users from paper to paper.

In the digital world, we face a different situation. All market-driven options of rewarding rightsholders for their efforts should always be explored first, before any legislator intervenes. DRM (or technical protection measures) may be a solution to enable rights holders to be directly remunerated for their work but the way in which DRM is currently likely to be applied may not provide for fair compensation to rights owners in respect of secondary uses, which are not directly linked to the primary (DRM controlled) licence.

This is why the development of DRM may not necessarily exempt users from paying levies where they exist, as they may address different ways of securing fair compensation for different uses.

The management of copyright has been developed at national level. Application of permitted copyright exceptions and limitations is often the result of long negotiations to obtain a balanced agreement between all the parties.

Levies may be progressively reduced, but this will depend on how well Digital Rights Management (both through technical protection measures and under rights management information systems) can be developed and applied in ways that both rights owners and users find practical and fair.

Accordingly, EPC considers that the market should be left to find the most appropriate system of remuneration rather than by imposition through regulatory intervention.

In conclusion, EPC members consider that they should be able to choose freely between individual and collective management in the digital area.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers, which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

The right approach to regulation

A large number of new opportunities for businesses are offered by the development of



technology, especially in the media and information sectors. However, it appears that the regulatory framework does not always allow businesses fully to exploit the opportunities created by the technological advances as, in some Member States, there seems to be a tendency for a strict, sometimes protectionist approaches to regulation. In view of that, the regulation at the EU level, aimed at removing barriers to opportunities for businesses, should leave less room for local "tightening" of any framework legislation by the national governments. The latest negotiations in the Council and Parliament on the revision of the Broadcasting Directive give cause for concern in this regard and we would urge the Commission to reject calls either for wide derogation from the principles of mutual recognition and country of origin control or for greater opportunity to impose even stricter rules on the media at national level.

This is especially relevant for the regulation of the media sector, which bases its business on the dissemination of information and ideas, without fear of either prior control or restrictions to free circulation. To prevent against any such attempts at restriction, all EU regulation which touches on the media sector, even indirectly, should:

- always in a very clear and straightforward way stress that it cannot in any way be used to limit freedom of expression;
- as regards the provision of services, always be based on the country of origin principle, so that no EU member state government is able to control the dissemination of ideas on its territory in a more strict way than that envisaged by fundamental principles of freedom of expression, enshrined in any EU regulation;
- pass the proportionality test and be based on self-regulation rather than statutory regulation.

The application of these three principles would significantly limit the possibility of imposing regulatory barriers for media businesses by the EU and its member state governments.

The establishment of an internal market, through removal of barriers to goods, services, people and finance should normally foster innovation and growth. However, additional layers of regulation can act as a brake on innovation if companies consider the hurdles of regulatory compliance and legal risk assessment to be overly costly in time or human resources.

Do not extend traditional television broadcast style regulation to content online

This is crucial for digital media businesses, where traditional free-to-air television has ceased being the sole method of disseminating moving images. More and more moving images are used to disseminate information or ideas through the internet and mobile devices. Whilst these images may resemble traditional TV because they are displayed on a screen they should not be regulated as such as the business models which underpin new media services are more akin to publishing which is not subject to special rules, but rather the general law and self-regulation.



Questions of spectrum scarcity and high barriers to entry no longer apply to new media. Therefore the regulatory framework should adapt, leaving the provision of new media services subject to minimum regulation. For example, the free circulation of such services is already assured through the E-Commerce Directive, which is based on sound internal market principles. Important European laws of Data Protection and Unfair Commercial Practices will also apply to these services, together with the general laws of defamation, obscenity and racism etc., as well as in many cases sector specific self-regulation. E-newspapers and e-magazines often use moving images. Internet portals and also use moving images. Moving images are used to transmit information in telecommunication networks - through mobile and traditional telephony.

The basic principle applying not only to media but to any type of business dependent on innovation should be: innovation first, regulation second. Only by applying such a principle can the EU internal market exploit fully the possibilities created by innovation on terms of innovative products, services or processes.

Copyright – the need for a stable framework

The current EU copyright acquis has proven to be a very successful driver and support of the EU's creative industries.

In the digital economy, growth is increasingly dependent on the creation, sale and licensing of intellectual property, not on the sale of physical products. The increasing availability of online services in the film, music and publishing industries is proof of this assertion.

This makes the copyright acquis the fundamental building block of the creative industries. Also, the importance of IP-based exports means that the same is true of the international legal framework for intellectual property.

As we said in response to question three, one of the working groups at the Creative Economy Conference held last year in London concluded that *“Copyright is crucial. In this new era, everything becomes a subset of IP. We believe that copyright has been a highly effective mechanism to generate creative wealth in the industrial mechanical age, and the concepts of copyright will continue to do this as they adapt to the online era.*

The need for a stable legal framework

Therefore, in order to ensure the appropriate level of competitiveness and investment in innovation based on IP, the current IPR framework should in principle be maintained. The EU regulations should acknowledge that IP rights are generated from creativity and investment and, as in the case of any business, any investment will only be undertaken provided that its fruits will enjoy the appropriate level of legal protection from theft or other illegal use by third parties.



What we need is a stable legal framework protecting the rights of rights holders who make available their content to third party users on a commercial basis, whilst giving time to the market to work out the business and technical solutions needed to achieve the new copyright compact amongst all players through collaboration and a permission-based framework. This collaboration is already happening in a number of areas, such as with libraries, search engines, etc.

Our remaining comments on this question concern the views being expressed about copyright by certain user groups. As we have already noted, it is important that all players in the content chain, including creators and distributors play a responsible role within our existing legal framework. EPC members consider that their legitimate needs can be accommodated within that framework.

Employers' Copyright

We referred earlier (see our reply to Question 3) to this very important matter. The EPC considers that solving this issue will contribute materially to the wider dissemination of content online.

A new concept for employment related copyright in Europe would cover all economic rights, including future rights which cannot be excluded. Publishers must have adequate control over their copyright to be able to adapt effectively to changes in their environment without asking for the consent of each employee each and every time they wish to develop new formats for new delivery platforms.

Publishers across Europe are faced with Court cases – where their employees refuse to allow secondary exploitation of content created during the course of their employment without additional payment. This is rendering some editorial ventures on the Internet and/or through other content distribution platforms such as mobile, uneconomical and is one of the areas where Europe loses in terms of competition with the United States or Asia.

The EPC is not asking for something completely new. Copyright law has already been harmonised throughout the EU regarding software programs created by employees under contract. Software copyright is vested in employers which puts European software producers the same IP rights as their non-European competitors. We need the same rights as our competitors in the US. There is no room for unfair competition from outside or indeed from within the EU (through middlemen i.e. collecting societies or levy collectors).

The “work for hire” concept, adapted from the American model, operates similarly in the UK and the Netherlands. It is no coincidence that these two European markets have been more successful in rising to the challenges of producing new formats for consumers with the confidence of a secure legal regime, underpinning their investment.



Accordingly, the EPC considers that **any review of the copyright law should include a presumption that the first ownership of the economic rights in a copyright work created by an employee in the course of their employment should belong to the employer**, unless otherwise agreed.

Country of Origin

EPC would also like to emphasise that safeguarding the principles of mutual recognition and country-of-origin is the most effective way of encouraging a thriving media industry online. In addition, self-regulatory approaches should always be preferred over statutory control.

Traditional newspapers and magazines cross borders and almost all publishers now have online publications that are universally accessible. For us, as with any business likely to cross borders, what is essential is legal certainty - legal certainty that whatever we distribute will be legally acceptable wherever it ends up; legal certainty that we will not be subject to 25 different legal systems in the 25 different Member States of the European Union – and potentially liable for a panoply of legal actions which may differ from one country to another.

For EPC members, the Country of Origin principle means that “service providers”, including the media (press, TV, radio, internet) and the advertising they carry, are subject only to the law of the country where they are established, and that Member States may not restrict services from a provider established in another Member State which complies with their home country rules.

Without this principle, the internal market cannot thrive: small and medium-sized enterprises in particular are discouraged from exploiting opportunities afforded by the internal market because they do not have the means to evaluate and protect themselves against legal risks involved in cross border activity or to cope with the legal complexities. Consumers and other users of services are also discriminated against – not able to benefit from a larger choice of competitively priced and potentially better quality services that would otherwise be available; often denied a service by service providers unsure of their legal position when providing the service from other Member States and often denied the use of the chosen service by overly restrictive national regulations.

ROME II

Rome II is the draft regulation on applicable law to non-contractual obligations that would apply in cross border cases of defamation, violations of privacy and the right of reply. Under cover of a mere “technical simplification” of rules related to applicable law, the Commission attempted in its original proposal a direct application of the earlier Brussels I Regulation which already gives plaintiffs the option of choosing the jurisdiction.

To mirror this option by automatically giving the plaintiff choice of law as well, strikes at the heart of press freedom, going way beyond any “technical simplification”. The EPC



instead sought a solution to ensure that the law applied in such cross border cases should always be closest to the point of editorial decision, thereby upholding press freedom and providing a balance of interests. Meanwhile the Council and the Commission have chosen instead to remove the media from the scope of the Rome II Regulation in preference to our favoured solution set out above.

Advertising De-regulation

Some categories of advertising are already banned or restricted in all media by European or national laws. For example, direct to consumer advertising of pharmaceuticals is a major category of advertising revenue for the media in the United States as well as many examples of restrictions and bans on advertising to children.

Advertising is a vital source of revenue for newspapers and magazines and helps keep their price low. The same applies to television and indirectly to movies. Advertising also plays a vital part in the national economy because it helps manufacturers to talk freely to consumers providing important information about their goods and services. Any opportunity the Commission can explore to initiate discussions which might lead to de-regulation would increase the profitability and competitiveness of Europe's media.

State aid has a considerable distorting effect on competition in the media market

State Aid to publicly funded broadcasters is growing more than 20% ahead of forecast EU GDP growth. This amounts to more State Aid than to agriculture, making publicly funded broadcasters the third most subsidised "industry" in Europe. This adversely affects the whole media industry in Europe including the press and internet publishing, not only private TV and radio broadcasters.

Publicly funded broadcasters who collect advertising revenues in addition to State Aid distort markets in excess of what is acceptable. Massive amounts of State Aid combined with inappropriate regulation adversely affect trading conditions and competition within Member States in a way that is contrary to the common interest.

Lack of political will, unimaginable in other sectors, has and continues to undermine the European media market, giving the US competitive advantage. As PSBs seek to extend their services online, distortions of competition experienced by commercial broadcasters will now be shared with publishers. We would urge the Commission most strongly to take these points into account. We understand that DG Competition will study this area next year as announced by Commissioner Kroes in Vienna in March 2006 at the Content for Competitiveness Conference.

Audiovisual Media Services

The proposal from the European Commission for a new Audiovisual Media Services Directive presents us with comprehensive regulation affecting editorial, programme and advertising content which unless amended will touch the very core of our businesses online as well as our traditional broadcasting services.



It is vital to make sure that EU does not force Member States to regulate in a way that will in practice be unenforceable; or would discourage the growth of e-services in the EU. Regardless of our own concerns about the way in which the press online will be affected, the approach the revision of the old Broadcasting Directive is in our view fundamentally flawed.

The EPC remains of the opinion that it would be better to exclude non-linear services altogether and instead recognise the respective roles of existing regulation, co-regulation and self-regulation in order to best protect consumers and to promote a healthy audiovisual industry in Europe as part of the i2010 and Lisbon agendas. At the same time a new proposal could have clarified any shortcomings of the current Broadcasting Directive in terms of linear services, leaving non-linear to existing EU laws, particularly the E-Commerce Directive, the general law and self-regulation. This would be in line with Option 3 of the Commission's Impact Assessment.

Any other approach requires major amendment of proposed definitions, and clear exclusions for the press and many other new media services on internet and mobile platforms to minimise the impact of the new Directive on non-licensed new media services.

Under the Commission's proposals, both linear and non-linear services would be subject to many of the same controls so that effectively, a television channel sent over the Internet would be regulated in the same way as a channel broadcast over the airwaves.

This will create anomalies that would make implementing the Directive at best difficult and impossible at worst.

Online publishing comprises text-based editorial, still photographs and increasingly video clips some of which are on-demand, either subscription based and/or supported by advertising which itself is sometimes audiovisual in nature demonstrates the difficulties for both publishers and regulators to distinguish between what is non-linear or linear. Furthermore, if a live feed is available, e.g. of a sporting or similarly popular event, this could be deemed "multicast" and fall within regulations for linear services. It is essential that the press online remains free of the comprehensive statutory content regulation foreseen in the Audiovisual Media Services Directive, which if left unchanged would have a chilling effect on the freedom of expression throughout the European Union.

VAT

Next year, we understand the Commission may be reviewing aspects of the VAT regime, including the Annex H which establishes the principle that member states may apply reduced or zero rates on newspapers or periodicals. Fortunately it seems that neither the Commission nor any Member State is keen to change this although the Commission could usefully recommend a harmonization of VAT at zero across the board for press, magazines and books. Because this Directive dates from the pre-digital age, no mention is made of their method of distribution. An adjustment should be discussed



which could offer Member States the freedom to apply the same rates which exist offline also to online distribution of media.

18. How does the country you mainly operate in encourage the development of creative online content and services?

This is not applicable as the EPC, as a pan European organisation, is making its comments on a pan European basis.

Release windows

19. Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

Certain EPC members make available some Hollywood film content and release windows are applicable to these initiatives.

Regarding all other rich-media content, or even plain text, licenses should be used to establish usage windows of the content. A publisher can decide to make additional content available after a certain period of time, or after a follow up as been released.

Networks

20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

The EPC considers that any move away from the current principle of net neutrality would benefit almost no-one except telecoms companies. It is little or no exaggeration to say that changes to the principle of net neutrality in favour of carriers (as is e.g. proposed by monopoly carriers in the US) would cause the Internet as it is currently understood to cease to exist. In common with a wide range of commentators including the inventor of the World Wide Web Tim Berners-Lee we are vehemently opposed to any change to the principle of net neutrality.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)?

The publishing industry is affected by piracy of copyright material in physical form (e.g. books, CDs, DVDs containing pirated content) as well as online in the form of pirate copies of press articles, novels in e-book form and illegal content distributed via P2P



networks.

What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?

Creative content needs to be protected by copyright and this should also apply in the online environment. Serious infringements should be punishable depending on the seriousness of the offence and the frequency of infringements. Damages should be awarded. The enforcement of copyright should be facilitated.

Distinctions between unauthorised uploading and downloading become difficult to maintain in the online environment. For example, podcasting is a hybrid activity which has elements of each.

However, as publishers EPC members are actively seeking to find practical solutions to some of the difficulties we are faced. Whilst IP crime requires a strong enforcement response which is rigorously supported and pursued by publishers worldwide, we are working also to reduce the incidence of civil infringement by offering legal services and the means for parties to use our content in compliance with agreed policies.

22. To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

It is widely acknowledged in the industry that there currently exists a widespread and unchecked phenomenon of intellectual property rights infringement which is causing creative industry and the publishing industry in general, severe levels of financial loss as well as €billions worth of lost tax revenues to the EU Governments.

Education campaigns can play an important role in combating piracy by explaining the importance of copyright protection to the consumer. The EPC is fully supportive of the Media Literacy work of DG EAC and is a member of the Commission’s expert group.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of non-copyrighted material) reveal new business models? If so, please describe them?

The EPC agrees that peer-to-peer has significant potential as a medium for the legal delivery of content. However, up until now peer-to-peer has been largely associated with illegal file sharing. Accordingly, in order to encourage the use of this technology for legal



delivery, it is important that some form of legal liability should attach to peer-to-peer network providers in the EU in a similar manner to the decision of the US Supreme Court decision in *MGM v. Grokster*.

Also, the potential of peer-to-peer networks may also be enhanced if, in appropriate cases, DRM systems can extend to them.

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

The press and news content generally should always be exempt from rating and classification systems in order to avoid inadvertent censorship and limitations on access to news information.

Wherever rating and classification does apply, self-regulation is the only viable method.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

27. In the sector and in the country or countries you operate in, are DRMs widely used?

Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?



29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

As yet, there is no consistent use of DRMs by EPC members as the market is still immature.

At this point, we would like to make a number of general observations about DRM.

Many discussions about digital rights management are skewed by the use of rhetoric, imprecise terminology and a confusion of issues. We are confident that the Commission will bring clarity to this debate. The EPC's views about the issues are as follows:-

Point 1: "DRM" is not just about encryption – it provides the framework for accessing and using digital content by providing tools to identify the nature and location of content and the permissions attaching to its use, with or without technical measures used to control access and use

"Digital Rights Management" ("DRM") is often used to mean technical measures used to prevent or restrict copying of copyright works. It is essential to make clear that "DRM" is much broader than that.

As the Commission is aware, there are two distinct components in the technologies described by the umbrella term "DRM". The first is standards (e.g. MPEG 21) whose purpose is to enable the movement of digital content from one technical platform to another in machine readable form by providing, amongst other things, a standardised grammar and vocabulary to identify and describe intellectual property and the rights pertaining to it. This first component of DRM is sometimes termed the "Management of Digital Rights" or "MDR".

The important point to make here is that MDR is often deployed without the second component in DRM – technical protection measures ("TPMs"). These are the technical enabling of usage permissions or enforcement of usage restrictions. Examples of the deployment of MDR without any TPMs can be found in the publishing industry and in 'Creative Commons' licences which provide the user with the necessary code which describes the rights attached to licensed content.

A good illustration is the work in the development of 'ONIX for Licensing Terms' (which is contributing also the ACAP). The essential point is that these formats make it possible for licence terms to be expressed electronically. It will mean that instead of relying on paper-based contracts and licences, those licence terms will be linked electronically with the content. This is key step in the automation of rights clearances.

In short, licensing - not further exceptions - is the way forward.



Point 2: TPMs do not necessarily conflict with consumer's expectations – they can work together.

There are many examples of online services (e.g. 'Movielink') which give their customers wider rights to make copies than would be available under a private copying exception.

The rights given to users of the i-tunes service follow a similar approach

Point 3: The law does not provide legal protection for TPMs which are used to prevent access or copying of works which are in the public domain i.e. not protected by copyright. This is often overlooked by the critics of legal protection for TPMs.

For example in the UK, "Technological measures" are defined in section 296ZF of the Copyright, Designs and Patents Act 1988 as covering any technology etc. which is designed...to protect a copyright work. For this purpose, "protection" applies to doing any act restricted by copyright. Thus, once a work ceases to be protected by copyright, it loses the benefit of the anti-circumvention provisions in the Act.

Point 4: Lack of interoperability between technical platforms is not a copyright issue

Consumers have the choice whether to purchase a device such as an i-pod which uses a proprietary technology or whether to choose an 'open standard' such as an MP3 player.

There are important issues regarding the interoperability – or lack of it – between different technical platforms. But that is primarily a technical issue, not a copyright issue. As far as EPC members are concerned, they are keen to provide their content to their customers over a wide range of technical platforms and devices.

Point 5: There are technical issues raised by TPMs for which technical solutions need to be found

The EPC recognises the challenges relating to preservation of digital content where TPMs are deployed which subsequently become inoperable or obsolete. This requires practical solutions and is the type of issue currently being addressed by a several working parties in the context of Legal Deposit.

Complementing commercial offers with non-commercial services

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

EPC members see the scope for public/private partnerships e.g. in the field of digital libraries provided that, in all cases, the dissemination of content is carried out on the basis of licence agreements agreed between willing parties or within the scope of



existing copyright exceptions.

What role for equipment and software manufacturers?

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

The answer, in short, is by working in close collaboration with all other players in the digital content chain.

Also, successful inter-industry cooperation, notably in the field of standardization, has a key role to play in the mass-market uptake of DRM technologies and in the establishment of an effective compliance policy allowing for true content interoperability in the online world

What role for public authorities?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

Public authorities have a key role to play. Often, they are a major instigator of new projects which involve the creation or dissemination of content online.

They also have a key role in promoting public awareness of the importance of IP rights, and the threat posed by IP crime.

They should also use their position to promote dialogue between all players.

Digital libraries

EPC supports the principle of making Europe's cultural heritage available to its citizens. But there is a real risk that of market distortion if platforms funded by public authorities such as digital libraries, are able to compete unfairly with commercial online content providers. There is clear analogy between nascent content online market and the public service television sector. In the latter case, the expansion of publicly funded broadcasters online has had a distorting effect in some new media and educational publishing markets.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

We have made our specific recommendations in response to the relevant questions. In addition, we would support the following:



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- ⇒ Promoting similar initiatives to 'Film Online' for other sectors of the creative industries
- ⇒ Provide support to projects such as ACAP so that machine readable permissions are integrated into the content creation and distribution process.
- ⇒ Promoting or encouraging Codes of Conduct e.g. in the field of DRM.
- ⇒ Further initiatives to raise public awareness of the central fact that the creative industries are crucial to growth of content online in Europe and that such growth depends on respect for copyright and other IP rights.
- ⇒ Ownership of copyright in employee-generated works – see Q 17 above
- ⇒ Ensuring that the nature of liability attaching to the hosting of third party content does not result in media owners' liability in a way which is beyond Article 14 of the E-Commerce Directive.
- ⇒ Maintaining a 'light touch' regulatory approach, always favouring self-regulation wherever possible.
- ⇒ A policy of not intervening unless there is a proven market failure.

European Publishers Council

13th October 2006

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