

SUBMISSION TO THE GOWERS REVIEW OF INTELLECTUAL PROPERTY

Introduction

The Newspaper Society (NS) is the association of publishers of the local and regional press; our members publish over 1300 newspaper titles across the UK. The sector is responding to consumer demand and extending local connections by investing in a range of new products and digital media platforms. As well as regional and local, daily and weekly titles read by 40 million adults every week, the regional press now has over 400 stand-alone magazines and niche publications, over 500 websites, at least 21 radio stations and two television stations.

In recent years the fundamental commercial importance of copyright to the newspaper industry has been increasingly demonstrated in relation to both traditional print products and new media services. The Newspaper Society has taken a lead role in the formation and amendment of UK copyright legislation, particularly in the consultations that preceded the Copyright, Designs and Patents Act 1988. The NS is a very active member of the European Newspaper Publishers Association (ENPA) which has spearheaded newspaper industry representations on EU proposals relating to copyright, database, and digital rights management issues (inter alios).

The NS is also a member of the Digital Content Forum, the UK representative body that coordinates a wide range of creative industries currently engaged in bringing digital content products and services to the market. A joint submission to the Gowers Review has been prepared by the DCF IPR Industry Action Group.

The newspaper industry is experiencing an ongoing shift from printed product to electronic delivery and web-based publishing operations. Over 90% of regional and local newspaper companies have an online presence. Our members are acquiring new sites and enhancing existing sites through investment in functionality and design, and the introduction of new services¹. For example, the Northcliffe Newspapers Group now invites users to post comments on every story, and has introduced weblogs and Podcasts. Archant has recently outlined plans for digital editions of all its titles. The Guardian Media Group has adopted one of the most innovative approaches. www.manchesteronline.co.uk is the region's leading online and news information service, offering an unparalleled breadth of content and reaching the largest online audience in the region. It offers information on local sport, business and entertainment news as well as classified adverts on property, holidays, cars and jobs. There has been a 160% growth year on year in unique users from May 2004 to May 2005.

¹ Digital innovation in the regional press www.newspapersoc.org.uk/Default.aspx?page=1563
Case studies of multi-media portfolios www.newspapersoc.org.uk/Default.aspx?page=996

The Annual Regional Press Survey for 2004² reveals that annual turnover in respect of internet advertising and publishing increased by 103.4% year-on-year. This multi-portfolio approach enables regional and local newspaper companies to achieve high levels of penetration among local audiences. The focus is on extending the brand to meet the demand for news and information when and where convenient to readers. For example, on 8 May this year the *Liverpool Daily Post* launched the first dedicated business website by any UK regional newspaper. TheBusinessweek.co.uk features breaking stories, daily podcasts and live updates on the FTSE100 index as well as a video debate on issues affecting local companies, a business-to-business directory, and a comprehensive archive. The free-to-access website is one of the first developments to take advantage of Trinity Mirror's £1.5m Transformation Project, which enables traditional newsrooms to create media-neutral content suitable for digital platforms.

The Review acknowledges that the UK's economic competitiveness is increasingly driven by knowledge-based industries. In our view, the speed, ease and anonymity of access to material in the on-line environment has posed significant challenges to all sectors of the creative industries in relation to the protection of IP.

This submission addresses the following issues raised by the Review:

General questions:

Section 1: How IP is awarded
Section 2: How IP is used
Section 3: How IP is licensed and exchanged
Section 4: How IP is challenged and enforced

Specific questions:

Copyright exceptions – fair use/fair dealing
Copyright – digital rights management
Copyright – orphan works
Legal Sanctions on IP infringement

Other Issues:

Database Directive
Legal Deposit issues/Digital Libraries
E-commerce Directive – extension of limitation of liability to content aggregators, hyperlinks and location tool services

In summary, some of the main issues highlighted in this submission are as follows:

- Copyright ownership of employed journalists' works by newspaper publishers is essential for their operations. Equally important are the exceptions to the 'paternity' and 'integrity' rights which apply where a work is produced in the course of employment for publication in a newspaper, magazine or similar periodical or for the purpose of reporting current events
- We have serious concerns over the parasitic use of online newspaper articles and advertising material via the establishment of hyperlinks and other abuses and have responded to the DTI's Consultation Document on the Electronic Commerce Directive (June 2005). Any extension of the limitations on liability

² Annual Regional Press Survey www.newspapersoc.org.uk/PDF/RP-analysis-04.pdf

in Articles 12 and 14 of the E-commerce directive to providers of hyper-linking, location tool or content aggregation services would be strongly opposed by the regional newspaper industry

- Uncertainty over the current state of the law relating to database rights persists in the wake of the ECJ judgments in November 2004. We believe that the Database Directive largely achieves a suitable balance of interests between rightholders and users, and the status quo should be maintained
- The role of trademarks in the global digital environment must be addressed. We are opposed to recent Patent Office proposals whereby marks will only be refused on relative grounds if the owner of a pre-existing mark files an opposition, but owners of existing marks will not be notified that a conflicting application has been received
- The role of the Copyright Tribunal might usefully be reconsidered and expanded to provide cheaper, quicker and easier resolution of general copyright disputes
- The freedom of publishers to be able to choose whether or not to employ digital rights management technologies must be respected
- Newspaper companies wish to retain control over whether or not their content (whether current or archival) is made available to third parties, and have concerns over legal deposit issues and European proposals in respect of digital libraries

GENERAL QUESTIONS

1. How IP is awarded

Although the current IP system in the UK is undoubtedly complex, NS members do not perceive system complexity *per se* to be a particular barrier to obtaining IP rights.

The preservation of strong copyright protection for publishers, together with effective means of enforcement, is vital under the UK, EU and global intellectual property regime. In order to maintain their role as a primary conduit for the free flow of information and content newspapers must operate in a legal landscape permitting flexibility and immediate business decisions to be made. Newspaper companies must be sure that their economic investment is underpinned by effective legal protection, so that they can be confident of their ability to use and disseminate the works created by them and their employees in any appropriate way, allowing the freedom to innovate and develop.

We believe that the current arrangements enshrined in the Copyright, Designs & Patents Act 1988 have generally worked well in practice and would strenuously resist any attempts to amend certain key elements that are crucial to the business of producing a newspaper, be it a digital or an analogue product. Copyright ownership of employed journalists' works (section 11(2) CDPA) is a central issue. It is important to our members both from an operational standpoint and from a commercial one, and reflects the legal risk assumed by newspaper companies in respect of published content. Other pertinent provisions are the various exceptions to the 'paternity' and 'integrity' rights which apply where a work is produced in the course of employment for publication in a newspaper, magazine or similar periodical or for the purpose of reporting current events. These are all practical measures which recognise the exigencies and unique characteristics of the newspaper business. These include the role of the editor; the volume and diversity of content; constraints on space; and the multi-contributor nature of newspapers. The application of moral

rights in the field of newspaper publishing could severely inhibit the provision of a rapid and responsive news service. It would also affect the development of newspaper companies' content and information services across media platforms. In Continental Europe the endorsement of the moral rights of the originator (eg author, journalist, illustrator) has led to serious constraints on the ability of media companies to adapt products to new digital channels.

Copyright is our members' principal IP asset, but enforcement is often difficult. The Internet has exacerbated the problem of the theft of copyright material. It is becoming increasingly incumbent upon newspaper publishers to protect and promote their commercial interests against the free exploitation of editorial and advertising content by search engines such as Google and portals such as Yahoo. These 'monsters of the internet' are attempting to build a business model - which competes with our own industry - on the back of newspaper editorial and sales investments, with no direct financial recognition or recompense for our publications [and see below, **E-Commerce Directive**].

WAN (the World Association of Newspapers) has set up a task force of publishers' organisations to deal with this challenge, and is seeking meetings with Charlie McCreevy, European Union Commissioner for the Internal Market and Services, and Viviane Reding, the Commissioner for Information Society and Media.

Advertising is currently one of the most important sources of revenue for newspaper web operations, and search and indexing services are important in generating of traffic to members' sites. News aggregation services, however, can only build their services with others' content; investing in quality journalism and the creation of high value content is expensive but this is a cost that aggregator and portal sites have sidestepped, taking content for free to build their own news franchises. News is among the most commonly used 'searches' on services like Google, and it must not be allowed to become completely commoditised. Gavin O'Reilly, the WAN President, calls the process the 'Napsterisation' of content (after the conflict between the Napster search engine and the music industry) and says: "Google, Yahoo and other search engines are not some new breed of social benefactors of information". The fact that a newspaper site might allow 'robots' and 'spiders' to index its content in no way legitimises the parasitic actions of the search engine companies in repackaging content in aggregated form, nor does it mean that this content should not be paid for through licensing, revenue-sharing or other means. Arguments about 'fair use' and social value simply cannot apply when dealing with clearly commercial and very-much-for-profit operations. There must be financial recognition and recompense for the significant investment that newspapers make in creating and delivering content.

The current legal proceedings between Agence France Presse and Google in the District of Columbia Federal Court will be of interest for all content publishers in beginning to formulate guidelines of what may or may not constitute 'compensatable' copyright, particularly on the fair use of photographs, headlines and story leads. Other wire services and news agencies have had some success in challenging and getting compensated for the use of their copyright, notably the successful legal challenge and settlement by Deutsche Presse Agentur (DPA) in Germany in 2003, a deal signed between the Associated Press and Google, and discussions between Google and the Press Association in the UK. The NS has voiced its opposition to proposals in the DTI's Consultation Document on the Electronic Commerce Directive issued (June 2005) which would extend the limitations on liability in Articles 12 and 14 to providers of hyper-linking, location tool or content aggregation services [see below, **E-commerce directive**].

NS members do not generally take steps to protect IP internationally, although they believe that this may become more of an issue in the future. For regional publishers,

their brands are distinctive, often old-established and geographically focused; actions for passing off can only give limited protection for titles and trade marks are extremely important [see below]. However, international poaching of brand reputation outside UK jurisdictions is a problem; overseas-based international operators may exploit a well-known UK-based publishing name on the world wide web or in another country, and enforcement is very difficult.

Libel, contempt and other laws require updating and defences expanded to protect publishers and content providers, given that online content is globally accessible and attracts global liability. Publishers face the possibility of multiple actions under many different legal regimes, even if publication is lawful in the country of origin. Sensible reform of applicable laws is required so that country of origin rules apply, with the result that publication is deemed to occur where the publisher of the material complained of is situated or where the website in question is based. The multiple publication rule means that there is a fresh publication each time material is accessed, and the limitation period for libel purposes similarly keeps starting afresh. For publishers to be held liable on each and every occasion that their online archives are accessed constitutes too great a restraint on freedom of expression.

Database rights are particularly important to publishers of directories, advertising and business information, but this area of law has been left in a state of uncertainty in the wake of the ECJ judgements in November 2004. In combination with the Evaluation of the Database Directive conducted by the European Commission [see below, **Database Directive**] this may be inhibiting investment, since the *sui generis* right, operating in tandem with copyright, underpins that investment. A number of questions remain to be clarified, including:

- It remains unclear what the 'creation' of data in the context of the database right actually means. Where one person both creates the underlying data and also gathers it together it may be difficult to separate the two activities. The commercial value of databases that are the 'by-product' of an organisation's primary business could be affected; if such a database is exploited for a secondary purpose, the database right may not subsist in it. The *sui generis* right should not be confined to protection of the data obtained to make the database. It should (and as we understand it, was originally intended to) equally apply to the investment in the creation of data intended to enhance and give added value to databases. In making this distinction the ECJ fails to recognise the processes involved in publishing companies' producing and publishing content and then marketing it through their databases.
- The ECJ has severely limited the scope of infringement by systematic extraction or reutilisation of insubstantial parts. Only if this leads to reconstitution of the whole or a substantial part of the database will infringement occur. We take the view that this is too stringent a requirement.
- Since there is no concept of exhaustion of the database right as a result of the data being made available to the public, indirect copying – such as the publication by newspapers of information from other sources – may be unlawful in some cases. There is no equivalent to the exception in relation to copyright of fair dealing for the purposes of criticism, review and reporting current events.

There are no specific barriers to obtaining IP rights in the newspaper sector. However, in members' experience, trade marking and domain name registration of individual titles can be expensive and inconvenient in terms of administration and maintenance. The Newspaper Society will be responding to the recent Patent Office consultation *Relative Grounds for Refusal: The Way Forward*, which seeks views on the procedure for handling trade mark applications where an earlier registered mark may provide grounds for refusal. We are deeply concerned by

the Trade Marks Registry's preference for adopting a system whereby marks will only be refused on relative grounds if the owner of a pre-existing mark files an opposition, yet the Registry will not notify the owner of an existing mark that a conflicting application has been received. This has serious implications, particularly for SMEs, who would be forced to incur the cost of utilising monitoring services in order to protect their trade marks. Many newspaper companies have registered their titles as trade marks and the system being advocated by the Registry seems to us highly likely to result in a serious diminution of the protection that registration presently affords.

Members report that domain name registration can be particularly frustrating: abusive registration of names still seems to be an issue and Nominet's dispute resolution processes are not considered to be very satisfactory.

With regard to the use of other tools (such as trade secrets) to bring innovation to the marketplace Simon Westrop (Newsquest Media Group) comments: "Publishers are literally an open book. We would tend to rely on constant evolution and re-invention with regard to content and sales ideas. With the exception of bespoke software, new technology tends to be introduced from outside and is therefore available to the industry generally".

2. How IP is used

Newspaper publishers employ all available means to protect their brands and content as may be necessary. Foremost amongst these are copyright and trademarks for brand identity; members are less likely to have a requirement for patent or design protection. Newspaper titles are the central hub of product portfolios, and are supremely valuable assets. Publishers value their IP on market values based on willing buyer and willing seller, and follow standard accounting practice. Finance is not generally raised on intangible IP assets alone. With regard to investment decisions, the term of IP rights at the margin is less likely to be a major factor in newspaper publishing.

Trademarks are an important tool in commerce and the role of the brand is arguably even stronger in the digital world than it is in print. As newspapers compete for audiences, and do so in a world where everything is only a click away, the power of the brand is clear. The reputation and performance of print titles and their online counterparts are increasingly interdependent. Regional newspaper websites borrow from and contribute to the unique position of trust the printed titles hold in their communities. These online products play an important role in driving print sales and building brand equity, and prevent others from misleading consumers by false association with an enterprise with which they are not connected.

There is a tension between the global nature of the Internet and the territorial rights of marks. A corporate presence on the Internet requires trademark owners to defend their rights against new forms of trademark abuse across millions of discrete sites, in multiple languages and domains. The scope of trademark protection in this borderless world should be neither less nor more extensive than the protection granted in the physical world. Due to the particularities of Internet technology, it is often difficult to fit the 'use' of a trademark on the Internet into traditional legal concepts of use. Legitimate right owners need some certainty that they can use their trademarks on the Internet without having to fear claims being raised against them by rightholders in other jurisdictions. It may be appropriate for remedies to be - as far as possible - limited to the territory for which the owner holds an exclusive right, except in cases where the use of a sign on the Internet has intentionally and in bad faith targeted a trademark right. An attempt could be made to develop global criteria

concerning unacceptable use, or alternatively, general definitions could be formulated for forms of 'fair use' that each country would treat as acceptable in its territory.

Some newspaper publishers have found that 'cybersquatting' on domain names has been an issue; we understand that there has been a 20% increase in the number of cybersquatting disputes reported to The World Intellectual Property Organization (WIPO) over the past year. This is not acceptable, but has not caused major problems for our members. In addition to cybersquatting, trademark owners are facing new types of infringement, including user-traffic diversion through keywords and meta tags, or unauthorized linking and framing. Deep linking can raise concerns of trademark infringement if it explicitly or implicitly suggests an unwarranted association between the linking and linked sites, and leads a user to believe that an unassociated web page is affiliated to the trademark owner. The related practice of framing has implications for trademarks because of its potential to mislead or confuse viewers as to the origin of the site and the goods and services it displays.

3. How IP is licensed and exchanged

There are no specific barriers to licensing IP in our sector, although the policing of licences can be very difficult. It is crucial that any legislative initiatives do not unduly constrain the ability of parties to negotiate contractual terms in the market place. Some members use the Newspaper Licensing Agency which was set up in 1996 to offer a one-stop shop for a licence to copy, for internal management use, from all of the UK's national newspapers and many regional and foreign titles. To date the NLA has been mandated to act for them by some 1,000 regional newspapers. However, we would strongly resist the introduction of compulsory licensing provisions in the UK.

The Review asks for information on how easy it is to negotiate licences to use others' IP for commercial purposes. In the newspaper sector copyright owners (including freelancers) often cannot be traced and sometimes seek to impose unreasonable prices or restrictions on content use: in particular, new formats or outlets (such as internet use or digital facsimile versions) have been seen as a pretext to demand extra royalties, adding to the cost of developing new distribution systems.

From our perspective there are no particular barriers to trade and exchange of IP internationally. However members perceive a considerable amount of petty abuse of copyright internationally; difficulties of enforcement in foreign jurisdictions means that there is often little incentive for overseas users to seek licences from the copyright owner.

4. How IP is challenged and enforced

With regard to enforcement, the main difficulty is in monitoring Internet sites that republish newspapers' copyright material without permission. There may also be occasions when it is difficult to force their publishers to desist. In many cases these are small enterprises, and it may be difficult to trace a publishing address. Litigation costs in challenging infringement can be high and potentially prohibitive, although in the analogue world a letter from the publisher is usually enough to resolve the issue. This may be followed by a letter from legal representatives. Smaller publishers are less able to undergo a legal dispute due to the costs and time involved. A recent study which analysed copyright disputes in a sample of 450 larger UK firms found

that despite the initial litigation costs, enforcement of copyright paid off in the long term, with increased profitability³.

Newspaper Society members make very little use of methods other than litigation – such as mediation services, ADR or the Copyright Tribunal - to resolve IP infringement cases. There is a feeling that more needs to be done to enhance the credibility of these alternative methods. The role of the Copyright Tribunal might usefully be reconsidered and expanded to provide cheaper, quicker and easier resolution of general copyright disputes, for instance on infringement and quantum.

The risk of litigation does not figure as a significant factor in member organisations' investment in innovation. Members report that threats of IP litigation are sometimes used by outside suppliers to deter them from moving to breakaway companies offering innovative technical solutions. Typically this occurs in respect of software design and development. An old supplier may threaten breakaway former employees with actions in confidentiality or breach of software copyright, and also threaten the customer with breach of copyright for use of such software or even with legal action for wrongfully inducing a breach of contract. Publishers would be forced to seek indemnities from the new supplier.

Copyright infringement can best be curtailed by a combination of law enforcement, technological measures and public education. The work of the Creative Industries Forum on Intellectual Property⁴, on which the Newspaper Society is represented, has helped to gain a recognition from government of the importance of leading people, both users and creators, to respect the value of intellectual property as fundamental to the future health of creative industries in the UK. Education will assist in maintaining the right balance between the rights of creators and the expectations of consumers in the digital environment. The Educational Working Group within the Forum has highlighted the fact that IP rights are "an intangible concept that is difficult to grasp and generally very poorly understood". The Group believes that "improving the communications and educational messages, and the way they are targeted at specific audiences, as the way to improve understanding, are therefore central to the whole IP agenda".

SPECIFIC ISSUES

• Copyright exceptions - fair use / fair dealing

Copyright exceptions and limitations are applied in UK law only in those cases which do not conflict with the normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of a rights holder. This flexible test has worked well to accommodate recent rapid technological developments.

Of particular relevance to the newspaper industry are the fair dealing exceptions for the purposes of criticism, review and reporting of current events (section 30 CDPA). These exceptions are generally accepted by both copyright owners and users. Section 30 (1) CDPA has of course been amended to reflect Article 5.3(d) of the EC Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, so that fair dealing with a work for the purpose of criticism

³ Mazeh & Rogers, *The Extent and Significance of Copyright Cases: An Analysis of Large UK Firms* (December 2005)

⁴ Government's response –

http://www.culture.gov.uk/global/publications/archive_2005/gr_cifp.htm

and review will not infringe copyright provided it is accompanied by a sufficient acknowledgement and *provided that the work had been made available to the public [by means of an authorised act]*. We have sought clarification from the Government as to whether they believe that this altered the UK position in practice. There is some case law to suggest that any dealing which results in the publication of a previously unpublished work could not be 'fair'. This would be in line with Article 10(1) of the Berne Copyright Convention, which limits the right to make quotations to works which have "already been lawfully made available to the public". However, some judges and legal writers have adopted the position that the fact that a work is unpublished is not determinative of fairness, although they deem it an important factor to take into account.

In light of the fact that all save 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-European basis.

Some Newspaper Society members argue that there is a case for a wider 'back-stop' public interest defence for categories of information not falling into the current exceptions. By way of analogy, the same wider defence already applies to breaches of confidence. There may be some instances outside 'fair dealing' when copyright presently could be used to prevent disclosure although confidentiality could not.

The Review canvasses views on whether UK law should include a statutory exception for private "fair use". We would not wish to comment on other industries directly, but the extent of royalty-free licences to private users would seem to be a question not for Government but for individual copyright owners to determine for themselves. In practice, newspaper publishers currently make much of their material available for free viewing by the public on the Internet. However, copyright owners should not be denied the freedom to determine how to raise a return from their investment.

Views are sought as to whether there are there issues concerning the archiving of material covered by copyright. Keeping electronic or paper archives requires consideration of copyright, data protection, defamation and contempt liabilities. Many of our members maintain archives in both digital and analogue format and these are frequently consulted for the resources they contain with respect to genealogical research and local events. The *Jewish Chronicle*, for example, has recently added an archive system to its website, allowing subscribers to search and view every edition of the paper since 1841. For an increasing number of NS members, archives are economically highly significant. One publishing company, for example, reports annual revenue of around £250k per annum generated via agencies such as Lexis-Nexis, ft.com and Factiva. They obtain greater revenue – around £800k per annum - from photocopying via the Newspaper Licensing Agency [see below]. There remains a reticence among users to pay for online content; education of consumers is required to raise awareness of the value of intellectual property and the recognition that unauthorised copying is in fact theft.

With regard to archive material we have concerns over current EU and British Library initiatives: see below, **Legal deposit issues/Digital Libraries**.

• Copyright – digital rights management

At present DR technologies are not widely used in respect of online newspapers, which are generally available free to readers. This is largely because such systems are expensive; they might be employed in the future depending on both affordability and the willingness of readers and other users to pay for content.

Online editions are recognised by publishers as one model for generating revenue that might become well more important in the future.

The freedom of publishers to be able to choose whether or not to employ DRM must be respected. There are situations in which a publisher may not necessarily need to use a DRM system. For example, in the B2B arena the position will be governed by contract. DRM can encourage tailor-made solutions to be put in place through license terms offering numerous benefits to customers, including a greater choice in content selection, flexibility, speed, ease of access and price precision. DRM could play a role in educating the user about copyright in general and in particular on the convenience of digital delivery and the long-term ill-effects of unrestricted copying and redistribution. Even in the analogue environment publishers favour usage-related individual agreements or voluntary collective licensing over the flat fee approach of a levy. We would not support any legislative intervention in this field as it could inhibit freedom of choice for publishers.

- **Copyright – orphan works**

Publishers have experienced some difficulties in identifying the owners of copyright content, particularly with regard to photographs. Copyright in photographs taken by professional photographers may on occasion be problematic when members of the public offer such pictures of themselves or family members for publication. Conversely, there may be issues over infringement of the moral rights of those shown in pictures submitted for publication by the copyright-holding professional photographer, for example a wedding picture of a later estranged couple. In these circumstances there may be scope for some kind of ‘fair dealing’ exception based on the extent of use.

Suggestions on how problems relating to ‘orphan’ works could be overcome vary from publisher to publisher. Some advocate setting aside an agreed level of payment (fixed by legislation) pending payment to the owner. This could operate in conjunction with provisions requiring users to demonstrate that they have carried out a search to attempt to identify copyright owners, with reduced compensation for rightsholders in consequence. A voluntary copyright register along US lines could be inaugurated which might assist this process.

- **Legal sanctions on IP infringement**

The speed and universality of electronic distribution has greatly augmented the opportunities for IP piracy, with consequent damage occasioned to content producers. Logically we can see no reason for applying different criminal sanctions to online and physical infringement. We are concerned that currently the courts do not award damages sufficient to deter misuse. The ease with which online copyright theft can be accomplished means that a power of prosecution alone may not solve the problem.

- **Coherence between competition policy and IP policy**

The Review asks whether organisations have experienced any activity linked to IP rights that they regard as unfair competition. Competition law may be irrelevant, because the offender may be a smaller operator in the market whose activities are not so closely controlled by competition legislation as those deemed ‘dominant’ in a particular market.

There can be editorial and commercial tensions - though not competition law issues - relating to copyright material such as listings and fixture lists. Copyright royalty rates for TV programme listings were determined by litigation before the Copyright Tribunal under the Broadcasting Act 1990. That litigation reduced the rates originally demanded by broadcasters in respect of listings material that they were required by law to make available.

NS members have experienced difficulties with certain sports clubs which have sought to maintain their control of fixture lists and players' images by invoking copyright and database rights. Newspapers face increasing problems from restrictions and conditions placed upon journalists' accreditation and access to sporting events and occasions, which restrict and control newspaper companies' publication and use of their own journalists' material whether in print, online or via other media.

OTHER ISSUES CURRENTLY OF CONCERN TO THE NEWSPAPER SOCIETY

Legal deposit issues/Digital Libraries

In March 2006 the Newspaper Society wrote to the European Commission in connection with the Communication '*2010 Digital Libraries*', which focused on online accessibility, the digitisation of analogue collections, and preservation and storage. We emphasised the importance of carrying out these activities in a way that is compatible with the commercial interests and sustainability of the publishing industry.

There are considerable legal challenges inherent in making digitised collections available online but there are some disturbing indications that the Commission considers that the current regime operates in a detrimental fashion. It states, for example, that "The limited use that can be legally be made ofdigital copies is a further disincentive for digitisation". We consider that the framework provided by Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society is adequate and we strongly oppose any changes to the current legislative landscape.

The Communication also comments that "Legal deposit schemes may fall short of their useful purpose if unprotected copies are not made available by those who produce the information". Rightholders should be free to control the copying of their works by means of DRMs, if wished, in the absence of which digital products may be shared illegally with impunity.

The UK's Legal Deposit Libraries Act 2003 Act is of course one of the first pieces of legislation worldwide which seeks to regulate for the deposit of both print and non-print material. The Act defines the deposit regime for print works in the six legal deposit libraries but it is generic in relation to non-print publications, giving scope for all current and future works to be included in the 2003 Act. A multitude of strategic, technical and legal issues surrounding the deposit of online content have yet to be addressed.

During the passage of the Act through Parliament particular concerns were voiced by newspaper publishers centring on access to electronic publications, and risk management in relation to defamation, contempt and copyright piracy. The Minister agreed that it was important not to introduce legislation that would undermine the

commercial viability of publishing organisations. Section 11 of the 2003 Act now goes some way towards safeguarding publishers' economic interests by providing that no Regulations can be made unless the Secretary of State considers (a) "that the costs likely to be incurred as a result of the regulations by [publishers]....are not disproportionate to the benefit to the public arising from the delivery of copies of such works"; and (b) that the regulations "do not unreasonably prejudice the interests" of publishers.

In this context the Newspaper Society has a number of concerns over the British Library's policy direction vis-à-vis newspapers' archives, online publications and websites. These concerns have been communicated to the Department for Culture, Media and Sport which helpfully indicated that the Government's 'instincts were not regulatory'. Newspaper companies wish to retain control over whether or not their content (whether current or archival) is made available to third parties. The BL are often to be found indulging in 'blue sky' thinking without a full appreciation of the legal and commercial ramifications for rightsholders. Despite assurances to the contrary made during the passage of the Act, it would appear that the BL is now attempting to accelerate the legislative timetable.

Digitisation has a valuable part to play in the preservation of fragile analogue material and publishers are happy to participate in facilitating the dissemination of knowledge. However, this can only be done in a way which does not expose publishers to an increased risk of legal action. Further, it must not prejudice the commercial interests of rightsholders, respecting copyright ownership and its attendant revenue consequences.

Database Directive

Newspapers – both in their traditional print and digital versions – constitute databases, and in March 2006 the Newspaper Society submitted a memorandum to the European Commission in connection with the DG Internal Market and Services Working Paper *First evaluation of Directive 96/9/EC on the legal protection of databases*.

Newspapers make substantial investments in the contents of their publications, whether on-line or analogue. For one large regional publishing group the cost of hardware and licences for advertising, circulation and editorial databases (excluding digital publishing) is around £1million per annum, plus the equivalent of £150,000 in staff costs for set-up and maintenance.

The industry depends to a considerable degree on the collection of reliable raw data. EU law protects databases by copyright if they are sufficiently creative. Other databases may benefit from the *sui generis* database right. It is apparent that the Database Directive can protect both the newspaper *per se* and value-added services offered by publishers such as advertising, archives and press clippings. Electronic databases are an increasingly important platform for the distribution of content and publishers across Europe are positive about their current performance and future competitiveness.⁵

Only with adequate protection will there be incentives to invest and innovate. A clear and specific framework affording protection to databases is essential in the current

⁵ See ENPA submission on the Commission Staff Working Paper *Strengthening the Competitiveness of the EU Publishing Sector – the role of media policy*
http://europa.eu.int/information_society/media_taskforce/publishing/consultation/contributions/index_en.htm

information society climate, where the public are constantly pushing the boundaries of what constitutes the fair use of copyright works, especially in digital format. Technological advances which were developed to improve access to – and the flow of – information have greatly increased the potential for abuse. Competitors in the digital marketplace have sought to appropriate the results of the collection of data and information undertaken by the makers of databases. One area of particular concern to the Newspaper Society and its members has been the parasitic use of online newspaper articles and advertising material via the establishment of deep links by search engines. This bypasses homepages and makes general browsing of online newspapers unnecessary, thereby having damaging repercussions in revenue terms by reducing the value of websites for advertisers. Publishers have been able to employ the Directive to combat such tactics; for example, hyperlinking was held in the *Newsbooster* case to be contrary to section 71(2) of the Danish Copyright Act, a provision based on the Database Directive.

The Working Paper acknowledges that the European publishing industry as a whole has argued that *sui generis* protection is central to their continued success. In summary it notes that “most respondents appear to believe that the *sui generis* right has brought about legal certainty, reduced the costs associated with the protection of databases, created more business opportunities and facilitated the marketing of databases”. We refute the overheated claim by libraries and others that the *sui generis* right has resulted in a concentration of database producers – among them electronic journals – somehow ‘monopolising’ information.

The Directive was of course adopted to address the problem of the differences in copyright standards obtaining across the Community, essentially the ‘sweat of the brow’ regime operating in the UK and Ireland and the ‘intellectual creation’ standard applicable in *droit d’auteur* Member States. The Directive was the product of extensive work over a considerable period of time (1988 to 1996), its central objective being to establish a “stable and uniform legal protection regime” for databases (Recital 12). Repealing the *sui generis* right would reignite the debate on the level of originality required for a database to enjoy copyright protection. In our view this would be wholly unproductive.

The Newspaper Society believes that the Directive largely achieves a suitable balance of interests between rightholders and users, and that the status quo should be maintained. Retention of this measure will help to ensure that databases are not threatened by unwarranted or uncontrollable exploitation. The alternatives are inadequate; technical protections are susceptible to circumvention and licensing agreements can only govern the activities of those who are party to them. However, there may be a case for making certain amendments to the text (see above).

E-commerce Directive

The NS responded to the DTI’s Consultation Document on the Electronic Commerce Directive issued in June 2005.

The DTI’s partial regulatory impact assessment envisages its proposals having a potential adverse economic impact upon publishers whose property may be used without their consent and without them receiving copyright fees. The paper failed to provide any justification for the potential cost to the established publishing industry, nor for action which might weaken intellectual property rights and reduce the economic benefit which can be derived from them.

Proposals for immediate extension of the limitations on liability in Articles 12 and 14 of the E-commerce directive to providers of hyper-linking, location tool or content aggregation services would be opposed by the regional newspaper industry. Publishers considered that the proposals would result in hyper-linkers, providers of location tools and/or content aggregation services being able to exploit their material without seeking permission or making an appropriate licence payment. Users of those services would be able to make use of them to exploit the publishers' material with impunity.

Regional newspaper publishers believed that the paper's proposals threatened unfairly to undermine the online strategies of established publishers and their ability to develop value from derivative products using content originally acquired for print editions. If implemented the proposals would undermine publishers' revenue from editorial and advertising content. Hyper-linkers could provide summaries and deep links to publishers' content including classified advertising. The hyper-linker/aggregator could in effect direct users to regional newspaper titles' classified advertising sites without leaving the hyper-linkers' or aggregators' own sites.

A likely but unintended consequence would be to undermine the role of press clippings agencies and to reduce the substantial royalties that regional newspapers derive from licensed copying (whether print or digital). Agencies as end-users must enter into agreements with cuttings agencies regarding the payment of copying fees for material received, but no such agreement would be required to use search engines. Publishers consider that the proposed change to the law would thus enable those hyper-linkers to become much more detailed and specific without redress for the originators of copyright material.

Providers of hyperlinks and location tool services have the usual commercial freedoms to assess business risk, to select those with whom they wish to contract, to negotiate terms of such contracts, to make such checks as they deem appropriate, and to obtain insurance.

Lord Sainsbury told the Social Market Foundation in February 2006 that the Government believes the present balance between consumers and innovators to be broadly right. In any event, a key question is the extent to which the UK Government has the ability to fundamentally amend intellectual property protection in view of its international obligations. The Newspaper Society is concerned that the IPR system remains flexible, and does not become too prescriptive or complex.

We trust that the Newspaper Society's comments will be taken into consideration in the formulation of any policy recommendations emanating from the Review. The President looks forward to welcoming Andrew Gowers to our offices for lunch on 21 September.

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