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Publishers
Council

GOWERS REVIEW OF INTELLECTUAL PROPERTY

**SUBMISSION OF EVIDENCE BY UK MEMBERS OF
THE EUROPEAN PUBLISHERS COUNCIL (“EPC”)**

21st APRIL 2006

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

This Submission is made on behalf of EPC's UK members - Ms Sly Bailey, Chief Executive, Trinity Mirror plc, UK, Sir David Bell, Chairman, Financial Times Group, UK, Sir Crispin Davis, Chief Executive, Reed Elsevier, Mr Leslie Hinton, Executive Chairman, News International, UK, Mr Tom Glocer, Chief Executive, Reuters plc, Mr Murdoch MacLennan, Chief Executive, Telegraph Group Ltd, UK, Sir Anthony O'Reilly, Chairman, Independent Newspapers PLC, UK and Ireland and The Rt. Hon. The Viscount Rothermere, Chairman, Daily Mail and General Trust, UK.

We welcome this opportunity to contribute to the important work being undertaken by the Gowers Review. The Review correctly recognises that the UK's intellectual property framework underpins the UK's creative industries which, in turn, play a critical role in making the UK a leading player in the global knowledge economy.

We have focused our evidence on copyright and the database right. These are the core intellectual property rights which most directly affect our UK members. However, our members are also creators and users of other intellectual property rights such as patents and trade marks and we have therefore made additional comments where appropriate.

The Review is taking place at a time when the distribution of high quality, high value content online is widespread. In this context, intellectual property rights are sometimes portrayed by some as a barrier to the creation and sharing of our cultural and knowledge resources and assets. On the contrary, our evidence shows that copyright and its related rights are enablers which make it possible for rights creators – the source of Europe's cultural heritage – to make works available through a whole series of online services, examples of which we give below.

EPC

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If the Review Team would find it helpful, we would be pleased to meet in order to discuss any aspect of this Submission.

INTRODUCTION AND GENERAL COMMENTS

EPC fully endorses the evidence-based approach to review the UK's intellectual property framework and this is reflected in our replies below. But evidence has to be placed in, and evaluated within, a context. We have defined that context in this introductory section, based on our members' experience.

The UK's current intellectual property framework ("IPF" for short) has proven to be a very successful driver and sustainer of the UK's creative industries. The Introduction to the Call For Evidence cites the creative industries' contribution of 7.8% to UK GVA in 2003 and its growth of 6% on average over the period between 1997 and 2003. The creative industries contribute £54.8 billion to the UK economy every year. They now account for over 8% of GDP, employ over 2 million people and contribute over £11bn to the country's balance of trade.¹ EPC's UK members are all major contributors to the UK media sector and include four constituents of the FT-SE 100 - Daily Mail and General Trust, Pearson, Reed Elsevier and Reuters.

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

This makes the IPF 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.

The Creative Economy Conference which took place during the UK Presidency of the EU in October 2005 brought together key stakeholders to consider the future of the creative economy and value of intellectual property. 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."*²

We agree with this conclusion. Our members' online businesses are continuing to grow and a strong IPF is fundamental to that further development. Our members see copyright and other elements within the IPF as true enablers of business growth. It makes it possible for them to provide the new services their customers want within a 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 IPF. Here are just a few examples:-

⇒ The publishing industry has been a frontrunner in developing innovative online services.

¹ Statistics taken from a speech by the Rt. Hon. Estelle Morris, Minister for Arts, Westminster Media Forum Seminar, Intellectual Property and Rights Ownership, 9th December 2004.

² The Papers produced by all the Working Groups can be found here - <http://www.creativeeconomyconference.org/Documents/FinalConferencePapers.pdf>

- ⇒ UK newspapers were amongst the earliest media groups to develop websites, either on a free, paid-for or 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, supporting the UK financial services sector.
- ⇒ In the book industry, Macmillan (owned by EPC Member Holtzbrinck) recently announced its 'BookStore' project which will be a searchable repository of digital book content, with e-commerce technology for purchasing titles.
- ⇒ 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.

These examples demonstrate that we are in a transitional phase during which change in the social, cultural, economic and technical spheres is occurring at different speeds. The time taken for the movie and film businesses to develop new business models is an example of this. We must therefore be wary of rushing to legislate to deal with perceived problems which are being solved through market and other developments.

The proven success of the IPF does not mean that it is immune to change. But against this background of proven durability, flexibility and success, and the growth in new online business models, the EPC strongly urges the Review team to approach their analysis of the IPF in the following way:-

1. What is the problem that requires any change to the IPF?
2. How widespread or pervasive is that problem?
3. What impact is that problem actually having in the real world?

The EPC also hopes that the Review team will resist pressures to re-visit issues which have been considered in depth in recent times, much of which related to the impact of the Internet and digital delivery. The IPF, at least as far as copyright is concerned, has been subject to extensive revision over the last ten years, as a result of changes at the international level (e.g. TRIPS and the World Copyright Treaty 1996) and by the European Union.

The Community acquis built over that period comprises seven directives. In particular, The

Copyright Directive³ involved extensive and lengthy debate and negotiation between stakeholders in all the creative industries across the entire spectrum from authors, producers, publishers, distributors to libraries, educational institutions, consumer groups and representatives of users with special needs or disabilities.

It is also important to ensure that the law in general and the IPF in particular, does not become the scapegoat for problems that lie elsewhere. For example, the lack of interoperability between one hardware platform or device and another, which prevents content purchased for one device being played on another, is not a copyright issue. It is a technology issue. The current battle between Sony and Toshiba over their rival new formats – Blu-ray and HD-DVD –for next generation DVs is an example.

Furthermore, although the pace of technological change does not slacken, we must be wary of rushing into further changes to the IPF before the Courts have had the opportunity to apply relatively recent changes to the law e.g. in relation to digital rights management.

EPC agrees that the IPF must achieve a balance between private rights and the public interest. In that regard, the UK courts continue to demonstrate that they are capable of maintaining this balance. The 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.

But the public interest is not synonymous with ‘content for free’. EPC strongly hopes that the Gowers Review will mark a shift away from the polarised debate between ‘rightsholders’ and ‘users’ – them and us, as we move into a much richer world in which digital media makes all of us rightsholders and users.

EPC’s EVIDENCE IN RESPONSE TO THE GENERAL QUESTIONS

Nb:- For ease of reference we have reproduced the Questions in full in bold text and then set out our evidence response to each question.

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

There is no barrier to obtaining copyright or database rights as such because registration of such rights is not required. However, lack of education about IP rights can operate as an informal barrier to obtaining, and therefore exploiting, IP rights. For example, many people think that inclusion of a copyright notice (e.g. “© Jane Smith 2006”) is a prerequisite to claiming copyright whereas, in fact, it only operates to raise a rebuttable presumption of ownership. The need for more focused IP education is a recurring theme in our response to the Gowers Review.

In the patents field, we consider that a European patent regime would be beneficial.

³ Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

The problem is qualitative rather than quantitative. Whilst there are numerous sources of free or paid for information about IP available on the Web and elsewhere, there is a lack of readily accessible information about IP which is both practical and targeted to particular groups. This applies at all stages of the IP supply chain.

For example, many companies, large and small, incorrectly believe that when they commission a third party to create IP such as the design of a website, the IP in that design vests in the commissioner. As a result, they fail to put the necessary agreement in place to secure the IP rights for which they have paid.

Other examples are easy to find. It is difficult for an SME, lacking financial resources and professional advice during its start up phase, to find out how to go about disclosing confidential information and business secrets to potential partners and funders without prejudicing any future patent applications it may wish to file.

The same is true amongst consumers.

EPC welcomes the initiatives of the Patent Office and the DTI/DCMS to help improve education about IP rights. EPC welcomes all attempts to create best practice on IP Education in schools, such as the Patent Office "Think Kit", aimed at 14-16 year olds, and the British Music Rights 'Respect the Value of Music' Schools programme, aimed at 11-14 year old music students. We are also pleased to note that the Patent Office is also looking to see how it can widen the appeal of the Think Kit working with HE and FE aged students.

What is needed is an ongoing, properly funded and concerted programme, backed by Government in delivering this information at the right points and presenting it in a way which is relevant to the recipient. For example, 'Business Link' and other business support services should have the right tools, especially online learning tools, to provide to their clients to help them understand how, where and when IP fits into their business and how it adds value to it.

In that context, e-learning has a very important role to play in creating tools which are as user-friendly as possible. A good example from another field is the 'learning journey' created by Taecanet, an innovative e-learning services company based in the UK. Its aim is to support teachers and students through the delivery of personalised learning by providing a fun, national curriculum based e-learning service - <http://www.taecanet.com/> Also, we would refer the Review to the 'Create' Principles attached at Annex 2.

(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?

As noted, as there are no cost barriers to obtaining copyright and database rights because there are no registration requirements.

However, the professional fees and filing costs of obtaining patents and, to a lesser extent, trade marks may constitute a deterrent to SMEs obtaining those IP rights.

(d) How do these costs compare internationally in your organisation's experience?

It is much more expensive to obtain and maintain patent and trademark protection in the EU as compared to the US, particularly because filing must still be done on a national basis and there are the additional translation costs which can be considerable. If EU as an economic area is serious about competing with the US in attracting investment and encouraging innovation, it needs to harmonise the patent regime.

(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?

No specific comments to make.

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?

As noted in (b) above, there is a lack of sufficient and appropriate education about IP. Lack of education and understanding of IP undermines trust in the IP system as a whole.

(g) Are there specific barriers to obtaining IP rights in your sector?

Generally, the answer is "no", but please note our comments in reply to (a) and (b) about the informal or perceived barriers created by lack of sufficient IP education and awareness.

EPC members invest substantial sums in producing and maintaining databases. We have already mentioned the databases made available online by Reed Elsevier and Reuters. Also, Associated New Media, part of Daily Mail and General Trust, has a number of on-line businesses including www.findaproperty.com and www.jobsite.co.uk which depend on rights in their respective databases to attract viewers and, consequently, advertisers.

The database right is a significant legal underpinning for our members' investments in those database services. EPC members have noted the Commission's Working Paper issued in December 2005, evaluating Directive 96/9/EC on the legal protection of databases. In the EPC's view the harmonised level of protection for copyright in databases, and the database right, introduced by the Database Directive should be maintained.

Some critics of the database right cite it as an example of intellectual property extending to the protection of facts or data. It is therefore worth reiterating that, as the ECJ decisions demonstrate, the database right does not extend protection to facts or data, but only to substantial investment in the production of databases. The EPC's responses to the Commission's consultations are attached at Annexes 3 and 4.

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals?

Please see our comments in answer to (b) above regarding IP education.

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work?

The Patent Office generally does a good job in administering UK copyright, including consulting stakeholders. We encourage the Patent Office to continue to reach out and respond to all sectors of the creative industries and to continue to promote the message of the importance of the creative industries in the UK and intellectual property rights which sustain them. As mentioned above, we also fully support the latest initiatives in improving the education of UK citizens about the role and importance of intellectual property rights. We also fully support the establishment and implementation of the IP Crime Strategy.

It is worth adding that the name “Patent Office” is too narrow for its current remit and does not convey the importance of copyright in the digital age. Furthermore, given the cross-departmental implications for policies in the area of IPR and related rights, we would support better coordination of government policy across relevant departments, particularly in the area of copyright through a dedicated Ministerial function.

2. How IP is used

(a) What types of IP does your organisation use and why?

EPC members use the following types of IP in order to protect their content and enable exploitation and making available of material through licensing:-

- ⇒ Copyright, including rights in the typographical arrangement of published editions.
- ⇒ Database Right
- ⇒ Publication right in unpublished works in which copyright has already expired
- ⇒ Moral rights (where applicable)
- ⇒ Trade Marks
- ⇒ Patents.

Copyright and database rights underpin the day to day activities of EPC members. In simplified, IP terms, their businesses can be broken down as follows:-

- ⇒ Production phase: creating and producing their own copyright material and database products and acquiring by assignment or licence the IP rights to use third party copyright material and databases within such products.

These products comprise physical products (e.g. print products such as newspapers and journals and electronic products such as CDs) and online databases and information services (e.g. subscription and paid for online newspapers and information services).

- ⇒ Distribution phase: delivering physical products directly or via distributors, making available online databases and information services directly to end users as well as via intermediaries such as information aggregators and, finally, via broadcast.

Where moral rights apply to any copyright materials used by EPC members, the applicable contracts will specify how those rights are respected. For example, in the case of an article commissioned by an author, the contract will normally specify how the submitted material will be edited or amended.

(b) To what extent do you seek multiple overlapping forms of IP protection?

The guiding principle followed by EPC members is to take sensible and appropriate steps to protect and secure its investment in the creation of its IP which, as we have already noted, underpins our members' businesses.

As EPC members provide branded products and services, common law and trade mark rights are used to protect the brands in addition to copyright and database rights which protect the content. It is therefore appropriate to make clear that although this Submission is focused on copyright and database right, EPC members regard trade mark rights – both at common law and in registered trade marks - as a key part of their IP portfolio which sustains their businesses.

The content may also be subject to overlapping forms of protection. For example, a website may be protected by the following forms of IP:

- ⇒ Copyright in the structure of the website as a database.
- ⇒ Copyright in the content of the database. This content can be literary works, including software and audio-visual material and artistic works.
- ⇒ Database right in the substantial investment made by the EPC member in obtaining, presenting or verifying the contents of the website as a database.
- ⇒ In some cases, both copyright and registered design right can apply to protect the design of screen interfaces.
- ⇒ Trade marks in the brands under which such products and services are supplied.
- ⇒ By appropriate contractual arrangements to protect non-patentable business secrets and confidential information.
- ⇒ If applicable, by patent applications where the EPC member has created or acquired patent rights.

(c) To what extent are these decisions influenced by sector-specific considerations?

Always. Please see our answer to (b) above.

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

As regards IP valuation, there are two separate issues: First, valuation for accounting purposes. In this context, the introduction of the comprehensive new financial reporting system represented by International Financial Reporting Standards, (IFRS), across Europe and many other countries around the world has left many people doubtful about the results as regards how to value IP for accounting purposes. The second issue is IP valuation in the context of business transactions – whether the sale, purchase or other forms of IP exchange. Valuation in this context is, of course, market driven.

(e) To what extent does the term of IP rights at the margin affect investment decisions?

The answer varies according to the nature of the investment. As a general proposition, there is a disincentive to continue to invest in any depreciating asset as it nears the end of its useful life or, in this context, its 'IP protected' life.

For newspapers and other media, this becomes a more significant issue in the digital economy. Online archives of news, information and other media resources are becoming an indispensable and readily available economic and cultural resource. As such, their value increases over time but is dependent on ongoing investment. That investment can be adversely affected by the term of IP rights at the margin.

(f) How well does the UK IP system promote innovation?

Generally speaking, the system itself works well. However, what is needed is greater education and awareness of the UK IP system so that it is used to maximum effect. Please see our comments in answer to question 1 (b).

Also, the need for education applies both to the IP system itself and the sources of finances and grants which are available to protect IP such as the DTI's Technology Programme.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

Only to a very limited extent.

(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?

With regard to patents, it depends very much on their quality. For example, in the US, we believe the data no longer gives a useful measure of innovation due to the high number of business methods and software patents of questionable validity. In the UK, this problem is less acute.

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

It is important to emphasise that copyright is not a true monopoly right. First, it does not protect underlying facts or ideas – see our comments above regarding the recent decision concerning the *Da Vinci Code*. Other examples of this principle can be found in the software field e.g. where two computer programs may be very similar in their functionality but provided that each is the result of independent skill and labour, each will be protected as copyright works. Second, it is not infringed by taking 'insubstantial parts' of a work and, third, UK copyright legislation contains numerous exceptions to copyright protection.

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?

Generally, this is rare in the publishing and media industries in EPC members' experience.

However, the practice of 'cybersquatting' is an example of seeking to prevent a legitimate trade mark owner from using its mark in the online field. This needs to be distinguished from the practice of defensive domain name acquisition by trade mark owners which is acceptable until such time as WIPO registrars are able to establish proper rules for the provision of accurate and verifiable information about registrants and until cybersquatting or any other form of 'domain name squatting' is eliminated.

Equally, the domain name resolution procedure operated by WIPO is important in this field, as are remedies available through the Courts for trade mark or passing off actions.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

EPC members are both owners and users of IP, principally copyright and database right.

In terms of copyright, it is relatively easy for EPC members to obtain permission from third parties, where required, to use their copyright material for commercial purposes.

In some cases, principally reporting news or current events, a specific exception applies and, as a result, no permission will be required. It is appropriate to note that in view of the fact that all but one of the exceptions in the Copyright Directive were voluntary, reliance cannot be placed on the UK fair dealing exception for reporting news and current events on a pan EU basis.

For EPC members, rights acquisition and clearance is dealt with primarily on a 'one to one' contractual basis through copyright assignment, licences and permissions.

Rights clearances are also obtained through collecting societies. In the case of the publishing industries, this is required to a limited extent and is dealt with via the Copyright Licensing Agency are also obtained where required in order to photocopy, scan and email extracts from third parties' books, journals and periodicals.

In the case of radio and television, rights clearances through collecting societies is a more significant activity, in view of the inclusion of performers' rights, musical works, films and other third party material in broadcast programmes.

EPC members, as owners and users of IP, strongly endorse all initiatives which make it easier and more cost effective to clear rights, provided that rights holders have the freedom to choose the rights which they wish to mandate to collecting societies.

EPC members welcome the principles contained in the European Commission's Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services. Recital (8) puts it very succinctly: *"In the era of online exploitation of musical works, however, commercial users need a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial."* This is applicable to the online exploitation of all works, not only musical works.

Difficulties can arise in relation to rights clearances where the owners of works cannot be traced. This is where rights management information has an important role to play. Please see our evidence in response to the questions concerning digital rights management and 'orphan works' set out below.

(b) What mechanisms do you use for finding potential licensing partners?

EPC members use a wide variety of mechanisms. Depending on the particular media sector, licensing partners may be found through existing contractual arrangements and ventures, business contacts, introductions through third party intermediaries and agents, exhibitions, trade fairs, other 'one to one contacts' and by online methods including the use of search engines.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

N/A as EPC members are engaged in the commercial use of copyright material and do not therefore rely on such exemptions.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

See our comments in (a) above.

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

No specific comments to make.

(f) Are there specific barriers to licensing IP in your sector?

See our comments in (a) above.

Also, we note with regret that HMT has decided to exclude Crown Copyright and the regulations surrounding Government-originated information from the Gowers Review. EPC believes that HMG should take the necessary steps to make Government-originated information readily available to the commercial publishing sector. In that context, we note that the OFT is expected to publish its report in the Autumn and that recent press reports suggest that the OFT has found examples of public monopolies fixing prices and taking advantage of inside information to drive innovative private competitors out of business – see, for example, the following article published in the Guardian Online on April 13 2006 - <http://technology.guardian.co.uk/weekly/story/0,,1752262,00.html>

(g) Does your organisation use methods to facilitate exchange of IP - such as cross licensing or pooling IP rights with other firms or organisations?

In the media field, EPC members regularly syndicate their material to other newspaper and media sources in both print and electronic form. EPC members also license certain uses of their copyright material through collecting societies such as The Newspaper Licensing Agency - <http://www.nla.co.uk/>

Other forms of intra-publisher collaboration include co-publishing deals and consortia.

Also, in the online world, the ability to use rights management information to find works online, and to identify and clear those rights online, becomes as important as offline methods of exchanging rights.

For example, CrossRef (<http://www.crossref.org/>) enables the assignment of Digital Object Identifiers for **journals** (working papers: journal title, volume, issue and article), books (title, chapter/section/entry) and **conference proceedings**: (multi-volume title, title, paper) and component parts of such works and materials.

CrossRef operates a cross-publisher citation linking system that allows a researcher to click on a reference citation on one publisher's platform and link directly to the cited content on another publisher's platform, subject to the target publisher's access control practices. Its citation-linking network today covers millions of articles and other content items from several hundred scholarly and professional publishers. This is another example of the rights management infrastructure being built today by the publishing industry that enables users to get what they want – to search and locate content irrespective of who owns it and where it resides.

(h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools?

We have nothing to add to our previous comments regarding the licensing of IP rights.

(i) Are there barriers to trade and exchange of IP internationally?

Notwithstanding the TRIPS treaty, the EU Trade Barrier Regulations and industry-led anti piracy campaigns, piracy continues to be a major barrier to the legitimate trade and exchange of IP internationally.

Losses caused by piracy in the form of counterfeit goods, copyright infringing products and illegal file sharing are a significant barrier. For example, according to research commissioned by the British Video Association, DVD piracy cost the UK video industry approximately £300m in 2004 and between 20-24m lost unit sales.

Our members are victims of piracy on a regular basis across all the sectors: newspapers, magazines, online databases, internet sites, books and broadcasting services. For example, Reuters estimate that they get at least 2-3 similar cases a month just in Europe. The most frequent case is where their content from the web or via another data source is taken without their permission and redistributed for profit by the infringing party. Whilst we cannot name the infringers for legal reasons, we have been provided with details of a number of such infringements involving unauthorised redistribution of Reuters content via the web, newsletters and subscription services.

Combating piracy requires a multi-strand approach, including legal enforcement, co-ordination between Governments and education about IP's importance.

(j) Does your organisation consider renewing patents using “licence of right” provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?

No specific comments to make.

(k) What could be done to improve “licence of right” provisions and business awareness of them?

No specific comments to make.

(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

No specific comments to make.

4. How IP is challenged and enforced

Key Points

- ⇒ IP Crime & on-Line Infringements Working Group (“IPCOI”), set up as part of the Creative Industries Forum On Intellectual Property, produced a Recommendations Paper last year.
- ⇒ EPC was a member of the Forum, Chaired and and was represented on the Working Group and, accordingly, fully supports all its recommendations.
- ⇒ The Paper contained sixteen specific recommendations.
- ⇒ Its key message was that “All the detailed recommendations should be pursued simultaneously and consistently with the key message that Government support for the creative industries on the one hand should be matched on the other hand by acceptance of the need for stronger deterrence against IP crime and online infringement. Without this there is an absence of coherence in the Government’s commitment to the sector. In turn, the creative industries should support independent research that has the confidence of other stakeholders to validate and improve recommendations flowing from this key message and so to encourage support from other stakeholders for stronger deterrence”.
- ⇒ In view of the direct relevance of the Recommendations Paper to the questions raised in this Section, the full text of that Paper has been reproduced as an Annex to this Submission.

a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Yes. These are dealt with in Recommendations 1-3 and 8 – 13 of the IPCOI Recommendations Paper.

We would reiterate our views that IP education has a vital role to play, especially in terms of educating consumers and other individuals and counteracting the still-prevalent myth that the Internet and the web are ‘law free’ zones. Rights holders are very reluctant to take action against individuals and see this as a last resort.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Yes, principally the costs of litigation including costs incurred in the provision of expert and other evidence. Legal costs of external law firms in obtaining injunctions, and High Court action, can be prohibitive. It is quite usual to incur costs in the

region of £40,000, just for the preparation of affidavits, issuing proceedings and an appearance in court for injunctive relief. This cost is often the same even if you have a 'sure-fire case'. If a case continues to trial, these legal costs will generally rise to between £80,000 and £100,000. This level of cost is likely to be completely out of reach for SMEs, bearing in mind that legal costs often cannot be recovered.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?

EPC members use alternative dispute resolution procedures, including mediation and arbitration, both domestically and the WIPO Dispute Resolution Procedure. In the field of arbitration, EPC also support 'ad hoc' industry-focused solutions such as the Informal Disputes Resolution procedure operated by The Publishers Association.

EPC members also actively support the development of voluntary procedures that can provide speedy and cost effective resolution of disputes e.g. the pilot 'Notice and Take Down' procedure developed by The Publishers Association.

d) To what extent do you use IP litigation insurance? How effective is it?

IP litigation insurance for claims for IP infringement is one element in risk management used by EPC members. However, it has its limitations. For example, web-based distribution exposes EPC members to global IP risks and the costs of obtaining insurance against IP infringement in certain jurisdictions such as the U.S.A. can be prohibitively expensive.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

Unlike certain legal jurisdictions such as Canada, mediation is still in its infancy in the UK. EPC encourages any steps which are taken to raise the profile, and encourage the use of mediation as an effective method of dispute resolution.

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

All our comments above are applicable but in the case of small businesses and individuals, enforcement costs are a major barrier to enforcement of their IP rights.

(g) To what extent is the risk of litigation a factor in your organisation's investment in innovation?

Fear of libel can have a "chilling effect" on publication.

We hope that final agreement on the current draft Rome II Regulation in Brussels will enable either a country of origin rule, or exclusion of all defamation, privacy and personality rights actions from the scope of the Regulation altogether.

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

In the digital economy, enforcement of IP rights is essential. Today, the principal barriers remain non-compliance by other states with their obligations under applicable international conventions and treaties, especially the Berne Convention, 'TRIPS' (trade-related aspects of intellectual property rights) and applicable Trade Barrier Regulations.

EPC endorses the steps being taken by the UK at an international level. For example we endorse the message expressed by the EU and United States also put out a declaration on working together to fight global piracy and counterfeiting on 20 June 2005, including a pledge to "Strengthen Cooperation to Reduce Global Piracy and Counterfeiting". (http://trade-info.cec.eu.int/doclib/docs/2005/june/tradoc_123867.pdf): which includes the following action points:

- to emphasise the importance of including effective intellectual property rights protection and enforcement rules in regional and bilateral agreements;
- to send a clear and consistent message to priority countries on the importance of effectively enforcing global intellectual property rules, and work together with those countries to secure commitments and implement actions to reduce piracy and counterfeiting levels, including through bilateral consultations;
- to make intellectual property rights enforcement a key focus of our trade capacity building technical assistance to third countries, and improve coordination of our respective efforts in this area with a view to avoiding duplication, and to exchanging best practices and lessons learned; and
- to establish informal mechanisms for IPR, customs, and law enforcement experts to exchange views on best practices in addressing piracy and counterfeit problems in third countries.

We also support the work of the European Commission in bringing together the various stakeholders to produce an Online Film Charter, due to be promulgated at the Cannes Film Festival, May 2006. We also support the European Commission's intention to extend this work to cover online content generally and the EPC is a member of the Commission's working group. Further information is available on request.

EPC's EVIDENCE IN RESPONSE TO THE SPECIFIC ISSUES

Current term of protection on sound recordings and performers' rights

Background: The Review will fulfill the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

- (a) What are your views on this issue?**
- (b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?**
- (c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?**

- (d) **Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?**
- (e) **If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?**

EPC is both a creator and user of sound recordings, including those made available via the web as podcasts. However, we see and endorse the arguments in favour of extending the term of protection to bring it into line with other jurisdictions. We were also pleased to note that the Review team has decided to commission a cost-benefit analysis of the economic impact of extending the term of protection for sound recordings and performers' rights (FT, April 21 2006).

Copyright exceptions - fair use / fair dealing

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

Key Points:

It is important to place any discussion about exceptions into its legal context.

- ⇒ All exceptions have to pass the 'three step test' in Article 9 (2) of the Berne Convention which allows reproduction (i) in certain special cases; (ii) provided it does not conflict with normal exploitation of the work and (iii) does not unreasonably prejudice the interests of the author. In short, it must not conflict with normal commercial exploitation.
- ⇒ Although the language of the Berne Convention is archaic, its principles are not. For example, in a decision of the Cour de Cassation in Paris in February 2006 in *UFC (the French consumers' association) v. Universal Pictures*, the Court applied the three step test in order to decide whether the private copying exception contained in French law was an absolute exception. UFC argued that the exception was absolute and should therefore override the technical protection measure used by Universal to prevent copying of the DVD of the film 'Mulholland Drive'. Applying the Berne test, the Court concluded that the private copying exemption was not absolute, and the risk of piracy was such in this particular instance that the exception did not 'override' the technical protection measure.
- ⇒ EPC is not opposed to due consideration being given, in appropriate circumstances, to additional exceptions where it can be demonstrated that there is genuine and specific need which is not already being met and which meets the Berne '3 step' test. An example was the exception for the visually impaired introduced by The Copyright (Visually Impaired Persons) Act 2002.
- ⇒ At the same time, it should be remembered that, through the combined effect of the Internet, the Web and broadband delivery, there is an unprecedented quantity and quality of information made freely available to consumers and other users.
- ⇒ Any further examination of exceptions should take full account of these factors.

In EPC's view, the current exceptions are well balanced. They have been subject to extensive debate over the years. Also, they have been subject to scrutiny by the Courts e.g. as regards the scope of the exceptions for fair dealing.

The Gowers Review will be aware that in June 2005, the DTI issued a Consultation Document on the Electronic Commerce Directive (“the Directive”).

EPC took part in the Digital Content Forum’s response and fully endorses the views expressed in the DCF’s written response. Its response can be downloaded from http://www.dti.gov.uk/industries/ecomunications/electronic_commerce_directive_0031ec.html#review

In particular, we are aware that certain location tool providers have put forward the argument that their activities should be covered by a fair use/fair dealing exception and that their activities should benefit from an extension of the limitations of liability in the e-Commerce Directive. We do not accept this view. Any threat to our ability to either build new content services on internet or mobile platforms, or to protect our content from piracy or more usually the “parasitic” models of some new players, will undermine our ability to invest in content creation in the future.

The new models of Google and others reverse the traditional permission-based copyright model of content trading that we have built up over the years. It will not be sustainable in the long term for these companies to continue to acquire, without proper licences, our copyright protected material, in order to build their own business models around what they have collected, and parasitically, earn advertising revenue off the back of copyright protected content.

It is interesting to note that Google's stock price hovers at around 423 dollars per share, giving it a 125 billion dollar market capitalisation. That makes Google more valuable than eBay and Amazon.com combined, dwarfs Time Warner's 84.35 billion dollar market capitalisation, News Corporation's 49 billion dollars and even tops Cisco Systems, which has a 107.4 billion dollar market capitalization.

We would be happy to provide further information about how copyright law and limitations of liability already apply to location tool providers e.g. through section 97.2 of the copyright Act.

(b) Could more be done to clarify the various exceptions?

We would repeat our earlier comments about the importance of IP education.

(c) Are there other areas where copyright exceptions should apply?

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?

The introduction of a private “fair use” exception would, in our view, be offering a solution which belongs to the analogue, but not digital, age.

As noted, UK copyright law does not have a private copying exception and, as a result, the consumer does not have to bear, directly or indirectly, the costs of any levies or other forms of compensation which would be required in accordance with Article 5. 2 (n) of the Copyright Directive.

But the point is that online services are now starting to deliver what the consumer

wants. For example, the 'Movielink' service to which we referred earlier gives its customers the following rights in relation to movies which are purchased online through the service - right to buy, store on a hard drive, to transfer copied to two additional PCs and to copy on to a back up disc.

In that way, the rights granted to the customer include –and, in fact, go beyond - any rights which might otherwise be covered by a private copying exception, thereby dispensing with the need for a private copying exception and the accompanying levies or other forms of statutory remuneration.

(e) How would you see content owners being compensated for such use?

Please see our comments in response to (d) above.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

(g) Are there issues concerning the archiving of material covered by copyright?

The preservation of electronic publications, including those under legal deposit regimes, is an important issue in the digital age raising questions not only of preservation but also of access. Just because Deposit Libraries have the legal right to collect and the technological capabilities of extending access to users beyond on-site physical access does not mean that terms of conditions of in-copyright works will be re-negotiated.

At the European Union level, discussions have just started about how to preserve the cultural heritage of member states and to make this available to citizens across the EU through an initiative on Digital Libraries. This raises concerns about how public policy objectives will take into account the legitimate commercial interests of the content producers. The challenge to Governments and to the European Union will be to find an acceptable balance between these competing interests so as not to harm the commercial business models of the publishers whose works they seek to acquire. See http://europa.eu.int/information_society/activities/digital_libraries/index_en.htm The EPC's response to the EU's consultation on Digital Libraries is attached at Annex 5.

Meanwhile, in the UK the Legal Deposit Libraries Act 2003 came into force on 1 January 2004 but its implementation will be through specific Regulations to be brought forward under the new Act. The deposit of print publications will continue as before. As an interim arrangement, the deposit of offline or hand-held electronic publications will continue under the terms of the Voluntary Code of Practice 2000 established between deposit libraries and publishers. Access arrangements to voluntarily deposited online or pure electronic publications will be developed in conjunction with the five other UK and Ireland Legal Deposit Libraries and the UK publishing community through the Joint committee on Legal Deposit. Also, as part of the 2003 Act, an independent Legal Deposit Advisory Panel has been established by Government to discuss and make recommendations to the Secretary of State for Regulations to implement the Act. Membership details are available on the website of the Department for Culture, Media and Sport. The JCLD will continue in parallel to the Legal Deposit Advisory Panel running pilot schemes and providing a forum for a wider discussion between libraries and publishers until Regulations have been passed.

JCLD is jointly chaired by the British Library and the [Digital Content Forum](#). [Membership](#) and [Terms of Reference](#) have been agreed. Three working groups have been established by JCLD: to undertake a review of the voluntary scheme for offline publications with a view to an early Regulation; to seek to identify a definition of the United Kingdom for online publication which will be acceptable to both publishers and libraries; and to scope and implement a voluntary scheme for e-journals. Terms of Reference for all the working groups have been agreed and are available here: [offline](#), [e-journals](#) and [territoriality](#).

An e-journals pilot scheme to test the technical infrastructure, mechanisms and procedures relating to the deposit, ingest, storage and preservation of electronic journals is being progressed by the e-journals working group and the British Library. Volunteer participants were sought through UK publisher trade organisations at the end of 2004 and 23 publishers have agreed to deposit over 200 journal titles, offering a diversity of subjects and complexity of formats. No end-user access will be provided under the pilot scheme, which will run for 12 months see interim report: [report \(PDF format\) 102kb](#).

Copyright – digital rights management

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means.

However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology.

They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

Do you have a view on how the use of digital rights management technologies should be regulated?

In terms of the relationship between copyright and digital rights management, EPC considers that the provisions of Section 296ZA - 296ZG of the Copyright, Designs & Patents Act 1988 provide an adequate legal framework for digital rights management. As the Reviewer will be aware, these are relatively new provisions. They implemented into UK law⁴ the provisions of Article 6 of the EU Copyright Directive which, in turn, was the mechanism by which the UK complied with its corresponding obligations under the WIPO Copyright Treaty 1996.

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 Review team 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

⁴ The Copyright and Related Rights Regulations 2003 - SI 2003 No.2498

prevent or restrict copying of copyright works. It is essential to make clear that “DRM” is much broader than that.

As the Review team will be 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 of the work taking place within the publishing industry is the development of ‘ONIX for Licensing Terms’. 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.

ONIX for Licensing Terms is a family of ONIX XML formats for the communication of licensing terms for IP resources, and particularly for material published in electronic form.

The first manifestation of ONIX for Licensing Terms is an ONIX Publisher License format, intended to support the communication of licensing terms for electronic resources from a publisher to a user institution (e.g. an academic institution or consortium), either directly or through a subscription agent. The purpose is to enable the license terms to be loaded into an electronic resources management system maintained by the receiving institution.

The ONIX Publisher License format may also be used for the communication of licensing terms from a content host system to a user institution; and it should also be possible to extend it for the communication of licensing terms from a publisher to a content host system that carries the publisher’s materials, and.

There is further potential for the ONIX Publisher License format to be used to communicate usage terms between publishers’ digital repositories and search engines.

The ONIX Publisher License format will allow any publisher licence to be expressed electronically as a standard XML document. Development of the format is ongoing; and work-in-progress documentation can be found on the EDItEUR website at http://www.editeur.org/onix_licensing.html

Rightscom, the consultancy, have coined the term ‘Digital Policy Management’ to cover the much broader world of digital rights management. This is described in their submission to the APIG inquiry.

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.

We have already given the example of the 'Movielink' service which gives its 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.

"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

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.

Point 6: DRM is still in its infancy Problems encountered with DRM do not invalidate its role

SonyBMG's flawed approach to TPMs with its XPC anti-piracy software was well documented. But that does not mean that all TPMs are bad.

Copyright – orphan works

- (a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?**
- (b) Do you have any suggestions on how this problem could be overcome?**

'Orphan works' are a very good example of the type of problem which 'Digital Policy Management' will increasingly overcome.

But as regards the specific issue of 'orphan works', EPC considers that there is a good analysis of the problem, combined with some sensible solutions, in the report issued by Marybeth Peters, the US Register of Copyrights, in January 2006, following extensive discussion of this issue in the USA.

The US Copyright Office concluded that legislation is necessary to provide a workable solution to the problem. In essence, it proposes a limitation on remedies for copyright infringement, if the copyright owner makes a claim. There are a number of provisos. These include (i) a requirement for evidence of a "reasonably diligent search" for the rightsholder, or for permission (ii) that any material used must be clearly attributed to the author and to the copyright owner. Also, we agree with their proposed inclusion of a 'sunset clause' after ten years, so that the issue may be kept under review.

EPC would support work being done in the UK along these lines to explore some similar provisions, provided they take full account of developments in the field of 'Digital Policy Management' and that the requirement for a 'reasonably diligent search' really does mean that. Alternatively, a well thought through Code of Practice could provide another solution. What is important to achieve is an internationally consistent solution to the problem which is in keeping with developments in DRM.

Copyright - licensing of public performances

- (a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings**
- (b) Could the system be clarified or simplified, and if so how do you see this working?**

We have no specific comments to make.

Patents – utility models

Background: Some countries, notably Germany, have a "utility model" system offering protection for simple inventions, usually subject to less examination and shorter terms than standard patents.

- (a) Do you have a view on some sort of second tier patent system?**
- (b) Has your organisation encountered problems in protecting its IP internationally where such systems exist?**

We have no specific comments to make.

Pharmaceutical Supplementary Protection Certificates (SPCs)

Background: SPCs are a "sui generis" IP right available in EU Member States for pharmaceutical products (as well as plant protection products). The standard patent term is 20 years. SPCs aim to compensate rights holders for the time required to obtain regulatory approval for their products. Where regulatory approval is issued more than five years after a patent is granted, SPCs may be granted to extend the term of protection on the active ingredient in the patented product. SPCs last for a term corresponding to the period elapsed between the five-year point and the point at which the product reaches market, up to a maximum term of 5 years.

- (a) Does your organisation use SPCs?**
- (b) How fair and effective are they in delivering an incentive for investment?**

- (c) **How could they be improved?**
- (d) **Should the term of SPCs be more flexible - perhaps relating straightforwardly to the period between patent award and regulatory approval?**

We have no specific comments to make.

Trade Marks – international issues

- (a) **To what extent does your organisation register its trade marks at the European rather than national level?**

EPC members register Community Trade Marks as well as national trade marks.

- (b) **Could the UK trade mark system be improved to work better alongside the European system?**

Generally, the UK trade mark system works well. Indeed, we think that substantial improvement is needed to the European system in terms of the service offered by OHIM. Some of the problems and frustrations experienced by our members with OHIM are long delays, fax-only communication and significant disparities between UK and CTM rules on 'relative grounds'. As regards the latter point, whilst the UK Patent Office will routinely cite and weed out applications that clash with prior rights, OHIM will allow conflicting applications to proceed without challenge, leaving trade mark rights holders having to keep watch and to file oppositions. Furthermore, OHIM do not generally refuse applications on 'absolute grounds' either, which makes it easy to file non-distinctive trade marks.

In view of these issues, we strongly support any steps which are taken by the UK to upgrade the services and procedures operated by OHIM.

Designs – registered designs and unregistered design rights

- (a) **To what extent does your organisation rely on registered designs? And on unregistered design rights?**
- (b) **To what extent does your organisation register its design at the European rather than national level?**
- (c) **To what extent does your organisation rely on the European unregistered design right rather than the national UK unregistered design right?**
- (d) **Could the UK registered design be improved to work better alongside the European system?**
- (e) **Could the UK unregistered design right be simplified to work better alongside the European unregistered design right?**
- (f) **Do you see a useful role for the UK unregistered design right alongside the European design right?**

We have no specific comments to make.

Legal sanctions on IP infringement

- (a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?**
- (b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?**

Yes. These are dealt with in Recommendations 1-3 and 8 – 13 of the IPCIO Recommendations Paper.

Coherence between competition policy and IP policy

- (a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?**
- (b) How did you deal with this problem?**
- (c) Was competition law effective at controlling this behaviour?**
- (d) Should competition law have a greater role to play in regulating IP?**
- (e) How would you see the system working?**

Parallel Imports / International Exhaustion

- (a) Has your company been affected by parallel trade?**
- (b) What would be the impact on your organisation of a change in the current rules?**
- (c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules?**

We have no specific comments to make.

On behalf of the UK Members of the European Publishers Council

21 April 2006

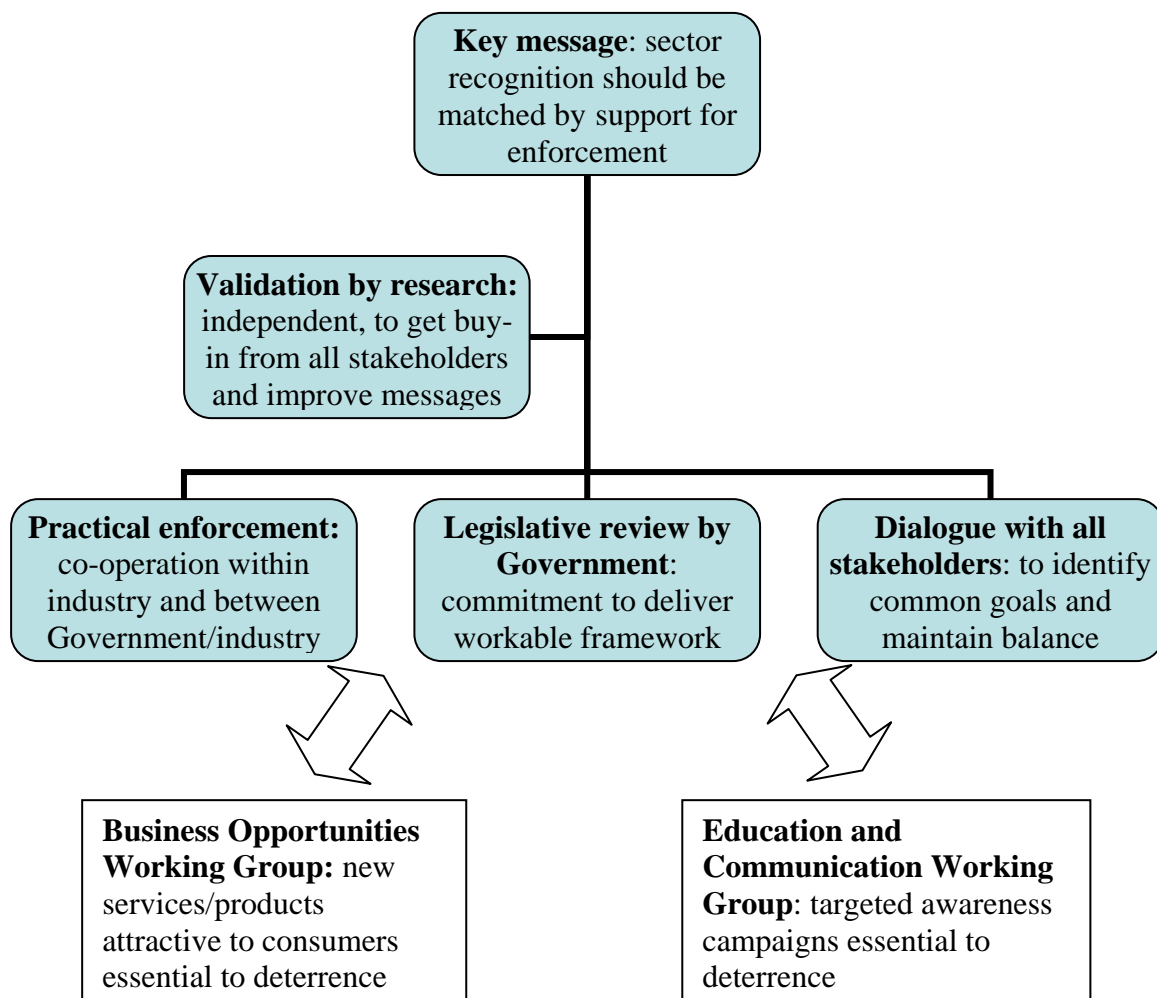
ANNEX 1

Creative Industries Forum on Intellectual Property

**IP Crime & On-Line Infringements Working Group
Recommendations Paper**

OVERVIEW

The recommendations of the IP Crime and Online Infringements Working Group can be grouped as indicated by the following chart:



KEY RECOMMENDATION

All the detailed recommendations should be pursued simultaneously and consistently with the key message that Government support for the creative industries on the one hand should be matched on the other hand by acceptance of the need for stronger deterrence against IP crime and online infringement. Without this there is an absence of coherence in the Government’s commitment to the sector. In turn, the creative industries should support independent research that has the confidence of other stakeholders to validate and improve

recommendations flowing from this key message and so to encourage support from other stakeholders for stronger deterrence.

KEY MESSAGE AND RESEARCH

1. Deterrence

Copyright crime and all online copyright infringements should be addressed in a context that deters illegal activity in the first place. Deterrence will be achieved through a combination of promoting products and services which meet consumer demand as well as effective enforcement action and meaningful remedies. The balance between the different responses will vary for different types of infringement. Activity that deters illegal behaviour includes developing new services that are attractive to consumers, an area being explored by the Business Opportunities Working Group, and collaboration on appropriately targeted IP awareness campaigns, an area being explored by the Education and Communication Working Group.

2. Defining infringement and response

Targeting criminal enforcement at the most damaging activity enhances the ability to respond effectively. The Government, the creative industries and other stakeholders should all support a proportionate response to IP crime and online infringements with an appropriate statutory framework and suitable mix of enforcement action and deterrent activity both in this country and elsewhere. Matrices of the type developed for copyright infringement (see the Annex) can inform decisions on what is the appropriate framework and should therefore be developed for other IP areas, in particular for rights in designs which are crucial to some sectors of the creative industries.

3. Independent research

The effectiveness of the key message is maximised when there is support from all stakeholders, including consumers. Support is more likely to be delivered where the evidence base about the impact of IP crime and online infringement, including the harm for the creative industries and other stakeholders, is arrived at by independent research. The creative industries should actively engage with consumer representatives to validate their approaches to research and so maximise confidence in its independence. Existing and future research can improve the evidence base on consumer perceptions and behaviours which can in turn feed into the development of a common vocabulary, appropriate awareness raising and new business models.

PRACTICAL ENFORCEMENT

4. Defining a common vocabulary

The term “piracy” does not clearly communicate the serious nature of infringements of copyright that should, and do, amount to criminal offences, including unauthorised copying or uploading that is prejudicial to right holders. There is no clear differentiation between these illegal acts and copying and downloading for private use that should not and does not amount to a criminal offence. A common vocabulary should therefore be agreed to describe unauthorised and criminal activity and this should be used consistently for the purpose of raising awareness, including in the areas being explored by the Education and Communication Working Group. The criminal offences should, however, be clearly labelled as copyright or IP crime.

5. Sharing best practice and resources

- (a) Sharing of best practice on enforcement action and awareness campaigns is desirable to inform further collaborative activity. The creative industries and others engaged in enforcement activity should continue to use every opportunity to share best practice and recognise that the impact of enforcement action can be maximised by sharing resources devoted to this enforcement both in the UK and other countries.
- (b) Collaboration and co-operation on enforcement action against physical copyright crime should continue to take place within the framework of the IP Crime Strategy as this demands a very similar response to that against trade mark crime.

6. Exploring Additional Funding Models

Greater engagement in enforcement against IP crime by the police provides an opportunity to disrupt the crime at a higher level with more far reaching consequences than simply seizing infringing goods at the point of sale. In addition to Government action based on the priorities recommended in the recent NCIS threat assessment, the creative industries should therefore continue to explore the Home Office proposal of industry funding for a dedicated IP Crime Unit along the lines of the motor industry and credit card units. This should be done having regard to the wide divergence of views about the broad impact of such a model amongst the creative and other industries adversely affected by IP crime.

7. Online infringements charter

Bearing in mind the recently agreed French Charter of commitment to the development of lawful on-line music services, the protection of intellectual property rights and the fight against digital piracy, which has been signed by the French Government, right holders and intermediaries, the UK Government should facilitate discussion with a view to agreement on similar charters in the UK. Although it is recognised that a charter has wide application for a range of content areas, it would be more appropriate to develop a separate charter for each area of content given the different right holder interests, but these work streams should progress simultaneously.

Legislative review by Government

8. Sentencing and damages

IP crime has become easier and more profitable in recent years, and, with help from new technology, is on the increase. There is currently no guidance to criminal courts on the levels of penalties to impose in such cases. We recommend that the Sentencing Guidelines Council is requested to review this area of the law and to provide guidance. Criminal courts will often see the issue of compensation as too complex to deal with in their proceedings and leave the rights holder to pursue a separate civil claim. Part 9 of the Enterprise Act 2002 prevents the victim-rights owner from obtaining the prosecution materials to pursue such claims. In the absence of sufficient enforcement of the criminal offences by the public authorities, right holders also continue to devote significant resources to enforcement via civil actions which the Government should welcome. The experience of rights owners is that the monetary awards made by the courts - in the form of damages or an account of profits - do not provide adequate compensation or in particular adequate deterrence. In this respect, the UK lags behind other jurisdictions that provide for deterrent levels of damages in the form of minimum statutory damages (such as in the United States), multiple damages (such as in Poland and Greece) or punitive damages (such as in Japan and Australia). This is the

backdrop against which there is particular concern that the way in which Section 97(2) of the Copyright, Designs & Patents Act 1988 has been applied in practice by the courts has not sufficiently reflected the gravity of the infringements in issue in the scale of the additional damages awarded. The Copyright, Designs and Patents Act 1988 should therefore be reviewed so that in practice damages awarded constitute a genuine deterrence to infringement, whether this is achieved by statutory change, judicial guidance or otherwise.

9. Criminal offences

The Government should review whether the copyright offences and other factors relevant to their proof should be remodelled, having regard to the difficulty of proving the offences in the absence of presumptions about ownership of copyright and copyright licences. The Government should also review whether the offences, copyright or otherwise, are effective for catching all gross abuses of copyright (including commercial rental piracy and abuses by companies), whilst remaining proportionate, consistent and deterrent. Further, covert acts preparatory to infringement, such as unauthorised recording of public performances (camcording) should be addressed. Finally, the Government should review whether it is appropriate to create criminal offences that apply to infringements of designs which are protected by a right other than copyright, such as UK unregistered design right.

10. Penalties

There is no justification for treating illegal dissemination of copyright material in the online environment as any less serious than the equivalent activity in the physical world. The maximum penalty for the offence of infringing copyright by communicating to the public (see section 107 (4A) of the Copyright, Designs and Patents Act 1988) should therefore be brought into line with that for unauthorised distribution of physical copies (see section 107(4)), ie it should be up to 10 years in prison and/or an unlimited fine.

11. Enforcement by trading standards officers

The Government should take action to bring section 107A of the Copyright, Designs and Patents Act 1988 into force, to provide for enforcement of the copyright offences by trading standards officers.

12. Anonymous evidence

The Government should explore the possibility of enhancing the possible response from the court to an IP infringement where at least some of the evidence has been provided by a person who has legitimate reasons for not wanting their name to be disclosed. In particular the Government should address the position of whistleblowers by assuring them of confidentiality where they have a genuine fear of the consequences should their name become known by the alleged infringer.

13. Investigating proceeds of crime

Trading standards officers do not currently have access to the restraint, confiscation and money laundering investigation provisions under the Proceeds of Crime Act. The Government should bring forward legislation to ensure that trading standards officers do have access to these provisions as soon as possible. Trading Standards Departments should also be able to receive payments under an incentivisation scheme from the Assets Recovery Agency as the Police can, to encourage them to take cases to court.

DIALOGUE WITH ALL STAKEHOLDERS

14. Agreeing common goals

Better enforcement against copyright crime requires better recognition of and response to the harm for consumers and local interests such as retailers from such crime, particularly to support the case for more resources to be devoted by local authorities to the fight against copyright and other IP crime. The Government, the creative industries and others should therefore engage in a constructive dialogue with consumer and retailer interests, which is sensitive to their needs and different perspectives, to try and agree common goals.

15. G8 and EU

The Government should use the opportunity of its Chair of the G8 and Presidency of the EU in 2005 to highlight the need to fight IP crime. In particular, the Government should seek agreement that counterfeiting and piracy is a criminal offence that should be treated no less seriously than other criminal offences such as forgery, theft and fraud. In the light of increasing evidence of the links between some IP crime and other serious organised crime, the G8 and EU should acknowledge that effective enforcement against IP crime can and does lead to effective enforcement against crimes such as drug dealing, people trafficking and terrorism as well as reducing harm from IP crime. The G8 and EU should agree to raise awareness about the impact of IP crime in their own countries and also encourage other countries to recognise the effectiveness of enforcement against IP crime for dealing with wider issues. The creative industries and other stakeholders should work with the Government through the IP Crime Group to compile the most convincing evidence that illustrates these effects.

16. Future dialogue and external relations

The UK's creative industries export to and invest in many other countries but inadequate intellectual property laws and/or a failure to provide effective enforcement of intellectual property rights can and does lead to barriers to trade. The Government can only act to tackle these trade barriers in the most appropriate way if it is aware of the issues that are of most concern to the creative industries, so the biennial meetings between the music industry and Europe and World Trade Directorate of DTI therefore provide an ideal mechanism for sharing information relevant to this sector and deciding on appropriate action, including proactive engagement by Government with the EU Commission to feed into the EU Strategy to enforce IPRs in third countries. Similar meetings should take place for the other creative industry sectors. The Government should also remind industry of the availability and willingness of UK Diplomatic missions overseas to lobby over specific cases of infringements with host governments, enforcement agencies and other relevant parties.

The accompanying tables are annexed separately as Matrix I and Matrix II

Annex 2

THE 'CREATE PRINCIPLES'

CREATE - Raising awareness of the value of intellectual property through Education - IP

Background

Intellectual Property Rights are considered to be difficult to grasp and generally poorly understood by users and creators. Improving the understanding of the value of IP and how a positive message is communicated through the educational system is considered to be a key element in changing attitudes in the long term and empowering future creators to effectively exploit their IP.

However, the CREATE Group consider that Industry and Government need to work together to build on this best practice in order to make it attractive and relevant for pupils, parents and teachers across the curriculum, and to consider ways in which the CREATE principles can be adopted by wider business and consumer interests.

CREATE for the future

Tools for innovation, enterprise and reward in the 21st century.

C Creativity improves the quality of our lives, and our economic prosperity at home and abroad.

R Respect for rights promotes investment in innovation, empowers artists, authors and rights holders to receive appropriate reward and respect for their work, and stimulates choice of access for consumers.

E Education is vital to help people understand what intellectual property is, and how, like physical things, it is relevant to and improves their everyday lives.

A Access to art and creativity enhances diversity of expression and quality of life for everyone when properly balanced with reward for those creating and investing in new work.

T Trust between the creators and consumers of intellectual property is to deliver access to creativity with respect for rights.

E Economic benefits from intellectual property must be publicly recognised by government and understood by the community, if they are to continue to provide the new jobs and the growth which have resulted from intellectual property in the last decade.

**RESPONSE FROM THE EUROPEAN PUBLISHERS COUNCIL TO THE
COMMUNICATION FROM THE COMMISSION
DRAFT EVALUATION OF DIRECTIVE 96/9/EC ON THE LEGAL PROTECTION OF
DATABASES (9.8.2005)
15TH September 2005**

The European Publishers Council (EPC) is a high level group 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 list of our members is attached.

EPC welcomes this opportunity to provide views on the Commission's draft Communication dated 9.8.2005 on the Evaluation of Directive 96/9/EC on the Legal Protection of Databases ("the Directive").

Databases are the heart of the Information Society within the Community. They play a vital role in its continuing cultural and economic development and, as such, members of the EPC have derived continuing benefit from their legal protection through the sui generis right. Although the majority of the content of our newspapers, magazines and internet sites are protected by copyright it is essential that we derive protection for the selection and arrangement of this content, including classified advertisements and listings. Case law is developing in this area and the EPC requests that the Commission discusses the economic and legal implications of the impact on the media before finalising the Report.

The Directive was the result of extensive and prolonged work from 1988 to 1996 by all interested parties to strike an appropriate balance between protection of the creativity and investment in database production on the one hand and the interests of legitimate users on the other.

EPC considers that the Evaluation's analysis of the Directive's impact is incomplete as it is based on limited data only. EPC considers that it would therefore be inappropriate for the Commission to develop any policy options for follow-up based on the Evaluation as it stands.

According to the recital 39 of the Directive it "seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor". On page 7 of the draft report reference is made to "a need to protect investments in the creation of databases against parasitic behaviour of "free-riders" and dishonest competitors who seek to misappropriate the results of the collection of data and information undertaken by the database maker". EPC wishes to underline that this need is today even more important than it was in 1996 due to ever increasing competition in the internet market.

The exploitation of publishers' news and classified advertising databases is technically easy for "free-riders". Sui generis/database right is an important tool for publishers when they provide good quality data to the public/users especially in an electronic form. Without an appropriate sui generis/database right, reasonable protection for investments by the publishers would be absent.

EPC recognises that the Evaluation follows the NAUTADUTILH Final Report published in September 2002 which was based on only 44 answers to a questionnaire – a very limited sampling on database producers and users. Also, in their Report (p.549) NAUTADUTILH noted that of the then 15 authorities in charge of the Directive’s implementation, only two – the UK Patent Office and the Italian Ministry of Culture – responded with their views.

Whilst the Commission is dependent on the responses it receives, it is quite clear that much wider and more extensive analysis and data is needed before an accurate picture can be formed about the success – or shortcomings – of the Directive.

Having said that, EPC considers that although there are aspects of the Directive which are worthy of review, it considers that, overall, the Directive has successfully achieved its core objective of striking that balance of interests. We would therefore oppose strongly any reduction in the scope of protection of the sui generis/database right. This view is supported by our comments set out below.

PART 1 – PRELIMINARY COMMENTS

1. The Directive’s overriding objective was to create a “stable and uniform legal protection regime” for databases (Recital (12)). Without that, as that Recital correctly observed, “...investment in modern information storage and processing systems will not take place.” The draft Evaluation focuses almost exclusively on a market analysis. By doing so, it places insufficient weight on that overriding harmonising objective. Subject to EPC’s comments below on the recent ECJ decisions, EPC considers that the Directive achieved its core objective. Accordingly, EPC opposes any changes to the Directive that would undermine, rather than strengthen, that core objective.
2. The Evaluation’s market analysis is based on only one measure – numbers of database entries as shown in the Gale Directory of Databases. This analysis is incomplete and therefore misleading. As noted below, other measures show that, in fact, the Community’s database market has continued to grow since the Directive was adopted in 1996.
3. The Evaluation contains no data to support the assertions made by the academic and scientific community and libraries that the sui generis right has not proved “sustainable” and that the balance between the legitimate interests of manufacturers and users has been achieved at unnecessary costs. EPC considers that neither assertion is true. In fact, the reverse is the case. There is growing competition amongst providers of paid-for data as well as an ever increasing wealth of free data available via the Internet.
4. Any reduction in the scope of protection of the sui generis/database right risks the Community ‘shooting itself in the foot’ in terms of the strength of the Community’s database industry against its US competitors. The proper protection of databases will facilitate European publishers’ database production. Any undermining of the sui generis/database right leads easily to an increase of unfair competition and commercial exploitation of databases by “free-riders” against the objectives of the Directive.

PART 2 – SPECIFIC COMMENTS ON THE CONCLUSIONS STATED IN THE EVALUATION

4.1 Has the Directive eliminated the differences in protection in Member States that hamper the functioning of the Internal Market?
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The Evaluation appears to conclude that it has failed in one of its operational objectives - to eliminate all such differences. EPC does not agree for the following reasons:-

- ⇒ Few – if any – Directives achieve a standard of “100%” elimination of differences in national laws in the applicable field. If that was the criterion for evaluation, virtually every Directive would be judged a failure.
- ⇒ It is inevitable that during the first few years following the adoption of a measure, the judgments of national courts will diverge in their interpretation of the measure in question. However, this divergence tends to narrow over time.
- ⇒ The sui generis right has the advantage that it is a ‘legal innovation’ of the Community. As such, is more likely than other measures in this field to move close to the ideal of elimination of differences in national law.

EPC agrees with the observations made at p.12 regarding the direct (and adverse) economic consequences of the ECJ judgments in the British Horse Racing Board and Fixtures Marketing cases.

As already noted, the Directive’s core objective was to protect the substantial investment made by database makers. Recital (40) of the Directive expressed that objective in the following way *“the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;”*

EPC considers that the distinction drawn by the ECJ between the (unprotected) investment in the creation of data and the (protected) investment in the obtaining data is inconsistent with the Directive’s core objective.

Many databases consist of a mix of obtained data and data which is created by the database maker to enhance and add value to the scope, breadth and usefulness of the database. In EPC’s view it is inconsistent with the Directive’s core objective that the added value data is outside the scope of the protection under the Directive.

- ⇒ EPC urges the Commission to examine this inconsistency in its review of the Directive.
- ⇒ EPC maintains that the sui generis right should protect substantial investment in the creation of added value data.

4.2 “Has the provision of uniform protection in all Member States initiated more investment in the creation of databases?”

Size of the market

EPC does not agree with the conclusion contained in the Evaluation that *“However, the European database sector has not improved in a sustainable manner.”* On the contrary, the sector continues to grow.

A survey of the UK B2B information industry due to be published next month will show that the total size of the UK B2B is estimated at £15.5 billion (2004). This compares with £13.7 billion figure for 2000. The B2B market comprises a wide range of “databases”, including

business directories/databases (print and online), other electronic services, catalogues, business newspapers, magazines and business conferences.

The continuing shift from print circulation to electronic delivery and migration to web based publishing means that databases' share of the overall UK B2B sector continues to increase.

As regards elsewhere in the Community, EPC understands that similar trends are taking place. We suggest that the Commission collects new data on this basis across the EU which will complement the data already assessed in order to give a more accurate validation of the size of the market.

Even if the size of the European database market was judged solely on the criterion of database entries as shown in the Gale Directory of Databases – an approach which EPC rejects – it is likely that the reason for any decline is economic recession in a particular market.

Of course, it does not follow that merely because such a regime exists that investment will follow. Such decisions depend on market factors. However it is indisputable that a *sine qua non* for database producers in the Community is the continued existence of a strong and uniform legal protection for databases.

UK database industry

The Evaluation notes that “*the UK has maintained its primacy as the first producer among all EU Member States.*” EPC makes the following comments on that observation:

- ⇒ It seems to imply that the UK's continuing leading role proves that the Directive has not achieved one of its overall objectives. That is not so. If anything, it shows that the Directive has been successful in substituting the sui generis right for 'old style, sweat of the brow' UK copyright protection for databases without damaging legal protection for databases.
- ⇒ There are other reasons, unconnected with the legal protection of databases, which contribute to the continuing primacy of the UK database market, including the relative maturity of that industry and the role of the English language.
- ⇒ The sui generis right has a vital role to play in providing a sound legal framework within which the database industries within other Member States can continue to grow.

4.3 Has the balance between the legitimate interests of manufacturers and lawful users of databases been safeguarded?

The EPC remains of the view that the correct answer to this question is “yes”.

The Evaluation contains no empirical evidence which supports the claim that the sui generis right has not proved “*sustainable*” or that “*the balance between the legitimate interests of manufacturers and users of databases has been achieved at too unnecessary costs.*”

It is important to bear in mind that the Directive does not extend to the contents of the database. To the extent that a database contains material protected by copyright, then Member States' copyright/author's right regimes govern the use of that material, including the application of all relevant exceptions and limitations.

As regards the sui generis right itself, Articles 8 and 9 contain significant rights for lawful users and exceptions to that right which, in EPC's view, strike an entirely appropriate balance. In particular, it should be remembered that the Directive contains the following safeguards for users:

- ⇒ The right to prevent unauthorised extraction or re-utilization only applies to the whole or a substantial part of the database (Article 7.1).
- ⇒ The maker of a database available to the public may not prevent a lawful user from extracting and/or re-utilizing insubstantial parts of the database (Article 8.1).
- ⇒ The extraction and/or re-utilization of substantial parts are subject to exceptions under various circumstances specified in Article 9, including for illustration for teaching or scientific research.

4.4 Has the EU database production increased as compared to the US?

The Evaluation concludes that *“In the long term, the Directive has not increased the global competitiveness of the EU information market. In particular, the economic gap with the US has not been reduced. The share of EU database production registered in 2004 has fallen back to pre-Directive levels.”*

EPC rejects those conclusions for the following reasons:

- ⇒ As noted above, EPC disputes the validity of the conclusions drawn in the Evaluation about the size of the EU database market, both in absolute terms and relative to the UK market, based on the data drawn from the Gale Directory of Databases.
- ⇒ The size and growth of the EU database market has been measured on one criterion only. As shown above, other statistics which measure the value of the market demonstrate growth.
- ⇒ Any diminution in the scope of the sui generis right will weaken the ability of the European database market to increase its share of the global market.

European Publishers Council

15th September 2005

Annex 4

RESPONSE FROM THE EUROPEAN PUBLISHERS COUNCIL TO THE FIRST EVALUATION OF DIRECTIVE 96/9/EC ON THE LEGAL PROTECTION OF DATABASES

- 10TH MARCH 2006 -

The European Publishers Council (EPC) is a high level group 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 list of our members is attached.

The EPC welcomes this further opportunity to provide input to the Commission's Evaluation of Directive 96/9/EC on the Legal Protection of Databases. Please note that several of our Members will be responding directly with regard to the Commission's request for economic data.

The EPC considers that although there are aspects of the Directive which are worthy of review, overall, the Directive has successfully achieved its core objective of striking a balance of interests and protecting the investment of producers. **We therefore continue to oppose strongly any reduction in the scope of protection of the sui generis/database right and support the status quo as we foresee long-term benefit for publishers from the sui-generis database right as more and more content is made available online**. This view is supported by our more detailed comments set out in our position of 15th September 2005. In addition we wish to emphasise:

1. The unauthorised exploitation of publishers' news and classified advertising databases is technically easy for "free-riders". The sui generis/database right is an important tool for publishers, over and above copyright protection, when providing high quality data and content to the public, especially in an electronic form.
2. Without an appropriate sui generis right, reasonable protection for investment by the publishers would be absent and out of step with the original purpose of the Directive.
3. According to the recital 39 of the Directive it "seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor". EPC wishes to underline that this need is today even more important than it was in 1996 due to ever increasing competition in the internet market.
4. The importance of database and sui generis protection cannot be underestimated for free online news information. Any weakening of the database protection would, therefore, threaten the long-term viability of free online news provision.
5. Although several of our members together with other publishing organisations will be providing data, the EPC considers that evidence on the economic impact of sui generis protection in stimulating the production of European databases does not tell the whole story about the importance of adequate protection of publishers' investments. In the publishing industry many other reasons also affect the decision to start a new business or project; e.g. an online newspaper or classified advertising website. Sui generis database protection works in tandem with copyright and trademark protection. Incidence of "free-riding" would in our view increase in the absence of legal protection for the database.

6. The overall message from a decision to abolish the database directive or any protection guaranteed by the directive would be contrary to the Commission's stated goals regarding the development of a European information society and the competitiveness of European publishing industry.
7. Quite simply, there would no advantages to the European content business from abolition but many disadvantages to publishers and the European information society as a whole. The EC should not in our view give any such signal that any copyright or IPR law is unnecessary or counter-productive to economic growth.
8. The definition of a database is not, and should not be, confined to any particular medium. Newspapers and magazines are considered as databases (at least in many European countries). Therefore, not only paid-for online information but also free online news information provision forms a database.
9. The Commission could review the implications for publishers of evolving case law. The EPC would be pleased to participate in such a review.

In conclusion we wish to underline our support for **Option 4**.

It is noteworthy that in section 1.5 of the Introduction, the Commission has referred to this fourth option of maintaining the status quo saying: "The Evaluation therefore concludes that leaving the Directive unchanged is an additional policy option for the Commission. ***The argument could be made that, despite its limited effectiveness in creating growth in the production of European databases, the Directive does not impose significant administrative or other regulatory burdens on the database industry or any other industries that depend on having access to data and information. In addition, the ECJ in November 2004 significantly curtailed the scope of the "sui generis" protection, thereby pre-empting concerns that the right negatively affects competition.***"

We would add that by withdrawing sui generis/database protection, the Commission would be going against better regulation principles in a situation where the main interested parties are largely satisfied with the status quo. Furthermore the publishing industry would be subject to unwelcome and additional administrative burden and cost in order to adjust to a new regulatory regime during and following withdrawal. Thereafter, businesses would be subject to lack of legal certainty and differing legal situations across the internal market particularly when seeking cross-border investments.

European Publishers Council

10th March 2006

COMMUNICATION FROM THE COMMISSION

**i2010: DIGITAL LIBRARIES (including Questions for online
consultation 30.09.2005)**

**Response from the European Publishers Council (EPC)
20th January 2006**

INTRODUCTION AND GENERAL COMMENTS

The European Publishers Council (EPC) is a high level group 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 list of our members is attached.

EPC welcomes this opportunity to provide its views on the Commission's Communication dated 30.09.05 on "**i2010: Digital Libraries**", and the associated online consultation.

EPC members share the vision of widespread and easy access to cultural and other information. That is the *raison d'être* of the publishing and other media industries. They are already involved in a number of initiatives, both individually and in partnership with other bodies including libraries, which touch on all three strands of the Communication – online access, digitisation and preservation.

As a result:

- ⇒ New business models are constantly being created and publishers are increasingly digitising their content and make it available online. For example, Macmillan recently announced its 'BookStore' project which will be a searchable repository of digital book content, with e-commerce technology for purchasing titles.
- ⇒ The range of licences available from RROs, 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.
- ⇒ Member States' legal deposit schemes are being extended to cover digitisation of materials and the making available of digitised materials within deposit libraries.

However, EPC members do not share the comments made in the Communication, expressly or by implication, that intellectual property rights (IPRs) are a barrier to the realisation of this vision. Copyright and related rights are not legislative barriers. On the contrary, they are enablers which make it possible for rights creators – the source of Europe's cultural heritage – to make works available through the initiatives described above.

Those initiatives are all taking place within the balanced framework of rights and exceptions contained in Directive 2001/29/EC which is also consistent with Member States' obligations under the TRIPS Agreement and the WIPO Copyright Treaty.

That balance is found in the rights set out in Articles 2, 3 and 4 and the exceptions contained in Article 5. As far as libraries are concerned, that balance is reflected in the exceptions contained in Article 5 2(c) Article 5 3 (n) and in the provisions of Article 5.5.

Directive 2001/29/EC, and the exceptions it contains, was the result of several years of intense but productive negotiations between all stakeholders. Those negotiations were shaped by the growth of the Internet and the Web and the needs and interests of all stakeholders in the digital environment. The Directive recognises the central importance to rights holders of online distribution and communication of content in digital form and that the exceptions in the Directive cannot unreasonably prejudice the legitimate interests of rights holders. This is expressly stated in Article 5 (5) and is, of course, consistent with international treaty obligations.

Increasingly, the distribution, communication and making available of content in digital form are primary means of exploitation for rights holders. That is why:

- ⇒ The core rights in Articles 2 and 3 of the Directive 2001/29/EC cover the copying of works in all forms and their communication to the public, including making available by wire or wireless means i.e. by 'push' and 'pull'; and
- ⇒ The exception in Article 5 3 (n) does not apply to works which are subject to licensing terms. That reflects the fact that, in short, EPC members and other rights owners are digital libraries, serving the needs of their users in the business, consumer and private spheres.

The Communication correctly identifies a number of other challenges – financial, organisational and technical – which may obstruct the realisation of the **i2010: Digital Libraries** vision. EPC considers that it is overcoming these challenges – and not the so-called 'legal obstacles' - that is the key to realising this vision. One of those key challenges is developing and implementing standards such as MPEG 21, which 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.

Accordingly, the solutions to achieving the vision of **i2010: Digital Libraries** must meet the following criteria:-

- ⇒ They must take full account of the range of voluntary, market-driven measures and initiatives which are currently taking place. Indeed, a core objective of **i2010 Digital Libraries** project should be to encourage such measures and initiatives.
- ⇒ They must be consistent with the existing legal IPR legal framework. If, as part of the **i2010 Digital Libraries** project, measures were introduced which undermined or conflicted with the ability of rights holders to legitimately exploit their works, the project would be self-defeating. It would stifle the availability of works, both those which are produced in digital form as well as 'borne digital works, as part of any digital library.
- ⇒ The digitisation of works, and making them available online, can only occur if they are in the public domain or with the consent of rights holders, granted primarily by individual

licences or secondarily via collecting societies.

- ⇒ Any EU funded initiatives in the field of the **i2010 Digital Libraries** project should not undermine nor compete with privately funded projects in the same fields.
- ⇒ Any Community action taken as part of the **i2010 Digital Libraries** project must be consistent with the principle of subsidiarity contained in Article 5 of the Treaty and based on reliable impact assessments.
- ⇒ They must recognise that in the cultural field, there are significant regional and national variations within and between Member States which mean that any horizontal measure which cuts across these differences should be avoided.

EPC REPLIES TO ONLINE QUESTIONNAIRE

Digitisation and online accessibility

1) *What additional measures could be taken at national and European level to encourage digitisation and online accessibility of material in all European languages?*

Creating a portal which enables participants to obtain details of the existence and scope of projects as referred to in section 7.2 of the Communication to help stimulate collaboration between rights owners, users and other intermediaries and to avoid duplication of effort and wastage of resources.

2) *What measures could be taken to promote private investments and new business models such as public-private partnerships for digitising and making historical collections accessible?*

3) *What measures of a legislative, technical, organisational or other nature, could facilitate the digitisation and subsequent accessibility of copyrighted material, while respecting the legitimate interests of authors?*

As we have already made clear, Directive 2001/29/EC has created the necessary legal framework within which the **i2010 Digital Libraries** project can operate. It does not need to be changed for this purpose.

Education has a key role to play here. The following steps would be helpful at a European level:

Promoting an awareness and understanding of how copyright and related rights apply in the online environment is important here. Examples can be taken from both the commercial and 'open access communities. As regards the former, we have already referred to the Macmillan 'Bookstore' project. As regards the latter, 'Creative Commons' licences are examples of how copyright can go 'hand in hand' with technology, by providing the user with the necessary code which describes the rights attached to licensed content.

The important point to note here is that both examples are built on the copyright framework. The EPC also supports steps taken to promote awareness of the voluntary measures already underway in the field of standards development. This is key to identifying and then accessing content once in digital form.

4) *Is the issue of orphan material economically important and relevant in practice? If yes, what technical, organisational and legal mechanisms could be used to facilitate wider use of this material?*

The issue of 'orphan works' is an important problem for which a pragmatic and proportionate response is required. We are aware that a number of collecting societies are developing appropriate responses and we consider that they are potential providers of a solution to this problem.

In the longer term, it is worth noting that the increasing use of standards-based technical solutions to identify works (e.g. linked to a 'Digital Object Identifier') will, in due course, confine this problem to works in analogue-only form.

5) *How could public domain material and other material available for general use (voluntary sharing) be made more transparent and widely known in order to facilitate its online availability for subsequent use?*

EPC has no further comments to make at this stage in reply to this question.

6) *What priority measures – in particular of an organisational and legal nature— should be taken at national and European level to optimise the preservation of digital content with the limited resources available?*

7) *Is there a risk that national legal deposit schemes lead to a multiplication of requirements on internationally active companies? Would European legislation help avoiding this?*

8) *How could research contribute to progress on the preservation front? Which axes of work should be addressed in priority by the forthcoming Specific Research Programmes as part of the 7th Framework Programme?*

The preservation of digital content is a task for voluntary measures within the private sector and for national legal deposit legislation.

In the private field, contracts relating to the online licensing or supply of digital content will often address this issue.

As regards legal deposit, we support the work being done to find voluntary solutions. In this regard, we endorse the work of the joint committee established by the Federation of European Publishers (FEP) and the Conference of European Librarians (CENL) to develop guidelines for a system of voluntary "legal" deposit for offline and online works.

As regards the 'multi-jurisdiction' risk of national legal deposit schemes, EPC favours voluntary solutions rather than European legislation. We consider that voluntary solutions are a more flexible way of accommodating the national characteristics of each country's cultural heritage.

EPC looks forward to continuing to playing an active and constructive part in the Commission's ongoing initiatives concerning the **i2010 Digital Libraries** project.

European Publishers Council

20th January 2006

MEMBERS OF THE EUROPEAN PUBLISHERS COUNCIL

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

Members:

Mr Kjell Aamot, CEO, Schibsted, Norway
Ms Sly Bailey, Chief Executive, Trinity Mirror plc, UK
Sir David Bell, Chairman, Financial Times Group, UK
Mr. Jose-Maria Bergareche, CEO, Vocento, Spain
Mr Aldo Bisio, CEO RCS Quotidiani S.p.A Italy
Mr Carl-Johan Bonnier, Chairman, The Bonnier Group, Sweden
Mr Oscar Bronner, Publisher & Editor in Chief, Der Standard, Austria
Dr Hubert Burda, Chairman and CEO, Burda Media, Germany
Dr Carlo Caracciolo, President, Editoriale L'Espresso, Italy
Mr Juan Luis Cebrian, CEO, Grupo Prisa, Spain
Sir Crispin Davis, Chief Executive, Reed Elsevier,
Dr Matthias Döpfner, Chief Executive, Axel Springer Verlag, Germany
Mr. Andy Hadjicostis, CEO, Sigma TV, Dias Publishing, Cyprus
Mr Leslie Hinton, Executive Chairman, News International, UK
Dr Stefan von Holtzbrinck, Verlagsgruppe Georg von Holtzbrinck GmbH – owners of
McMillan
Mr Tom Glozer, Chief Executive, Reuters plc
Mr Steffen Kragh, President and CEO, The Egmont Group, Denmark
Dr Bernd Kundrun, Chief Executive, Gruner + Jahr, Germany
Mr Christos Lambrakis, Chairman & Editor in Chief, Lambrakis Publishing Group, Greece
Mr Murdoch MacLennan, Chief Executive, Telegraph Group Ltd, UK
Sir Anthony O'Reilly, Chairman, Independent Newspapers PLC, UK and Ireland
Ms Wanda Rapaczynski, CEO, Agora, Poland
Mr Jaakko Rauramo, Chairman and CEO, SanomaWSOY Corporation, Finland
Mr Gerald de Roquemaurel, Chairman and CEO, Hachette Filipacchi Medias, France
Mr Michael Ringier, President, Ringier, Switzerland
The Rt. Hon. The Viscount Rothermere, Chairman, Daily Mail and General Trust, UK
Mr A.J. Swartjes, CEO, De Telegraaf, Netherlands
Mr Antoine de Tarle, Chief Executive, Société Ouest-France S.A., France
Mr Christian van Thillo, Chief Executive, De Persgroep, Belgium

Executive Director: Angela Mills Wade
Copyright Adviser: Laurence Kaye
Press Relations: Heidi Lambert Communications

21st April 2006

Physical Copyright Infringements including where physical copies offered for sale from a website

Action (layman)	Civil infringement		Criminal offence	Criminal penalty	
				Summary sentence (in magistrates' courts)	Sentence on indictment (in Crown court)
Making illegal copies, eg copying digital carriers (CDs, DVDs, videos), photocopying books and journals, copying designs	Primary infringement: unauthorised copying of a copyright work (section 16(1)(a) and section 17)	Making infringing copies for sale or hire	v (section 107(1)(a))	Up to 6 months in prison and/or statutory maximum fine	Up to 10 years in prison and/or unlimited fine
		Making infringing copies for any other purpose, including private copying			
Importing illegal copies	Secondary infringement: importing infringing copies other than for private use (section 22)		v (section 107(1)(b))	Up to 6 months in prison and/or statutory maximum fine	Up to 10 years in prison and/or unlimited fine
Dealing with and selling copyright material	Primary infringement: unauthorised issuing of copies to the public (section 16(1)(b) and section 18). Secondary infringement: dealing with infringing copies (section 23(b), (c) and (d))	Distributing infringing copies in course of business or to extent that prejudicially affects right holder	v (section 107(1)(d)(iv) and (e))	Up to 6 months in prison and/or statutory maximum fine	Up to 10 years in prison and/or unlimited fine
		Offering to sell infringing copies	v (if in course of a business) (section 107(1)(d)(ii))	Up to 6 months in prison and/or up to Level 5 fine	
		Selling infringing copies	v (if in course of a business) (section 107(1)(d)(i))	Up to 6 months in prison and/or up to Level 5 fine	
		Other issuing of copies (not necessarily infringing ones) to the public for the first time for any purpose			
Having illegal copies at work	Secondary infringement: possessing infringing copies in the course of a business (section 23(a))	Possessing infringing copies with a view to infringing copyright	v (section 107(1)(c))	Up to 6 months in prison and/or up to Level 5 fine	
		Possessing infringing copies for any other purpose			
Making, having or dealing with something to make illegal copies that has no general purposes	Secondary infringement: making, importing, possessing in course of business, selling or hiring article specifically adapted to make infringing copies (section 24)	Making or possessing article specifically adapted to make infringing copies	v (infringing copies must be made for sale or hire) (section 107(2))	Up to 6 months in prison and/or up to Level 5 fine	
		Importing, selling or hiring article specifically adapted to make infringing copies			

Public performance of copyright material	Primary infringement: performing or playing or showing copyright work in public (section 16(1)(c) and section 19)	Other than by reception of broadcast or on-demand transmission	v (section 107(3))	Up to 6 months in prison and/or up to Level 5 fine	
		By reception of broadcast or on-demand transmission			
Renting or lending copyright material	Primary infringement: renting or lending copyright work to the public (section 16(1)(ba) and section 18A))	Letting for hire or offering for hire infringing copies in course of a business	v (section 107(1)(d)(i) and (ii))	Up to 6 months in prison and/or up to Level 5 fine	
		Other renting or lending of copies (not necessarily infringing ones)			
Broadcasting copyright material	Primary infringement: communicating a copyright work to the public by electronic transmission, including by broadcasting the work (section 16(1)(d) and section 20))	Broadcasting to the public in course of business or to extent that prejudicially affects right holder	v (section 107(2A))	Up to 3 months in prison and/or statutory maximum fine	Up to 2 years in prison and/or unlimited fine
		Other broadcasting to the public			
Providing the means to enable an illegal public performance of copyright material to take place	Secondary infringement: letting premises be used for infringing performance (section 25)				
	Secondary infringement: supplying apparatus, letting apparatus onto premises or supplying copyright work used to infringe copyright by performing, showing, playing work in public (section 26)				
Translating, arranging, transcribing copyright material	Primary infringement: making an adaptation of a copyright work (section 16(1)(e) and section 21)				

Notes

1. All sections referred to are sections in Part I of the Copyright, Designs and Patents Act 1988 (as amended) which provides UK copyright law
2. Primary infringements take place whether or not the person knows the activity is illegal
3. For primary infringements, both the person doing the infringing activity and the person authorising it are liable for the infringement

4. "Knowledge" is required for all the secondary infringements
5. "Knowledge" is required for all criminal offences
6. Specific tools for enforcement of the criminal offences are search warrant provisions for the police (section 109)
7. Private prosecutions by right holders or another person are possible for all the crimes
8. General provisions such as in Police and Criminal Evidence Act assist with enforcement of offences
9. Civil remedies include damages, account of profits and injunctions
10. No damages possible where defendant had no "knowledge" that copyright subsists