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Contribution from The European Publishers Council (EPC)

to the European Commission's
Consultation on
A Reflection Document on

Creative Content in a
European Digital Single Market:
Challenges for the Future

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EPC

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A VISION FOR COPYRIGHT IN 21ST CENTURY PUBLISHING

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PREFACE BY FRANCISCO PINTO BALSEMÃO, CHAIRMAN OF THE EUROPEAN PUBLISHERS COUNCIL

The internet and digital technologies offer unprecedented opportunities for creativity and content. There is immense potential to develop an expanding and diversifying market, with increased investment in creativity, greater competition from established and new players and growing choice for consumers.

We stand at a critical moment to decide how to fulfil this potential and to assure a flourishing European market for digital content in general and professional journalism in particular. At the heart of the debate - is copyright. The key question is: "What policies must we pursue to develop a management system for copyright that is fit for the 21st century?"

This document presents our members' vision of how this should be accomplished. Copyright is central but it must be founded upon a dynamic rights management infrastructure which enables all in Europe to have access to our rich assets of creative content.

And let me be clear. By "this infrastructure" I mean the technical standards, the software, the databases and the services that make it easy for the user to find, access and enjoy our content across a range of devices. But to do so in a way which respects the rights of the copyright holder and clearly accommodates any exceptions and limitations. This is essential to the future of not only a free press but a viable and profitable publishing industry as a whole that upholds our unique economic, cultural and social contributions to the future of our digital Europe.

The European Commission's 'Reflection Document'¹ addresses many of the issues that we ourselves are grappling with. The EPC now presents to the Commission our contribution to their timely debate about the future of copyright. We look forward to working constructively with the Commission to find solutions that benefit us all.

¹ "Creative Content in a European Digital Single Market: A Reflection Document of DG INFSO and DG MARKT 22 October 2009"

EXECUTIVE SUMMARY

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. Many also have significant interests in commercial television and radio. A full list of the EPC's members is attached at Annex II.

The Commission's *Reflection Document* lists three challenges which it has identified as arising from the growing importance of the internet, and in particular of digitisation technologies, which they recognise as opening up new possibilities for distributing creative content online:

1. Consumer access
2. Commercial users' access
3. Protection of rightsholders

We note that the Reflection Document mentions newspapers and magazines only once, in the opening paragraph, but any mandatory solutions agreed at EU level (including a new European Copyright Law with new, mandatory harmonised exceptions) would have a significant impact on the whole of the publishing industry.

There's one startling omission in the Document - *automated rights management*. In focusing mainly on the music and audiovisual industries, the overall message seems to be about simplification of licensing music and audiovisual content, with a special emphasis on collective management solutions; through collecting societies, or through extended collective licensing with third parties. This emphasis seems to be at odds with significant developments in individual rights management solutions and especially the latest developments and future potential for greater use of technological solutions to deal with the simplification of licensing. In our view the two should live side by side but the impression (rightly or wrongly) is that the policy agenda is already firmly in favour of collective arrangements which could be seen as downgrading copyright to a mere right to remuneration in return for content distribution. We recommend strongly that in following up the Reflection Document the Commission investigates the potential for technological solutions, including automated rights management, to deal with the simplification of licensing in the digital age.

The Commission has invited contributions to a broad debate about the possible European regulatory responses to these challenges. The Commission President-elect José Manuel Barroso called, in his Policy Guidelines presented to the European Parliament in September 2009, for an ambitious **European Digital Agenda** which he said should include **targeted legislative action**.

In this document, the EPC is responding to the Commission's stated objectives of seeking balanced and durable foundations for an innovative and competitive market place across Europe through:

- creating a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online
- focusing the debate on practical solutions to encourage new business models, promote industry initiatives and innovative solutions, as well as on the possible need to harmonise, update or review legislation.

The European Publishers Council proposes that the following Six Principles will provide that balance for the future of copyright law and the industries which depend upon it.

- **Principle 1:** We must cherish the fundamental role of copyright in providing the incentive to invest in the production and dissemination of creative content.
- **Principle 2:** We must respect the entitlement of copyright holders to choose how their content is made available, accessed and used.
- **Principle 3:** We must promote freedom of choice in licensing solutions.
- **Principle 4:** We must make sure that our system of rights management always carefully balances rights, exceptions and limitations.
- **Principle 5:** We must take a balanced approach to the challenge of digitising Europe's analogue print legacy.
- **Principle 6:** We must uphold the publishing industries' unique economic, cultural and social contributions to the future of our digital Europe.

We call on the European Commission to:

1. Recognise and promote investment by Europe's publishers by ensuring that, as rights holders, they are in no less favourable a position - online - than other producers and distributors of digital content.
2. Fight against all forms of piracy of copyright content and to ensure full implementation and respect for the EU Enforcement Directive.
3. Ensure that in developing its agenda for a European digital single market



it preserves publishers' freedom to choose licensing solutions. These must be designed to give business users and consumers access to our products and services across a wide range of digital platforms and devices, respecting the principle of authorised use, whilst at the same time ensuring a fair and competitive market place.

4. Encourage the development of technological solutions for rights management that are effective in law and to recognise that technology is an enabler of rights management, not a replacement for copyright.
5. Work with rights holders to meet the challenge of digitisation of existing collections in libraries and archives in a balanced way and in accordance with established copyright principles of prior consent by right holders.
6. Develop an appropriate, harmonised approach to the issue of Orphan Works, based on the need for a 'diligent search' on the lines proposed by the High Level Expert Group, combined with an appropriate collective management solution and recognise that with appropriate technical solutions Orphan Works will become a diminishing issue over time.
7. Resist any move in the direction of extending mandatory exceptions to copyright unless there is a proven case that the existence of different national exceptions constitutes a real barrier to the movement of services within the common market; rather, the Commission should encourage collaboration amongst all stakeholders to ensure that existing exceptions and limitations are accommodated within licensing solutions, including the development of automated methods of facilitating the operation of exceptions.
8. Apply a test of 'adaptive innovation' to the development of the copyright framework in Europe. We firmly believe that, wherever possible, it is preferable to adapt existing solutions for copyright, with their long-proven track record of economic and cultural success, in the new European market for digital content. Introducing inappropriate and untested measures carries the substantial risk of damaging well-established creative businesses.

In **Part 1** of this document, we lay out the **Critical Issues** facing our industry during the transitional period from an analogue to a fully digital market; and the **Principles** which we consider are essential to achieve the future we describe, one in which all participants in that market all derive benefit.

In **Part 2**, we have translated those principles into a series of **Policy Propositions**.

PART 1 - Critical Issues and Principles

The importance and distinctive societal contribution of Europe's publishing industry

Publishing is central to Europe's Digital Agenda. The publishing industry plays a vital societal role in facilitating access to news and information, culture, sport and entertainment. Through our reporting and analysis, we offer understanding and enjoyment. Through scientific, technical and medical publications, our industry contributes to the advancement of science and education. Through our books, newspapers, magazines and journals, much of which is available online throughout the EU, we are contributing significantly to Europe's digital economy.

As a result, the choices made about copyright policy as they apply to the publishing industry have both economic and social impacts. In fact, maintaining a copyright-based incentive for investment in creating a professionally edited free press goes to the very heart of our democratic society.²

Professional journalism fulfils a unique role. A free and plural press is a pillar of any democratic system and of the 'knowledge society.' It is essential to the public interest and safeguards a wide diversity of independently financed content and opinions.

Social media outlets for 'citizen journalism' enrich our societies, but they cannot replace high quality editorial content. Professional reporting, research and analysis, independently financed through advertising and sales to the public under trusted brands, are produced by publishing organisations and their staff in compliance with the law and according to our own, self-imposed standards and self-regulatory codes of conduct. Professional publication carries with it the responsibilities of pre-publication, editorial judgement and control and, where necessary, defending and enforcing rights in court, including those of journalists. The same does not apply to social media which, in that sense, are unproven. A 'tweet' can be fired off without the need to verify facts or distinguish them from rumour; and certainly not to undergo the same rigorous publication processes of professional journalism. This is not to dismiss social media but to recognise the unique role that professionally published content fulfils.

² It should be noted that while copyright law is essential to create the incentive for investment in creativity, its existence in no way inhibits the actions of those creators who do not wish to avail themselves of some or all of the rights which copyright gives them. They can, if they choose, waive their economic or other rights, and schemes to help them do so such as Creative Commons, facilitate such actions within the copyright framework.

There is much at stake

There is much at stake in shaping the European Digital Agenda. If the right steps are taken, a mutually beneficial environment can be created in which the creative industries will thrive and citizens, consumers and business users will have access to the full range of content they want, including new categories and models not yet devised, across a range of fixed and mobile devices. If the wrong steps are taken, we believe that the creative industries, creativity itself and society as a whole will be the poorer.

The publishing industry has already proven itself to be at the forefront of business innovation and experimentation, with a range of online offerings across the different sectors of the industry. Examples are given in the Annex to this document.

However, the industry's different sectors all face similar and significant challenges in developing sustainable models for online content services. Some of those challenges derive entirely properly from structural shifts caused by the migration from analogue to digital production and distribution; however, others result from illegal file sharing and a range of unauthorised or insufficiently controlled commercial uses. What is essential is that the incentive to invest is 'carried forward' into the digital age.

From the analogue to the digital age

Copyright is not a *barrier* to accessing content. On the contrary, it is (as it always has been) the *solution* to providing access while creating viable business models for creators and those who invest in the creation of content. Put simply, without the possibility of popular success producing reward, very few will invest time and money. Copyright creates that link between success and reward and is directly responsible for the huge success of the creative industries.

Powered by technology-based tools and the network, consumers will potentially be able to have access to an ever increasing variety of content. But this is entirely dependent on the maintenance of the incentive to create and make available professionally-produced content, through copyright law and sensible implementation in order to provide for a proper return on that investment.

In the not too distant future, issues like 'orphan works' and 'out of print works' will be seen for what they are, legacies of the analogue age. In their place - provided always that the right policy decisions are taken, will be the infinite space of the digital bookshelf and the digital news store with multiple new services, products and content providing access to an ever-expanding and diversifying range of materials. The power of online search,



together with the range of meta-databases that enable our content to be searched for and found, will enable and expand that access across online bookstores, newspaper and magazine archives, scientific journals and dynamic databases.

In the 'Reflection Document' the video games industry is described as 'born digital' and it is noted that *"To a certain extent, the Digital Single Market is already a reality when it comes to video games."* We entirely agree, while adding that the video games industry could only have emerged and become profitable with the support of the existing copyright framework. And of course, in the relatively near future, virtually all creative industries will be "born digital."

Therefore, in formulating copyright policy, we must avoid prescribing analogue solutions for a digital future not only in terms of rights and exceptions but also recognising the potential of the technology to provide innovative ways for publishers to manage their rights. By adapting rights management procedures in particular, as an integral part of the process of offering their content directly and through new internet and mobile services to consumers and other businesses, copyright will continue to underpin business innovation in the content sector and to ensure future access to revenues.

We must recognise that we are in a period of transition and that new services are emerging all the time which support the view that innovation is taking place within our existing copyright framework thereby proving itself capable of adjusting to and underpinning the digital age. At its simplest, publishers - whether incumbent players or new entrants - will meet consumer demand where there is a market which offers a commercial return on their investment.

The EPC members welcome the competitive and creative environment that the global internet creates, but seek to ensure that that it is properly open and competitive with incentives to meet consumer demand and remain profitable. Through well-understood "network effects", the internet tends to create global businesses which come to hold dominant positions in their markets. While this tendency cannot easily be resisted, every effort needs to be made to mitigate the less helpful aspects of the phenomenon, especially in the internet's formative phase, on behalf of consumers and creators alike.



THE EPC's Six Core Principles to underpin a 21st century copyright framework

Principle 1: Assuring the incentive to invest

'Trusted' content recognisable through brands is essential to the public interest and its continued creation in the digital world requires sustainable business models for publishers. These in turn require a strong foundation in copyright and the ability of publishers to licence and provide access to their content in the way they think fit.

Copyright is the basis for making the investment which is necessary to create that content from the outset by providing the mechanism to ensure the necessary return on that investment. As the Commission's recent 'Reflections Document' puts it, *"Copyright is the basis for creativity. It is one of the cornerstones of Europe's cultural heritage, and of a culturally diverse and economically vibrant creative content sector."* It goes on to cite that the cultural and creative sectors generate a turnover in excess of €650 billion p.a., contribute 2.6% of EU's GDP and employs more than 3% of the EU work force.

But for copyright to function as an effective *incentive* in the digital world *"as the basis for creativity"*, publishers must have the opportunity to adopt the business models of their choice, just as consumers will decide which content - and which business models - they prefer.

In the words of one of our members: *"Nobody can be forced to create or publish value-added and trusted content. This originates from copyright legislation, which has enabled an abundance of content available ever more widely at ever lower prices. This is a positive outcome for society and it should not be mistaken for an accident or a force of nature. The best guarantee of continued wide availability of valued and trusted content is copyright and the ability of creators to be rewarded for their success. It is a mistake to think that the internet demands any fundamental change in copyright - we just need better mechanisms for implementing it in the digital era."*

Principle 2: Preserving choice

The EPC members share the Commission's goal of creating more choice and diversity for consumers in digital content services. The EPC also notes that the 'Reflection Document' contains an insightful analysis of many of the issues that we face in the transition to the age of digital content.

However, there appears to be an implicit assumption that the 'exclusive

rights' in copyright are inherently inefficient and should be replaced with an extended or mandatory collective management system coupled with the introduction of alternative remuneration models which are not market driven.

Collective management offers creators little or no choice about the terms on which their content is offered. While this is appropriate in secondary markets where the benefits of the efficiencies this brings outweigh the disadvantages for creators and consumers alike, when applied to a primary market it will tend to act, like all monopolistic or undifferentiated markets, as an inhibitor of competition and choice.

Based on our members' experience, the starting point for achieving a goal of more choice for consumers and greater diversity in digital content services in the publishing market, lies in preserving the publishers' right to choose the terms on which their content is accessed and used, and the channels through which it is distributed.

21st century rights management must be built on choice. This means the choice of the author or rights holder to create and to licence their content through new, innovative business models on the basis of prior authorisation. Bear in mind that 'prior authorisation' in the digital world has the potential to require only 'one click'. A rights management infrastructure fit for the 21st century will make Europe's rich creative content assets available on a pan-European basis in the seamless way that the internet works, with machine to machine communication of permissions and transactions, consistent with the balance of rights, exceptions and limitations built into our copyright system.

Principle 3: Freedom of licensing solutions

A world in which consumers and citizens expect to have access to a range of services delivered to their fixed or mobile device of choice requires a range and variety of licensing solutions developed by content owners and service providers together to meet those access requirements.

Where the correct incentives exist, rights are easier to license. In a well functioning market, demand creates an incentive to supply. Where this is not happening, the demand for copyright licences (or the belief that they are not needed) does not bring with it sufficient reward to justify investment, especially in the light of existing substantial piracy. This leads both to the non-emergence of appropriate rights-clearance systems and also a reduction in investment in and making available of content creation. This is a perverse outcome, which should be addressed by legislators positively, by creating a balanced environment for a market to emerge, rather than negatively by removing legal rights and enshrining market failure in law.

Much of the discussion about copyright in the “Reflection Document” and in recent speeches from European Commissioners concerns the issue of cross-border rights clearances which are needed to deliver pan European services within the music industry.

We are not aware that any real barriers exist to multi-territorial licensing in publishing. As demand from consumers for content and services from outside their home territory grows, licensing solutions will evolve to meet that demand. In the publishing industry the territorial nature of copyright does not constitute a barrier to providing pan European services. As an example, the services marked with an * in the Annex are all available in several or all Member States. Often, it is language, not rights clearances, which constitutes the “territorial” limitation to cross-border demand and as a result, reduces availability.

The publishing industry has for many years operated within a system where primary and secondary licensing co-exists, according to whichever method seems most appropriate within their businesses and to meet the requirements of their customers and other users. In the future, we see this same co-existence continuing. As the examples in the Annex show, publishers are increasing the number and variety of online services they offer. At the same time, the repertoire of licences available from collecting societies mandated by publishers is also increasing.

The key point is that publishers should remain free to choose whichever mix of licenses seems best suited to their business models which, in turn, are driven by their customers or users.

Whilst the EPC acknowledges that there are some challenges faced in some sectors of the creative industries in the clearance of rights, we consider that it would be wrong to extrapolate from that need a new ‘one size fits all’ solution to all sectors of the creative industries, especially to publishing which has a proven track record in developing innovative services and licensing solutions.

For example, take the Press Database and Licensing Network - [PDLN](#). This includes publishers from different countries - currently Australia, Austria, Belgium, Denmark, France, Germany, Ireland, Portugal, Switzerland and UK - who are coordinating their activities as regards newspapers’ licensing at national, EU and International level providing access to digital articles through a central access point. One of PDLN’s stated aims is “...supporting international cooperation between press owned database and licensing organizations leading to more efficient international licensing of press articles worldwide, for content owners, intermediaries and users.

Principle 4: Powering access through a rights management technical infrastructure

The missing link in completing a thriving market for creative content in Europe is not copyright itself. It is the lack of a rights management infrastructure fit for complex digital markets to enable access to Europe's rich creative content assets available on pan-European basis at a click, and in a way which is consistent with the balance of rights, exceptions and limitations built into our copyright system.

Whilst this technical infrastructure will be complex and diverse, its purpose is simple. It is to automate (and thus simplify) the process by which a person who wants access to content can use their fixed or mobile device to search for it, find out who owns it, find out what permissions attach to its use, get those permissions, pay for it (where it's part of a paid-for service) and then enjoy the content. It is also the method by which the authors and other creators will get paid.

There are already important initiatives underway in the fields of technical standards, software-based services for expressing permissions and clearing rights, and the development of meta-databases. 'ARROW', to which we refer later, is a leading-edge example of one of the critical elements of rights management infrastructure for the 21st century - a distributed rights registry.

In the area of machine-readable permissions, we believe that mechanisms such as ACAP - the Automated Content Access Protocol³ need to be more widely considered by the European Institutions and national governments as the type of solution online which gives the same legal status as any other kind of licence. These mechanisms work in the way in which the internet works, facilitating real-time mass processing of data, for a wide range of content aggregation and consumption. This automated rights management system reduces the need either for one-to-one human mediated licensing, or for delegated collective licensing of primary rights. In the longer term this will create a more plural and competitive landscape for content creators to the ultimate benefit of consumers. This in turn provides an incentive to investment in content and helps restore the link between success in reaching an audience and financial reward.

This infrastructure can, of course, accommodate content delivery and clearances by rights holders directly but equally by other intermediaries such as collecting societies who can also benefit from the greater efficiency of automated management of their delegated rights, speeding up the processes of distributing remuneration.

³ www.the-acap.org



In short, making copyright fit for the digital age does not require fundamental change to copyright law. Instead, the application of the law must be made more efficient in order to remove barriers to ease of transaction. There is much work to be done to complete this infrastructure and we call on the Commission actively to promote and support initiatives in the field of technical standards such as ACAP and to encourage their widespread adoption.

Principle 5: Ensuring a balanced digital agenda

The copyright system is and always has been about balance and it is vital that the balance is maintained in the digital era. The Commission's 'Reflection Document' identifies 3 key criteria for creating *"a modern, pro-competitive, and consumer friendly legal framework for a genuine Single Market for Creative Content Online:*

- *creating a favourable environment in the digital world for creators and right holders;*
- *encouraging the provision of attractive legal offers to consumers and*
- *promoting a level playing field for new business models and innovative solutions for the distribution of creative content.⁴*

We agree with those criteria. Complying with them though requires a balanced, proportionate and nuanced approach to the issues arising from the digitisation of content such as the 'orphan works' and 'out of print' works noting two specific points:

1. These works are orphan or out of print mainly because of lack of interest. Where strong demand exists material remains available for a long time, up to and beyond the term of copyright. But as the cost to serve drops so the availability of works, even where demand is low, will increase. So the copyright framework also creates the incentives for commercial solutions (orphan works could, for instance, be addressed by insurance companies without any legal changes whatsoever).
2. Works become orphan or out of print because of the huge amount of investment in *new* works. In 2006 more than 200,000 books were published in the UK alone. This emphasis on new works is a good, not a bad, thing and suggests that demand is mainly met through these new works. Again, the market produces positive outcomes and the market can, if allowed, address the perceived negative aspects.

It is essential that the approach taken to those issues recognises that we are in a transitional era and that any legislative solutions do not remove or

⁴ Source : 'Reflection Document, page 3.



dilute the future commercial incentive to creators, publishers and other producers to create and provide access to their content on the terms they choose to meet their customer and consumer requirements.

Principle 6: Recognising the publishing industries' unique role

We made the point at the beginning of Part 1 of this document that the press in particular and the publishing industry in general play a vital societal and cultural role. The Commission's 'Reflection Document' draws a number of important distinctions between the publishing industry and other sectors of the creative industries. For example, it observes that the online distribution of in-print books is more straightforward than other sectors.

We urge policy makers to bear in mind the importance of a sectoral approach, recognising those industries where voluntary solutions to the issue of digitising and making available 'born digital' content is an increasing reality without the need for legislative intervention.

PART 2: The EPC Copyright Propositions

In Part 2 of this Vision Document, we have set out a series of **Key Propositions** based on the six **Core Principles** set out above, which we believe should shape copyright policy. This will enable the creative industries to flourish and Europe's citizens, consumers and business users to have access to the full range of content they want across a range of fixed and mobile devices.

Proposition 1

In order to

- (a) recognise and incentivise investment on the part of Europe's publishers in new services for digital content and**
- (b) ensure that publishers will be in no less favourable a position in the online area than other producers and distributors of digital content**

We call on the Commission to open a dialogue with the EPC to investigate whether either or both of the following measures should be introduced:-

- **a measure similar to that contained in Article 2.3 of Council Directive 91/250/EEC of 14 May 1991 (the Software Directive) so that any work created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the work so created, unless otherwise provided by contract; &/or**
- **a new publisher's right to recognise their investment (human, technical and financial) in producing and making available press products.**



The two measures referred to in this first proposition are based on Principle 1⁵.

Professionally produced, independent journalism and other forms of 'trusted, editorialised content' are indispensable to freedom of expression and the maintenance of democracy. Certainly, the internet and social media provide exciting opportunities for the citizen to create his or her own content. User Generated Content (UGC) will certainly co-exist with professional journalism but the public interest will not be served if UGC became its sole replacement.

The production of professional journalism, with the legal risks and liabilities it entails, requires substantial financial, technical and other forms of investment. No business can exist without a means to ensure a return on that investment. As the Commission noted in its recently published "Reflection Document"⁶, *"Right holders want to ensure that they are remunerated fairly and adequately when their works are used on digital platforms."*

Without a firm foundation and incentive built on copyright and neighbouring rights to ensure a fair commercial return, new business models created by publishers to meet the demands of business users and consumers will be built on sand. Whilst the publishing industry would not disappear, quality and diversity of editorialised journalism will undoubtedly suffer as investment continues to decline and jobs will also be lost.

The two elements of this proposition would create the appropriate incentive for publishers to invest in the creation and dissemination of content online. In particular, we call on the Commission to discuss with the EPC how a new publisher's right could put the publishers in a position whereby they have a sound legal mechanism for licensing their content in the online environment, making it easier for them to licence that content and ensuring that they are in no less favourable a position than other rights holders, producers and distributors of digital content.

⁵ P1: "Maintaining copyright's fundamental role to provide the incentive to invest in the creation and dissemination of creative content."

⁶ "Creative Content in a European Digital Single Market: Challenges for the Future, 22 October 2009"

Proposition 2

The EPC calls on the Commission to:

- **respond to the call made by the Council to contribute by means of all relevant policies to the fight against all forms of piracy of copyright content and**
- **to ensure full implementation and respect for the EU Enforcement Directive (see footnote 5)**

Rationale for Proposition 2

This 2nd Proposition is also based on Principle 1.

Combating piracy⁷ is essential in encouraging and facilitating legal offers of content to thrive online, a core part of incentivising the creation of new digital content services as expressed in Principle 1.

The EPC supports the widely held view that there are two essential and interdependent requirements to creating a vibrant and sustainable market for digital content online. The first is the availability of 'legal offers' - online services such as those offered by our members, examples of which appear in the Annex to the document. The second is the availability of effective legal measures and sanctions to combat all forms of piracy of copyright material.

This inextricable link between the fight against piracy in the digital environment and the development of legal offers of digital content is well recognised by the Commission and by the Council - see, most recently, the 'COUNCIL Conclusions on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment'.⁸

A recent article in [The Guardian](#) (23rd November 2009) referred to the fact that *"Record labels are pointing to the dramatic rise in music sales in Sweden, just months after the country introduced anti-piracy laws, as evidence of what a similar crackdown in Britain could do to the flagging market."*

The article went on to state that *"Figures from the record labels association [IFPI Sweden](#) show revenues rose 18% in the first nine months of this year, a significant reversal from seven consecutive years of decline."*

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:319:0015:0017:EN:PDF>
http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm

footnote 6 : http://ec.europa.eu/internal_market/iprenforcement/directives_en.htm

⁸ (2008/C 319/06)



Much of the rise came after April's implementation of an anti-piracy law and a ruling against the operators of The Pirate Bay file sharing site.

In this context, it is important to have a clear understanding of 'piracy', which can occur in the 'B2B' market as well as elsewhere, and of the variety of technical means by which it takes place, whether via 'peer to peer' services, websites illegally hosting content or otherwise. The way the publishing sector is affected by piracy differs from the situation in the music industry, but the vulnerability (due to ease and low cost of illegal storage and dissemination) is comparable and requires coherent measures in order to protect the functioning of an otherwise sound market.

It is also important that there is a full and proper valuation of the role played by all those within the 'copyright value chain', to ensure that with benefit goes responsibility. In particular, we think it is important to undertake

- (a) a thorough analysis of the role and effect of content aggregators and
- (b) to ensure that reproductions or displays of copyright material for commercial purposes (e.g. by linking and/or using search engine technology and copying a headline and head-note/photograph) are treated within copyright law as a "distribution or making available of work to the public.

Proposition 3

The EPC calls on the European Commission to ensure publishers' freedom to choose the licensing solutions which they consider best suited to give business users and consumer access to their products and services across a wide range of digital platforms and devices whilst at the same time enabling publishers to build sustainable business models for the digital content market.

Rationale for Proposition 3

This third proposition is based on our second and third principles⁹.

In developing its copyright agenda, the EPC calls on the European Commission to take full account of the following factors:-

- Publishers are leading the way in developing new services for digital content. The Annex to this Document contains links to a number of these services.

⁹ P2: "Maintaining the right of publishers and other rights holders under copyright law to choose the terms on which their content is accessed and used". P3: "Freedom of choice of licensing solutions."



- However, the development of legal online content services is constrained by the challenges which the publishing industry faces in developing sustainable, paid-for services. Whilst to some extent this is a business challenge arising from the impact of the Internet and digital technologies, it is also due to continuing uncertainties, particularly lack of respect for and acknowledgment of the central role played by copyright.
- Apart from this business uncertainty, where there is willing collaboration between publishers and other businesses to conclude and respect licensing terms and conditions, the publishing industry does not face significant barriers in developing licensing solutions on a pan European basis. In our comments on Principle 3, we have already mentioned initiatives being taken by publishers in the field of pan European services. Another example is the service available at www.relay.com which allows downloading against payment of PDF versions of the periodical press worldwide, without any territorial restrictions. In short, where there is market demand for cross-border services, publishers will seek to meet that demand.
- Equally, the Commission should recognise that, on the 'supply side', markets for media/press products are in many cases still territorial - language and cultural differences, for example, mean that there are few genuinely international mass market newspapers, magazines or even TV channels. What is appropriate for one audience in one territory may be unappealing to another audience in another territory. While a better functioning system for rights management and clearance would obviously help, it is important that copyright owners remain free to make their content available on appropriate terms in different territories (depending on consumer demand and expectations).

Proposition 4

The EPC calls on the European Commission to

- **promote an EU-wide roll out of an e© or i© symbol**
- **continue to encourage the development of technological solutions for rights management and**
- **ensure that they are effective in law, recognising that technology is an enabler of rights management, not a replacement for copyright**

Rationale for Proposition 4

This proposition is based on the fourth core principle¹⁰ and the observations

¹⁰ P4: "Powering access through the development of a rights management technical infrastructure....."

we have made above concerning the vital, enabling role played by the technical infrastructure.

As Commissioner Reding observed,¹¹ *"I also believe that new technologies can support rights management and enforcement."* As the the EPC would put it, *"Technology can be an enabler to find the right solutions, but should not replace copyright."*

These are core parts of the technical infrastructure for digital content services, in the form of databases of metadata and machine readable permissions, which enable users and consumers, click by click, to get what they want. That is, to search for content, see the permissions attaching to that content, choose the content they want, pay (in the case of paid-for content) and then enjoy the content by streaming, download or otherwise to the chosen device.

The solution to dealing with the complexity of rights management in the digital age is not by diluting copyright, extending the use of compulsory licensing or by 'downgrading' copyright to a mere right of remuneration. Instead, the right approach is to use technology to manage that complexity. One step towards managing that complexity would be to create an instantly recognisable symbol for all websites, which encapsulates not only the © symbol but also the electronic nature of rights management and permissions.

We therefore encourage the Commission to establish a project for the development of a symbol/icon to show to any visitor to any website, whether human or machine, that permissions are attached to the content on that site. This should be both machine and human recognisable, and could link directly to machine-readable terms of use for example e© or i© or similar.

The value of such a symbol or icon would be to point the way to the right management information, so that it was recognisable as such by the human or machine in question. In this way we instantly communicate to the user that copyright material is available to be accessed and used and that it is easy to find out the permissions that apply. The rights information would then be communicated using whichever language or protocol (such as ACAP) which the site owner chose to use. This would encourage, but not mandate, the emergence of standardised language but would also allow humans or machines which did not understand the instructions to recognise their existence and in the absence of unambiguous permission or legal right, avoid copying the work in question.

¹¹ Viviane Reding, Speech: The convergent publisher – Print media in the broadband economy, Publishers Forum, Brussels, 6 December 2007 [SPEECH/07/788]

As our members have observed: *“Such a symbol could be very helpful and bring a great value of awareness-raising on copyright, and should possibly be subject to an EU-wide public information campaign.”*

Proposition 5

Press archives are a substantial part of the publishers’ patrimony. Digitisation of any existing collections in libraries and archives must therefore be subject to prior consent of publishers. It is up to the publishers to decide if their archives should be available or not, and under which terms and conditions.

Rationale for Proposition 5

This is based on the fifth principle.¹² the EPC agrees that ‘orphan works’ is a particular issue which requires a proportionate, legal solution (see also Proposition 6).

The EPC endorses the potential benefits to citizens and consumers, and to authors and other rights holders, of making more content available in digital form that is currently only available in print. Fundamentally, this is an ‘analogue’ legacy issue, not one that applies to new works made available *ab initio* in digital format. Furthermore, any initiatives designed to encourage digitisation should not undermine the ability of authors and other rights holders from having control over the digital exploitation of their works.

In finding the appropriate solutions, it is important to distinguish clearly between the following categories of works (1) in copyright and commercially available; (2) in copyright but ‘out of print’; (3) ‘orphan works’ and (4) works in the public domain.

In a number of its recent Communications and other documents, the Commission acknowledges the need for public and private partnerships to meet the ‘Herculean task’ of digitisation.

Appropriate direct licensing arrangements are needed in the case of works which are still in copyright. This should also apply to ‘out of print’ works which, except for the minority of orphan works, which have rights holders who are both identifiable and locatable through an adequately “diligent search”¹³. For that reason, the EPC does not support the notion of

¹² P5: “A balanced Approach to the challenge of digitisation.”

¹³ A point made by Statement of Marybeth Peters, The Register of Copyrights, before the Committee on the Judiciary in respect of the Google Settlement

extended collective licensing applying to 'out of print' works nor to works belonging to 'non-mandating' rights holders who freely choose to be outside a licensing collective scheme.

Proposition 6

THE EPC calls on the European Commission to develop an appropriate, harmonised approach to the issue of Orphan Works, based on the principle of a 'diligent search' on the lines proposed by the High Level Expert Group, combined with an appropriate collective management solution.

Rationale for Proposition 6

This principle is also based on Principle 5.

The EPC supports solutions based on a sectoral approach and stresses the importance of respecting the principle of diligent search. We support the 'ARROW' Project because it recognises the critical role of gathering and managing of rights and licensing information.

We support the approach which ARROW takes, not least because it does not have the ambition to become a new licensing organisation. Rather, it is a way of creating the infrastructure necessary to make connections between potential users and potential licensees, through a distributed data network - an exchange.

Whilst its focus is the digitisation of printed books, we are also confident that ARROW will provide a test bed for many of the concepts which are essential for similar projects in different media and for offering different types of permission.

The EPC members are very well aware that the development of orderly and well managed market infrastructure for rights licensing - both for business-to-business and business-to-consumer transactions - is essential for the management of copyright in the digital age. Projects such as ARROW and ACAP are at the forefront of the design and development of that infrastructure.

However, the EPC also calls for caution in the way in which any collective management solution for 'orphan works' is implemented:

- the issue of 'orphan works' should be seen as a transitional issue as we move into a 'born digital' world where, increasingly, rights



metadata will be associated with content to enable, amongst other items of information, the rights owner to be identified.

- care must be taken to avoid a situation in which works can too readily become 'orphaned' by defining the scope of "orphan works" too broadly so that, for instance, works protected by copyright can too easily become 'orphaned' because metadata on the author and/or other relevant right holders becomes missing or outdated.

Proposition 7

THE EPC calls on the European Commission to

- **resist firmly any move in the direction of extending mandatory exceptions to copyright unless there is a proven case that the existence of different national exceptions constitutes a real barrier to the movement of services within the common market and**
- **evaluate whether such proven barriers could not be overcome by adaptive innovation through licensing solutions.**
- **encourage collaboration amongst all stakeholders to ensure that existing exceptions and limitations are accommodated within licensing solutions,**
- **Support developing automated methods of facilitating the operation exceptions.**

Rationale

This proposition is based on Principle 5.

The introduction of additional mandatory exceptions is unnecessary and potentially damaging to an environment in which Europe's creative industries will flourish and in which citizens, consumers and business users have access to the full range of content they want across a range of fixed and mobile devices. We consider that licensing solutions, which are able to take account of exceptions and limitations, are the best and most effective way of achieving this goal.

The updating of specific exceptions at a national level may well be appropriate and indeed this is already occurring in some individual jurisdictions. For example, following the Gowers Review, certain exceptions under UK copyright law in the field of libraries and education are being reviewed. In that context, it is worth noting that certain exceptions only apply in the absence of a licensing solution.

Education also has an important role to play; including the development of sector- specific guidelines to explain to users what is and is not permitted to them under copyright.

In particular, we observe that the relative absence of legal proceedings before European courts on the effect of exceptions in the 'B2B' market illustrates that the scope of exceptions and limitations is generally well understood and that most disputes can generally be resolved by reasonable negotiation.

We note that comments in the Commission's 'Reflection Document' regarding what it describes as "public interest" exceptions. We welcome further dialogue between stakeholders, especially in the case of exceptions that may be required to assist persons with a disability. Our members are keen to explore solutions that facilitate access to the works they publish by people with disability in reading or accessing digital media, and welcome the opportunity that digital delivery affords to make all new works fully accessible through mainstream distribution channels and on platforms that are appropriate to all potential users.

The EPC opposes any proposal for a general 'fair use' exception'. The concept of "fair use" is an alien concept drawn from US copyright law (which has developed from a different place and in a different way from Europe). The recent Google Book Search litigation, which failed to resolve the scope of 'fair use' even in the US, illustrates the extent to which a "fair use" defence increases the uncertainties around potentially infringing uses of content. We believe that it is unhelpful to increase uncertainty at this time, not least because it would be likely to lead in the direction of a massive increase in litigation.

Proposition 8:

The EPC, while maintaining an open minded approach to the development of copyright, calls on the European Commission to apply a test of 'adaptive innovation' not legislative change to deal with significant technological and market developments.

This proposition is based on several of the Principles set out earlier in this document.

Rationale

In its 'Reflection Document', the Commission floats a number of ideas for more radical reform of the copyright system in order to "streamline rights management across the Single Market", including the notion of a "European Copyright Law" or, as a different approach, alternative forms of remuneration.

Whilst we welcome innovative thinking, the existing system of copyright has shown itself to be more than capable of adapting to innovation and significant technological and market change.

The recurring theme of this paper is that technology can be used to manage the complexity of copyright. With the right systems in place, these tools can be used to manage rights - locate works, the permissions associated with them, handle clearances and make them available - on a global basis.

It is also true to say that a European or other form of 'unitary copyright' would not necessarily eliminate the notion of territoriality. 'Virtual communities', markets delineated by linguistic boundaries and other factors mean geographic boundaries will likely be replaced by other forms of boundaries for rights management purposes.

Concluding remarks

We have set out Six Principles in this document for the future of copyright law and the copyright-dependent industries, for the benefit of European society and culture.

We have taken those Principles and expressed them in the form of eight reasoned Policy Propositions and Calls for Action which we believe meet the Commission's objective of finding "balanced and durable foundations for an innovative and competitive market place across Europe".

We call upon the European Commission to open a dialogue with the EPC and our members. We want to work with you to agree the policies and initiatives necessary to create the right environment to maximise the potential of the Internet and digital markets. In this way we can build a dynamic framework for the benefit of consumers, citizens and all stakeholders in the creative industries.

European Publishers Council
December 2009

ANNEX I

(Proposition 4: Examples of new services)

The following examples of new services offered by publishers have been categorised by reference to the country from which (and/or the country of the language in which) each service is made available.

We have marked with an asterisk (*) those services which are available in several or all Member States (or, indeed, globally).

For example, where a publisher in France makes French language content available on a French website for access and download by users worldwide, this will appear under 'IV France' below and marked with an asterisk. ,

I International

The following services are positioned as serving the global market, with worldwide sources and focus, rather than being country-specific.

- www.factiva.com*: *large subscription database of world news and business information with more than 28,000+ leading sources from 157 countries in 23 languages.*
- www.lexisnexis.com*: *across the globe, LexisNexis provides customers with access to five billion searchable documents from more than 40,000 legal, news and business sources.*
- www.ft.com*: *subscription-based news content services accessible worldwide by website and mobile.*

II EU

The following services have a European focus and serve the European market only.

1. **EuroPressNet***: *a consortium of partners from twelve European countries involving national libraries, press agencies, digital editions of newspapers, universities and technological institutions in a joint effort to aggregate digital content and ensure their enrichment and diffusion through Europeana and with the creation of a new business model. EuroPressNet is expected to provide to Europeana significantly higher quantities of quality content (see attached summary below).*



europressnet_summa
ry.docx

- www.spotify.com*: *Spotify offers legal and free access to a huge library of music. Users can choose free (advertising-based) or premium (paid-for) access. Spotify is currently available in Sweden,*



Norway, Finland, the UK, France and Spain.

III UK

- <http://archive.timesonline.co.uk/tol/archive/>*: Services such as The Times Archive, which represents hundreds of years of content and a very substantial investment, show that content is made available online to those who could never previously have access in a new and revolutionary way.
- www.nla.co.uk eClips: The NLA's eClips system represents a huge investment by the UK newspaper industry and a substantially improved service for end users and intermediaries.
- Associated Newspapers Limited: Publishers are leading developers of new online content services. Associated Newspapers Limited offers numerous commercial website services including:
 - National newspaper companion sites (e.g. MailOnline)
 - Local newspaper companion sites in the Northcliffe division (e.g. www.thisisbristol.co.uk, www.thisisdevon.co.uk)
 - Recently launched large regional focused website which targets those communities of 30K-50K population that are not currently serviced by a local newspaper: www.localpeople.co.uk
 - Digital publishing and new product developments sites (e.g. www.thisismoney.co.uk, www.lastingtribute.co.uk, www.holdthefrontpage.co.uk, www.thisismotors.co.uk)
 - Recruitment sites (over 30 including www.cityjobs.com, www.euromoneyijobs.com, www.just4graduates.net, www.jobsite.co.uk, www.justtechnicaljobs.net, www.retailcareers.net)
 - Motoring and holiday sites (about 20 including www.teletext.co.uk, www.motors.co.uk,)
 - Dating sites: subscription-based (www.datingforparents.com)
 - Property sites (www.findaproperty.com, www.primelocation.com)
 - Productionbase.co.uk: subscription based.
- Financial Times
 - "FT articles are available on FT.com for free on a limited basis. Registered users can access up to 10 articles a month at no cost. Unlimited access requires a subscription. This can be done either by purchasing a single subscription to FT.com for an individual's personal use. Or by buying a group subscription for many people to have access rights.
 - The Financial Times introduced a direct licence in April 2008 for rights to have unlimited access to Financial Times journalism on FT.com and via 27 other authorised agents (a list of agents and further details are available at



<http://www.ft.com/corporate>). The price per subscriber is based on the number of users not the technology platform. There are discounts available for large group licences. The FT licence has been designed to allow users of Financial Times content to pay for content independently of the cost of the technology platform it is accessed via.

- 120,000 people and more than 700 organisations pay for the right to have unlimited access to Financial Times journalism online. The direct licence is designed to ensure FT customers pay once to access FT journalism on many platforms, they only pay the FT for this right and the price is independent of the platform used to access. This ensures transparency of pricing and consistency in the licensing of access to the Financial Times' business news and analysis on a global basis."

IV France

- www.relay.com*: *French language site allows paid-for downloading of pdf versions of the French language periodical press worldwide, with no territorial restrictions.*
- www.lejdd.fr*: *"Journal du Dimanche" online newspaper ("L'actualité en temps réel")*
- **iPhone applications:** *e.g. "Premiere"/"Public"/ "Télé 7 Jours" magazines for iPhone.*

V Portugal

- www.imprensaregional.com.pt: *newspaper portal (Portuguese media offering commercial services online are at an early stage).*
- **PBS:** *The PBS has a small online offering in Brazil and Micronesia countries.*

VI Italy

- www.premiumpublishernetwork.com: *founded in January 2009, this provides access to national and wired news, local news, magazines and radio (see attached summary below).*



Premium_Publisher_Network_9th November

VII Germany

- Magazine contents can be accessed worldwide through commercial databases like LexisNexis (with 170 German content partners, cf. <http://www.lexisnexis.de/partner/partner?ArtikelNr=GNB>)*, Dow Jones Factiva (<http://www.factiva.com>)* or Genios (http://www.genios.de/r_startseite/index.ein)*.

ANNEX II

MEMBERS OF THE EUROPEAN PUBLISHERS COUNCIL

Chairman:

Mr Francisco Pinto Balsemão, Chairman and CEO, Impresa Publishing, Portugal

Members

Ms Sly Bailey, Chief Executive, Trinity Mirror plc, UK

Dr Carlo de Benedetti, Chairman, Gruppo Editoriale L'Espresso, Italy

Mr Carl-Johan Bonnier, Chairman, The Bonnier Group, Sweden

Mr Oscar Bronner, Publisher & Editor in Chief, Der Standard, Austria

Ms Rebekah Brooks, Chief Executive Officer, News International Ltd, UK

Mr Bernd Buchholz, Chief Executive, Gruner + Jahr, Germany

Dr Hubert Burda, Chairman and CEO, Burda Media, Germany

Mr Juan Luis Cebrian, CEO, Grupo Prisa, Spain

Dr Mathias Döpfner, Chief Executive, Axel Springer AG, Germany

Mr Erik Engstrom, Chief Executive, Reed Elsevier,

Ms Rona Fairhead, Chief Executive, Financial Times Group, UK

Mr Tom Glocer, Chief Executive, Thomson Reuters

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Mr Steffen Kragh, President and CEO, The Egmont Group, Denmark

Mr Christos Lambrakis, Chairman, Lambrakis Press Group, Greece

Mr Murdoch MacLennan, Chief Executive, Telegraph Media Group Ltd, UK

Mr James Murdoch, Chairman and CEO, News Corporation, Europe and Asia

Mr Piotr Niemczycki CEO, Agora, Poland

Sir Anthony O'Reilly, President Emeritus, Independent News & Media PLC, Ireland

Mr Didier Quillot, Chairman and CEO, Lagardère Active, France

Mr Michael Ringier, President, Ringier, Switzerland

The Rt. Hon. The Viscount Rothermere, Chairman, Daily Mail and General Trust, UK

Mr Rolv Erik Ryssdal, CEO, Schibsted, Norway

Mr Hannu Syrjanen, CEO, Sanoma Corporation, Finland

Mr Giorgio Valerio, CEO, RCS Quotidiani S.p.A Italy

Mr Christian Van Thillo, Chief Executive, De Persgroep, Belgium

Mr. Jose Manuel Vargas, CEO, Vocento, Spain

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