

Gowers Review of Intellectual Property

Call For Evidence



Response from the UK Association of Online Publishers (AOP)

21 April 2006

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Introduction

The online publishing industry is an increasingly important part of the successful creative economy within the United Kingdom. Its success relies upon the work of writers, editors, photographers, designers, journalists, and many other creative people who ultimately earn their living from the appeal of their intellectual property.

This appeal may be rewarded directly by consumers in the form of subscriptions and paid-for content, or through online advertising, both of which also rely for success upon the innovative intellectual property developed by advertisers and those with whom they work.

Copyright and other intellectual property rights are central to the economy of the online publishing industry. Without them the industry may be unable to recoup its investment in the copyright works, their presentation, and in new products and services both online and through new digital channels such as mobile.

AOP therefore welcomes the Government's recognition that intellectual property is crucial for the success of knowledge-based industries such as online publishers. We also welcome the opportunity to respond to the Review, but, to reflect our primary interest, will concentrate on the questions raised in the Call for Evidence which concern the way in which copyright applies to the work of the sector.

The UK Association of Online Publishers

AOP is an industry body representing UK online publishing companies that create original, branded, quality content. AOP champions the interests of approximately 160 publishing companies from diverse backgrounds including newspaper and magazine publishing, TV and radio broadcasting, and pure online media.

Members include: Associated New Media, BBC, BSkyB, Channel 4, CMP Information, CNET Networks, Condé Nast Interactive, Dennis Interactive, The Economist Group, Emap, Financial Times, Future Publishing, GCap Media, Guardian Unlimited, Haymarket Publishing, Independent Digital, IPC Media, ITV Online, News International, Reed Business Information, Reuters, Telegraph Group Limited and Which?. In addition, AOPi (Periodical Publishers Association Interactive) retains a corporate seat on AOP board: representing the interests of magazine publishers online. www.ukaop.org.uk.

Together they publish around 1,800 products (AOP Census 2006) and their websites have a combined audience of almost 20m users, or an active reach of

68 per cent of the entire internet population (source: Nielsen/NetRatings, Q4 2005).

All AOP members offer online services, including websites, mobile content services, email services, RSS/web feeds, podcasts, and versions of print publications and publications only available online, or through electronic transmission. Online publications encompass consumer, business to business and contract-published websites, and increasingly involve the use of new electronic rights management systems to help improve the provision of publications and services to subscribers.

Increased use of digital technologies is having a significant impact on the way in which publishers from all publishing heritages compile and design their products and services, and subsequently publish and make available their goods and services to customers and individual consumers.

Ultimately, consumers and rights holders share the same objectives, involving affordable access to a wide range of content to satisfy effective demand for consumption across an ever increasing number of delivery platforms and devices. The successful use of new technologies (or "new media") embracing delivery platforms, electronic rights management systems, and technical protection measures will help to support these ambitions, stimulating new business models and creating opportunities for business to offer more choice to the consumer/citizen.

Evidence of Economic success

The latest results from the Internet Advertising Bureau and PriceWaterHouse Coopers reveal that total UK internet advertising reached £1,366m in 2005, taking a 7.8 per cent share of the overall advertising market. It is predicted that UK online advertising spend will reach £2bn in 2006, and could overtake national press ad revenues.

The estimated total turnover of AOP members' online businesses is £344m – up from £166m in 2004. The average turnover for AOP members is £6.6 million, up from £4.3 million in 2005. Average advertising revenue for AOP organisations is £3.5 million a year (up from £2.4 million in 2004). Forty-four per cent of AOP members are now generating more than £1 million annually from online advertising alone.

AOP members forecast an average growth of 37 per cent over 2006.

(Source: AOP Census 2006)

Executive Summary

1. Relevant Rights.

AOP members rely particularly upon the value of copyright, databases and trademarks for the intellectual property rights which protect their business. As such this response will concentrate on issues relevant to these rights.

Copyright law has developed to prevent unauthorised reproduction of the form in which works are expressed. Copyright protection does not provide a monopoly in the sense that the protection can apply distinctly for two similar works which are produced wholly independently of one another.

It is important to bear this in mind when hearing those who argue against copyright protection on the grounds of its monopoly status. Copyright is, and should remain, the way in which creators are able to receive recognition and secure return for their investment in their work.

2. Improving education and awareness about the value of intellectual property.

A broad range of educational initiatives are needed to engage people and business with the important work highlighted by the findings of the Creative Industries Forum on Intellectual Property in 2005.

The Patent Office has an important role to play in working to improve education and awareness about the value of intellectual property.

Government should support improved education and awareness about the real scope of products which might fall under the generic description of "Digital Rights Management", in order that consumers are better informed about the ways in which such products can work to improve efficiency, and provide for and protect consumer choice.

The CREATE Principles are a useful base for further education initiatives.

DfES support is needed to help promote education initiatives in the context of the citizenship curriculum.

3. Orphan Works

"Orphan works" is not an expression currently used within the Copyright, Designs and Patents Act 1988. However, the issues raised in the recent US Copyright Office Report, in relation to the licensing of copyright works which

cannot be identified or located by someone who wishes to make use of a work in a manner that requires permission of the copyright owner, should be taken into account in the current UK review.

If provisions can be introduced which balance the onus on prospective users to undertake a “reasonably diligent search” to identify rights owners, and seek licences and reducing the remedies available to rights owners for use of their works when they cannot be identified through such “diligent search”, this may help improve transparency, and help reduce perceived barriers to access to copyright works that might be described as “orphan works”.

4. Collective Licensing

AOP welcomed recognition in the European Commission’s Recommendation of October on cross-border management of copyright and related rights for legitimate on line music services, that the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to need any immediate action at Community level.

However AOP has a number of concerns arising from the Recommendation which relate to the way in which markets for the licensing of copyright works are given differing priorities depending upon the type of work, and the ways in which use is regarded as primary or secondary use by the rights owner.

5. Enforcement

AOP would submit that it is wrong to consider IP in terms of overlapping forms of protection. Each form of protection has its own role, and it is important for the education and awareness initiatives supported by this submission to take this into account.

Despite valuable work in implementing the EC Copyright and Related Rights Directive and the EC Enforcement Directive within the UK, some anomalies remain to be addressed in the context of the current Review.

Particular concerns relate to the delayed implementation of sections 107A and 198A of the Copyright, Designs and Patents Act 1988.

The work of the IP Crime Forum will be important to help resolve current difficulties in information sharing between private and public enforcement organisations to help tackle IP crime.

Consideration should be given to a new act of secondary copyright infringement to cover the provision of software or access to network services for the communication of infringing copies, with a knowledge requirement and defence based upon reasonable grounds that the communication would not infringe copyright.

6. Term of protection on sound recordings and performers' rights

The recent extension of copyright term in the USA for sound recordings made as works for hire to 95 years may act as a distortion of the marketplace for those who wish to invest in the making of new sound recordings in the future.

AOP members will increasingly be involved in the making of sound recordings as the opportunities opened up by digital technology support the launch of new online products and services.

In the online world, films and their sound tracks may be exploited separately in the form of the film and distinct copyright sound recordings related to the film (but not forming a soundtrack in the traditional sense).

Increasing the term of protection for new sound recordings from the current 50 years to 70 years is proposed for the reasons outlined in this submission.

7. Copyright exceptions and limitations

Copyright exceptions and limitations are applied in law only in special cases which do not conflict with a 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 enable and accommodate recent rapid technological developments. It should continue to be recognised and observed.

Advances in digital compression technology and the new range of platforms over which digital broadcasts can be transmitted, and the devices over which broadcast material can be captured, copied and stored for on demand access, has grown far beyond what was intended at the time that the current "time shift" copyright exception under section 70 CDPA was agreed.

AOP believes that these market developments mean that the current provisions of section 70 CDPA no longer reflect the requirements of Article 5 of the EC Copyright Directive and should be amended.

8. Private use

AOP believes that a combination of the fair dealing and other copyright exceptions and limitations already recognised within the UK alongside new licensing solutions already within the power of rights owners, obviates the need for any broad “private use “ exception to be introduced.

This does not mean that genuine non commercial private copying should be restricted. Merely that licensing solutions available to rights owners (whether collectively or individually and with or without the use of digital right management solutions) should be promoted and provide flexible ways for securing the “fair compensation” for rights owners recognised in Article 5 (2) (b) EC Copyright Directive.

The way in which the range of exceptions and limitations already recognised, apply differently against the background of different commercial priorities for different types of copyright work (e.g. an article in a journal as opposed to a commercial sound recording), is important when considering how they all balance against the overriding “three step test” for application of any copyright exception or limitation.

9. E-Commerce Directive Review

AOP responded in detail to the recent DTI Consultation concerning the Electronic Commerce Directive, which requested views on possible extension of exemption from liability of hyperlinkers, location tool service providers and content aggregators for the purposes of Articles 12 to 14 of the Directive.

AOP continues to believe that the existing copyright and other intellectual property regimes within the EU provide for a carefully developed system of rights and exceptions which it would be wrong to alter by changes to Article 12 to 14 of the Electronic Commerce Directive.

10 Digital Libraries and Legal Deposit Regulations

The cost burden of archiving works in digital form will be a concern for AOP members.

Defining “electronic publications” which are to be subject to Legal Deposit rules when the publications do not comprise films or sound recordings will be

important in helping to ensure that it is clear who will be responsible for the legal deposit of different types of work in an increasingly digital world.

“Archiving” and “access to archives” are different issues for rights owners. Rules under which consumers may have direct access to archives may challenge the three step test applicable to any copyright exceptions and limitations.

Care will need to be taken to ensure that the correct balance regarding access is maintained.

11 Technical Protection Measures and Rights Management Information Services

AOP believes that the legal protections for “DRM”, already recognised in law at both European level and within EU Members States, should be maintained, in order that industry can develop and offer an increasingly diverse choice of products and services for the consumer, including online and digital publications.

The market for DRM solutions is a nascent one. There are few nascent technologies for which there are not initial technical problems. Government and Parliament should continue to monitor developments in the marketplace, and the way that new technical protection measures and rights management information systems are brought to market, but recognise the careful balance of interest established by the framework already provided for under the EC Copyright Directive.

12. Specialist groups.

No specific right for libraries to circumvent technical protection measures is necessary in the light of the discussions which are taking place between representatives of both libraries and rights owners, who recognise the mutual interest in ensuring the right environment to stimulate creativity and invest in new work in the future.

Rather than imposing forced exceptions to DRM systems for specialist groups, which serve to reduce incentives for investment in innovation, voluntary systems must be allowed to develop, bearing in mind that it is in the commercial interests of publishers to ensure that consumers are not alienated, and that effective demand for their products and services is maintained.

13. Review of the Database Directive.

AOP supports the response of the Periodical Publishers Association (PPA) to the European Commission's consultation concerning review of the Database Directive.

AOP opposes any change to the status quo for the rights recognised by the Directive.

One of the key elements underpinning the growth of database-driven businesses is the existence of the *sui generis* right that protects database-driven companies, and which works alongside copyright to further assist publishers in safeguarding their high levels of investment.

AOP believes that were the *sui generis* protection to be withdrawn, the industry would reduce investment and either diminish in size and activity, or switch to a more favourable environment where that investment can be more readily protected.

AOP is working closely with the Patent Office to help gather information about the practical application of the *sui generis* right and its value to the industry.

As this work is carried out, it is important to remember that when the *sui generis* right was introduced, it was not made conditional upon users having to account for the investment made specifically as a consequence of the new right.

14. International exhaustion of trade mark rights.

It is important to distinguish between copyright and trade marks in the context of this issue. International exhaustion has never been part of UK copyright law, and we do not believe that such status quo has ever seriously been questioned. In contrast it is only in relation to trade marks that the effect of European Community law has been to change UK law so as to preclude international exhaustion. AOP is strongly opposed to any attempt to introduce international exhaustion for copyright.

GENERAL QUESTIONS

1. How IP is awarded

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

1. The intellectual property upon which AOP members rely most heavily is copyright, and the protection of mastheads and logos under trademark registration.

2. Copyright is not secured through registration. The ease with which it is obtained is therefore an advantage which helps to support and encourage innovation and creativity by individuals and by SMEs.

3. The existence of copyright facilitates the effective operation and growth of the industries which rely upon it.

However, perceived complexity is often used to attempt to discredit the framework within which copyright is applied. To challenge this, the importance of improving education and awareness of the value of copyright, and its role in securing reward for creators is a challenge for both Government and industry. It is a vital issue which, if handled correctly, will encourage growth, choice and innovation within the creative industries in the future.

4. The work within the European Union to harmonise laws concerning copyright and related rights has played an important role in providing for a flexible framework for application of copyright within the EU, whilst still vitally preserving recognition for the territorial nature of the rights recognised at law.

(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?

1. The Creative Industries Forum on Intellectual Property found that intellectual property rights are "an intangible concept that is difficult to grasp and generally very poorly understood." The forum's education working group concluded that there are many agencies and organisations communicating

issues surrounding intellectual property, but that this communication lacked consistency and coordination.

2. The group also noted that the debate about intellectual property has been too heavily flavoured by a narrow, negative, piracy focus. Although it has a role, this approach fails to explain and promote the importance of intellectual property to the success of creative industries, and the careers of those who work in them. The group also recognised that listening to consumers and reacting to their desires and behaviour are key to a successful communications and education strategy.

3. The education group therefore agreed that messages should be positive and empowering, and developed the so-called CREATE statement of principles to express the importance of intellectual property as a social, creative and economic tool.¹ They cover the importance of

Creativity

Respect for Rights

Education about why the rights affect everyday lives

Access to works on fair terms

Trust between creators and consumers

Economic benefits from intellectual property, stimulating job creation, business and economic growth.

4. In addition to expanding the message, it will be increasingly important to coordinate support to improve education and awareness about the value of intellectual property and the role that it plays within the economy, supporting jobs and providing reward for innovation.

The Patent Office should play an important role in encouraging this coordination within Government and in connecting with industry. It will need the support and involvement of key government departments if its work is to have the best effect.

5. The Patent Office's work developing a "Think Kit" for schools and higher education is important. It will be important that the support of the DfES is secured to promote to teachers both the thinking behind the CREATE Principles and the lesson plans and other background material which is made available through the Patent Office and other agencies, to help stimulate debate and teaching about the value of IP within the

¹ CREATE for the future: tools for innovation, enterprise and reward in the 21st century - Appendix 1.

wider citizenship curriculum. AOP hopes the review team will support and encourage the involvement of the DfES in this respect.

6. In business, the work of trade associations, unions, and Sector Skills Councils is valuable in providing education and awareness of intellectual property issues which are directly relevant to members. However, the partisan language of some advice can create confusion in the messages that are picked up by the media and other third parties.

7. Incentives should therefore be considered for specialists to link their advice and information with the broader information and advice centres available through Government agencies and departments. This would avoid duplication, or potentially conflicting messages.

8. Business links and projects such as Passport to Export provide an important source of advice and information for new businesses and SME's. This is also important to help awareness of the need to protect intellectual property internationally. Increased opportunities for participation in cross border e-commerce services makes education about the international application of rights, all the more important.

9. However, trade advisers in many regions do not have the expertise or resources to offer specific training on intellectual property matters, leaving individual clients to source appropriate additional support either through training or consultancy. It is hoped that the review will highlight the importance of further research into the level of expertise amongst trade advisers, in order for additional resources or training to be put in place where necessary.

10. Good links are being established with the CBI as a means of helping highlight the importance of intellectual property to British business. This dialogue should be supported and encouraged by Government.

11. There should be much greater emphasis about the role of IP within vocational training for those who work within the creative industries. AOP believes that the relevant Sector Skills Councils have a role to play here.

(c-e) Are there specific barriers to obtaining UK IP rights on grounds of costs?

AOP believes that the way in which copyright is recognised, without the need for formal registration, helps to support innovation and creativity,

generally complementing the other forms of intellectual property for which registration is a requirement.

(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?

1. Improving trust in the intellectual property system will be a key part of the education and awareness initiatives we have referred to above.

2. This should be addressed by encouraging improved media literacy across the whole of society. Additionally, industry should be clearer and more transparent in explaining to consumers the terms and conditions attached to the licensed or authorised use of copyright materials.

3. Ofcom and the BBC will have important roles to play in helping to build consumer trust in the services which they receive, and the different ways in which services can be accessed as a result of technological developments.

4. If real choice of access and opportunity is to prevail in the digital world, the use of technological protection measures for copyright works will be increasingly important. The development of Digital Rights Management (DRM) will be central to stimulating innovation in the market by providing protection and ensuring reward for audiovisual works. On this issue AOP supports the recent response of the Periodical Publishers Association (PPA) to the All Party Internet Group inquiry into Digital Rights Management, and we attach the PPA submission as Appendix 2.

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

1. With the growth of new online services and reliance upon new means of delivery for publishing and content services, the number of works requiring clearance will increase, as will the types of work for which clearances are required.

Increasingly sound recordings, films and audio-visual works will compliment the more text and still photographs and artistic works featured in printed editions.

3. The relationship between AOP members and collecting societies is therefore becoming increasingly important part of rights management not only to collect payments from secondary forms of exploitation, but also to ensure that clearances can be secured for the delivery on new electronic services in multiple territories.

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

1. In terms of copyright licensing, we believe that the system works well, providing a level playing field for all those who are interested in securing copyright licenses.
2. Where it is impractical for an individual rights owner to police the licensing of rights in specific fields of exploitation, licensing opportunities through collecting societies have generally provided helpful market solutions.
3. One area which we believe warrants further review concerns the problem of clearing "orphan works".
This is where a proposed user of a copyright work cannot find the owner from whom to seek a licence (having made reasonable efforts to do so).
4. In practice, publishers make a reasonable provision for licence fees against a budget to cover the likely costs of a licence, when a particular work is significant for a particular publication, and all reasonable enquiries to confirm the relevant rights owner have failed.
5. However, in this context AOP has noted with interest the recent work of the US Copyright Office² following extensive discussion of the issue of orphan works in the USA.
6. Despite what we have said about the advantages of copyright existing without the need for registration, one of the difficulties when dealing with clearance or licensing of orphan works is the lack of any comprehensive database of rights owners or publishers from which information about current owners can be sought.

² US Copyright Office report January 2006

7. This issue is being addressed by collecting societies, and much work has been done to improve databases including rights owner details which will help monitor increasingly micro payments to rights owners under blanket licensing agreements.
8. This work should be encouraged and supported by the Patent Office and Government.
9. In addition AOP believes that consideration should be given to the proposals now under consideration within the US, whereby a limitation is provided on the remedies that are available for copyright infringement if the owner of orphan works cannot reasonably be identified, works are used, and the owner subsequently seeks to assert their copyright and make a claim against the user. The limitation would provide that, in cases of commercial use, there would be no claim for statutory damages (a major concern under US law) and that any remedies which a copyright owner may obtain would be limited to a reasonable licence fee which would have been chargeable at the time the copying first occurred.
10. Where use of orphan works is non commercial, it is suggested that no monetary relief should be available provided that the orphan work is not further used, removed or taken down expeditiously when the user has received notice from the rights owner.
11. AOP believes that the above proposals are worth further consideration, bearing in mind that the proposed arrangements often reflect what occurs in practice in any event. Clarifying the position may help improve transparency within the copyright licensing system, encourage rights owners to ensure that their rights ownership is traceable by ensuring that their interests are noted on industry databases where appropriate.
12. The provisos under consideration within the USA whereby:
 - a) there must be evidence of a "reasonably diligent search" for the rightsholder, or for permission; and
 - b) there will be a sunset clause in order that the provision will be kept under review;will be important, and should be provided for in any consultation about the impact of any change to be considered for the purposes of legislation applicable within the UK.

In addition any review will need to address a number of issue relating to the definition of an "orphan work". These include:

- (i) if the author is unknown, how does the potential user discern whether the work is in copyright;
- (ii) what steps the potential user must take to identify the owner;
- (iii) what steps the user must take to locate the owner.

Once an orphan work has been identified, any review would need to consider what solution(s) would be suitable, and the problems and possibilities these raise. These include:

- (aa) how and to whom the user demonstrates their efforts at a reasonably diligent search;
- (bb) what level of remuneration should be provided for;
- (cc) how and by whom that remuneration should be held?

(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?

This is not relevant for the purposes of copyright. However, for trademarks and patents, it is important for the Patent Office's role to extend beyond purely policing the award of intellectual property, and include promoting education and awareness about the whole range of rights which comprise intellectual property.

2. How IP is used

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

Whilst publishing companies increasingly rely upon the use of patents to support their work, they primarily use copyright and trademark protection to protect the publications which they produce.

The relationship between publishers, writers, journalists and photographers is central to the work of AOP members.

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

AOP would submit that it is wrong to consider IP in terms of overlapping forms of protection. Each form of protection has its own role, and it is

important for the education and awareness initiatives supported by this submission to take this into account.

As the law currently stands, enforcement issues make it important for producers to have the benefit of both trademark and copyright protection.

For example, Trading Standards currently only has a duty to take action in cases of trademark infringement, but not copyright infringement or infringement of performers rights, as sections 107 A and 198 A of the CDPA have not yet been implemented. The Alliance Against IP Theft has made the case for effective early implementation of these provisions, and AOP hopes that action will be taken to pursue this imminently.

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

Branding is becoming increasingly important for companies in the digital world. The links between copyright and trademarks are particularly important for online publishers. In this sense the overlap is sector specific. However similar issues will apply in other creative industry sectors.

(d- h) 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?

AOP supports the work of the Creative Economy Programme and initiatives which help to identify why companies whose products are based on intellectual, rather than physical, property find they face additional difficulties in securing capital investment within some parts of the creative industries when moving from start up to early growth stage.

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

1. Copyright law has developed to prevent unauthorised reproduction of the form in which works are expressed. Copyright protection does not provide a monopoly in the sense that the protection can apply distinctly for two similar works which are produced wholly independently of one another.

2. It is important to bear this in mind when hearing those who argue against copyright protection on the grounds of its monopoly status. Copyright is, and

should remain, the way in which creators are able to receive recognition and secure return for their investment in their work.

3. There have been longstanding concerns regarding the operation of collecting societies. The issues raised by the recent European Commission study in this area should be taken into account.³ The Commission proposes the elimination of territorial restrictions and customer allocation provisions for existing licensing contracts. It includes provisions on governance, transparency, dispute settlement and accountability of collective rights managers.

4. AOP believes that it is vital the core principles outlined in section 7.2 of the study are further reviewed in the light of the different online primary and secondary markets which are developing for copyright works, and the extent to which collecting societies have a role in these markets.

3. How IP is licensed and exchanged

1. The comments made in response to sections 1 and 2 are relevant here.

In particular we would refer to consideration being given to the US proposals concerning possible limitations on the remedies available to owners of “orphan works” who cannot be traced after a “reasonably diligent search” by a programme producer.

2. AOP recognises that the current collective management structures for licensing use of works in online services that can be received in more than one EU Member State are seen as a barrier by some.

3. Copyright is by its very nature territorial, and this has proved valuable to allow for degrees of flexibility in the international framework which have supported local markets.

However, although collecting societies have been developing their international reciprocal network to accommodate new forms of cross border licensing, frustrations do exist when a local collecting society is unable to grant licences for pan-territorial use to support the licensing requirements of a single service. The process of acquiring separate licences from a different collecting society for each territory may also add to the costs of clearance without improving the efficiency of the licences eventually secured.

³ European Commission study on the cross-border collective management of copyright, July 2005.

4. AOP therefore welcomes the European Commission's Recommendation of October 2005 on cross-border management of copyright and related rights for legitimate online music services. In particular we welcome recognition that the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level.

5. It is hoped that the industry discussions ensuing from this will encourage fairer and more transparent cross-border distribution of royalties, and ensure good standards of society governance at the same time as going some way to addressing user's concerns.

However, AOP does have a number of concerns arising from the Recommendation which it would hope are noted in the context of the current review.

These are:

(a) The Commission stated that most collecting societies form part of a network of interlocking agreements, by which rights are cross licensed between societies in different Members States. However, this is not always the case. The important locally recognised role played by collecting societies which operate at local level⁴ must not be forgotten.

(b) It is important that collecting societies can continue to be able to operate within local and niche markets. Schemes such as the one operated by ERA allow rights to be managed efficiently, with the educational purposes of the licences also contributing to the establishment of fees at levels that the user community are prepared to accept.

(c) If proposals are made for the establishment of common ground at Community level to promote good governance of all collecting societies, it is important that the different scale and scope of different collecting societies are taken into account.

(d) Just as the rules applicable to publicly listed companies, and small or close companies differ to reflect the internal administrative, and the external shareholder, obligations of a corporate entity, so the scale of a collecting societies' operation should be taken into account.

⁴ For example The Educational Recording Agency Limited in the UK

If this is not done there is a danger that well intentioned regulations to promote good governance within collecting societies actually serve to impose regulatory burdens on smaller societies, which result in an increase in administrative costs without commensurate benefits to members of the society or its licensees.

This last point is also important when continuing to recognise the importance of respect for subsidiarity and proportionality principles being observed concerning any recommendations for the harmonisation of certain features of collective management.

6. AOP would urge the Review team to take these issues into account in anticipation of further review of the role of collecting societies by the European Commission.

4. How IP is challenged and enforced

1. As before we shall limit our comments to issues related to copyright.

2. AOP believes that the EC Copyright and Related Rights Directive and the Enforcement Directive have both helped to evolve the fair balance under copyright law, between the rights of copyright owners and consumers access to rights, recognised in earlier International Copyright Treaties, to reflect advances in technology.

3. The way in which the Copyright acquis had been reflected and implemented through changes to copyright law since the Copyright, Designs and Patents Act 1988 was first enacted, reinforces the valuable flexibility which the copyright legislative framework has accommodated over the years. This flexibility remains as important as ever in the light of rapid technological developments.

4. Despite the advances made, and the valuable flexibility provided for, concerning choice over the ways in which rights are licensed and administered, some concerns remain. AOP hopes that these will be addressed further as a result of the current Review. In this respect AOP is aware of the concerns highlighted by the Alliance Against IP Theft, and would support further consideration of the anomalies that the Alliance refers to.

5. Remaining anomalies include :

- (a) addressing deficiencies in the system for damages, which does not reflect the true loss to rights holders and the economy as a whole as a result of the profits secured by counterfeiters and pirates;
- (b) company directors being able to turn a blind eye to IP infringements carried out in the workplace;
- (c) Trading Standards not having the duty, power or resources necessary to enforce copyright law; and
- (d) difficulties in information sharing between private and public enforcement organisations to help tackle IP crime.

6. As referred to above, because Trading Standards do not currently have a duty to enforce copyright law, a major inconsistency exists in the way that the law currently treats different forms of IP infringement.

This inconsistency should be addressed by implementation of sections 107A and 198 A of the Copyright, Designs and Patents Act 1988.

7. Whilst rights owners do all they can to protect their rights, they do not have any enforcement powers for criminal offences. This means that although they may have clear evidence of infringing activity, they cannot enter premises and they cannot inspect and seize goods and documents relating to that infringing activity.

Rights owners rely upon the Police and Trading Standards to protect and enforce their IP rights against crime. Confirming Trading Standards duty in this respect will serve the interests of both the consumer and rights owners, retailers and others who work in the supply chain for legitimate products.

Secondary infringement – review of section 26 Copyright, Designs and Patents Act 1988.

Due to inadequacies in the current legislation, legal action against software providers behind infringing peer to peer services and Internet Service Providers that provide access to them has proved difficult. This is because the secondary infringement provisions of section 26 of the Copyright, Designs and Patents Act 1988 do not clearly apply the authorisation provisions of this section to circumstances where the peer to peer software provider or linked IPS is merely facilitating the unauthorised activity, rather than “authorising it”.

This has resulted in the people or companies behind the services making money from the use of their services linked to unauthorised use of copyright, whilst industry has to focus its attention on members of the public to seek redress from those who upload copyright works for unauthorised communication to the public across networks.

Consideration should therefore be given to the analogy which exists between a person who provides software and/or network services which are used to infringe copyright and a person who permits the use of premises for an infringing performance under section 26. The latter is currently an act of secondary infringement which attracts both civil and criminal liability. Consideration should therefore be given to confirming a new act of secondary infringement to cover the provision of software or access to network services for the communication of infringing copies, with a knowledge requirement and defence based upon reasonable grounds that the communication would not infringe copyright.

Copyright Tribunal and alternative dispute resolution.

AOP welcomes the current review by the Patent Office to consider whether improvement could be made to the way in which the Tribunal works.

AOP also welcomes the fact that the Patent Office has now developed a Patent Office Mediation Service consistent with the general move towards Alternative Dispute Resolution.

However, for the purposes of copyright disputes, there are a number of issues which should be further addressed.

These include:

- (a) lessening the adversarial nature of the Tribunal procedure by simplifying procedures.
One example would be the introduction of an automatic first stage meeting or preliminary hearing between the Tribunal Chairman and representatives of each side in a case aimed at isolating and identifying issues in dispute, This would be similar to the case management role of the civil courts under the Civil Procedure Rules.
This would also help to reduce costs.
- (b) reviewing the constitution of the Tribunal.

It is suggested that the Tribunal should retain a legally qualified Chairman (with deputies), However the current panel of ordinary members should be replaced with two people with industry expertise relevant to the case, who are appointed for their appropriate expertise for each side of the case, and selected by the parties to the reference.

If this is not accepted, at the very least the ordinary members of the Tribunal should receive training about the relevant industries.

SPECIFIC ISSUES

Current term of protection on sound recordings and performers' rights.

This issue is potentially becoming more relevant for AOP members as they develop new digital products and services. In this context the issue is of relevance to members in their capacity as makers of sound recordings (both comprising soundtracks of films and as commercial sound recordings exploited independently of a film) and as licensees of the use of sound recordings produced and owned by third parties.

AOP members as makers of sound recordings.

1. AOP recognises that the European Commission position on term of protection for producers of phonograms is currently that it should be 50 years after first publication⁵.

AOP also recognises that the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations lays down only minimum terms for the protection on rights they refer to⁶.

Since changes to the term of protection on sound recordings and performers' rights in sound recordings will need to be agreed at EU level, we would suggest that the UK needs to take a lead in reviewing the evidence for change, bearing in mind both the status of the UK recording industry (third largest in

⁵ Community position adopted for the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) and reflected in Article 3.2 of EC Directive 93/98 of 29 October 1993 harmonising the term of protection of copyright and certain related rights.

⁶ A minimum of 20 years computed from the end of the year in which
(a) the fixation was made – for phonograms and for performances incorporated therein;
(b) the performance took place – for performances not incorporated in phonograms;
(c) the broadcast took place – for broadcasts.

the world behind only the USA and Japan) and the significance of use of the English language in many sound recordings produced within both the UK and the USA.

2. In considering whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, AOP believes that the recent extension of copyright term to 95 years for sound recordings made for hire under the law of the USA⁷ cannot be ignored.

Whilst the term now fixed under USA law should not dictate policy within the EU, there is concern that the longer term within the USA acts to distort the marketplace for those who wish to invest in the making of new sound recordings and other works for hire benefiting from the 95 year term. Companies making recordings in the USA will have an advantage if they are able to qualify for the longer term of protection recognised within the USA, but not within the European Union.

3. The significance of the English language within both the UK and the USA must be taken into account when considering the affect of this market distortion.

4. Whilst the issue of copyright term in sound recordings has traditionally been a matter for debate within the music recording industry, the way in which sound recordings are now being used in an increasing number of ways within new digital services will have a bearing on a wider range of copyright owners in sound recordings in the future.

5. Recognition of term of copyright for films under the EC Term Directive should be regarded as an important precedent when considering a change to the term of protection for sound recordings.

Whilst sound tracks accompanying a film are treated as part of a film for the purposes of assessing copyright⁸, the way in which films, and the sound tracks made for them will be made available for use in the digital environment, may increasingly mean that films and sound recordings made at the same time, will be licensed for exploitation within digital services in parallel ways.

In the interests of transparency, consideration should be given as to whether the term of protection for such sound recordings should be extended to run more in parallel with that recognised in the film.

6. AOP believes that any attempts to link the term of copyright in sound recordings (and therefore the term of protection for performers rights in sound

⁷ Sonny Bonno Copyright Term Extension Act 1998.

⁸ Section 5B(2) Copyright, Designs and Patent Act 1988.

recordings) to the life of a contributor plus a number of years would be inappropriate.

Such a change would:

- (a) work against the increased transparency and reduction of market distortion that any change should address; and
- (b) create difficulties in assessing the contributors whose lives are thought significant enough to dictate the term of protection in the sound recording to which they contribute.

7. A helpful precedent already exists for fixing the term of copyright in films, where the identity of the persons who might provide for a 70 year post mortem acturis term of protection, is not known⁹.

This provides for the term of copyright in a film to then expire either:

- (a) 70 years from the end of the calendar year in which the film was made; or
- (b) If during that period the film is made available to the public, at the end of the period of 70 years from the end of the calendar year in which it is first so made available.

8. In view of the above provisions, the recognition of a 70 year term for the protection of sound recordings commencing in the same way as currently provided for under EU law should be considered.

AOP members as licensees of sound recordings.

- A. Increasingly new online services operated by AOP members will involve the use of sound recordings and films produced by third parties and licensed for inclusion within an online product or service.
- B. As such the terms upon which AOP members are able to license rights to use such pre-existing sound recordings are part of the commercial negotiations for new productions.
- C. It is therefore important that licences for the use of recordings are available on reasonable terms, and that record companies are able to offer licences for use of sound recordings in services which can be received in a number of different territories. We refer to our earlier comments about the evolving role of collecting societies against the background of the Commission's Recommendation on cross – border

⁹ S13B(4) CDPA 1988 as amended

management of copyright and related rights for legitimate online music in this respect.

Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

1. If sound recordings are to be given a longer term of protection, it will be important that the recordings are not withheld from the market place during any part of the extended term. Hopefully digital technology will ensure that such withholding from the market place will not be a practical reality.

2. However, consideration might be given to requiring that a sound recording is available for licensed communication to the public during the last 20 years of the 70 year term, and if not, provisions along the lines of those under discussion for orphan works might be deemed to apply.

If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

Taking into account the need for approval of the change of term at EU level, and in the interests of transparency, it would seem preferable for the extended term only to apply to sound recordings made after the date upon which a Member State adopts the new term.

Copyright exceptions - fair use / fair dealing.

(a) What are your views on the current exceptions in copyright law?

Copyright exceptions and limitations have evolved over time, but the underlying principle established in International Treaties, and more recently within Article 5.5 of the Copyright Directive, must continue to be applied and supported.

This provides **“Exceptions and limitations... shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder”**.

Since the existing regime had enabled rights owners to choose whether they wish to license the use of their works by means of sharing licences, such as those developed by Creative Commons, it is unnecessary to make legislative changes to permit them.

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

Liabilities of hyperlinkers, location tool services and content aggregators.

1. AOP has noted the recent DTI Consultation Document concerning the Electronic Commerce Directive, requesting views on possible extension of exemption from liability of hyperlinkers, location tool service providers and content aggregators for the purposes of Articles 12 to 14 of that Directive.

2. AOP believes that the existing copyright and other intellectual property regimes within the EU provide for a carefully developed system of rights and exceptions which it would be wrong to alter by changes to Articles 12 to 14 of the Directive.

3. Although Article 21 (2) recognised that the Commission review of the E-Commerce Directive should include examination of the need for adaptation of the Directive, it is submitted that such review is the wrong forum and route through which to look at any extension of (or change to) the carefully balanced provisions for copyright exceptions and limitations outlined and provided for in the EC Copyright Directive.

4. AOP would urge the Government to recognise this, and the other concerns below in the context of addressing the review at Commission level during 2007.

5. The meaning of "hyperlink" and "location tool service" is not defined by the E-Commerce Directive. The Member States which have applied additional provisions to the concept of liability of hyperlinkers and location tool services, may not be correctly focused to take account of the way that the concepts have evolved since the Directive was adopted. The range of information services which might include hyperlinks and location tool services is increasing. Some of these may promote unauthorised or other illegal use of copyright or other material in which intellectual property rights exist, to the overall disadvantage of the audio visual services industry.

6. The harmonisation intended by the Directive has already been challenged as a result of some Member States having provided some liability limitation cover for hyperlinks, location tool and content aggregation services. This lack of uniformity would be aggravated, if the United Kingdom enacted its own additions to the liability provisions of Articles 12 to 14 at this stage.

7. The evolving e-commerce market place needs to distinguish responsibilities for different types of hyperlinks, location tool services and aggregation services, taking into account the economic intentions of those providing the links or services, the practical business procedures which are developing and the importance of the protection and respect for copyright and intellectual property rights.

8. Exempting "hyperlinkers" or "location tool providers" from liability for copyright infringements would increase the burden on all copyright owners to "police" the internet for unauthorised use of their material, contrary to fundamental property right principles.

9. Exempting content aggregation services from the normal commercial rules which should apply to the licensing of copyright material will diminish the protection that the creators and producers of original material currently enjoy, making the disintermediation of online programme providers, and the potential monetisation of original programming more difficult."

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

We would refer to our comments above concerning clearance of orphan works, and the discussions taking place in the USA.

(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"?

AOP believes that a combination of the fair dealing and other copyright exceptions and limitations already recognised within the United Kingdom, alongside new licensing solutions already within the power of rights owners, obviates the need for any broad "private use" exception to be introduced.

This does not mean that genuine non commercial private copying should be restricted. Merely that licensing solutions available to rights owners (whether collectively or individually, and with or without the use of digital rights management solutions) should be promoted and provide flexible ways of securing the "fair compensation" for rights owners recognised in Article 5(2) (b) EC Copyright Directive.

The way in which the range of exceptions and limitations already recognised, apply differently against the background of different commercial priorities for different types of copyright work (e.g. an article in a journal as opposed to a commercial sound recording), is important when considering how they all balance against the overriding “three step test” for application of any copyright exception or limitation.

In this context AOP believes a review should take place over future application of the current “time shift exception” recognised within the United Kingdom.

Section 70 – time shifting.

The range of platforms over which digital broadcasts can be transmitted, and the devices over which broadcast material can be captured, copied and stored for on demand access has grown far beyond what was intended at the time that the current provisions of section 70 CDPA¹⁰ were agreed.

AOP notes that submissions made by interested parties to the recent All Party Internet Group Inquiry into Digital Rights Management have been brought to the attention of the Review team.

The concerns raised in PPA submission¹¹ are relevant to show how the nascent market for new audio visual on demand services is now rapidly developing to provide new opportunity and choice for consumers.

However this new choice and opportunity could be completely undermined if the scope of section 70 is not properly reviewed and amended to allow for digital licensing solutions to operate alongside a private, domestic, non commercial time shift provision which is permitted by rights owners as a result of the terms and conditions which are agreed applicable for the reception of a particular service.

AOP believes that market developments for the provision of digital online services have meant that the current provisions of section 70 no longer reflect the requirements of Article 5 of the EC Copyright Directive because it fails to provide for “fair compensation” to rights owners taking into account the way that

¹⁰ Section 70 CDPA 1988

(1) The making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or in any work included in it.

¹¹ PPA submission to APIG – Appendix (2)

technological developments have enable the digital recording of broadcasts and the long term storage of copies with relative ease, and the section does not currently take into account the application or non-application of technological measures to the broadcasts to which section 70 currently applies.

AOP does not believe that the requirements of Article 5 are met by the current provisions of section 70.

Section 70 fails to address the market significance of the way that rights of “communication to the public” embrace not only “broadcasting” rights but also other forms of “communication to the public” including the making available to the public of a work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chose by them¹².

Article 5 (2) (b) of the EC Copyright Directive recognises the scope of private use exceptions that may be permitted concerning “private use”.

However this Article limits the exceptions and limitations that may be provided “in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on the condition that the rights holders receive fair compensation which takes into account the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.”

In view of the concerns expressed below about introduction of a “private use” copyright exception, our opposition to levies as support for “private use” exceptions, and our preference for rights owners to follow licensed market solutions, AOP would propose that section 70 (1) of the CDPA be amended to allow for digital licensing solutions to operate alongside a private, domestic non commercial time shift provision which is permitted by rights owners as a result of the terms and conditions which are agreed applicable for the reception of a particular service.

In order to accommodate this, the application of Section 70 (1) might be qualified along the following lines :-

“To the extent permitted by the licence or other conditions applicable to reception of the same (whether linked to payment of fees or controlled by technical protection measures or otherwise), the making in domestic premises for private and domestic use of a recording of a broadcast solely for the purposes of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or any work included in it”.

¹² See section 20(2) CDPA 1988.

Sections 70 (2) and (3) would then continue to apply making it clear that no “dealing” with time shift recordings permitted under the above provision would be permitted or implied.

To recognise the original intention of section 70 and the current transition towards digital switch off in the UK, consideration may also be given to a transitional provision for those who make private, domestic non commercial time shift recordings of analogue broadcasts using analogue recording equipment.

A transitional provision for this might reflect the provisions of Article 5.3 (o) of the EC Copyright Directive¹³.

This proposal would :-

(i) maintain the original intention of the time shift provision for those with analogue television receivers and analogue recording equipment during the run down to digital switchover;

(ii) recognise the market significance for rights owners of the rights to authorise “on demand” communication to the public of their works, over and above authorising the broadcasting of their works within scheduled programme services; and

(iii) reflect the European Commission’s views ¹⁴ that “arguably, the widespread deployment of Digital Rights Management as a mode of fair compensation may eventually render existing remuneration schemes (such as levies to compensate for private copies) redundant, thereby justifying their phasing down or even out”.

“Private use exception”

As a matter of principle, any act of private copying that takes place in the UK without the consent of the rights owner, whether directly or indirectly through agents or intermediaries such as collecting societies, is illegal, in the absence of applicable exceptions or limitations or a statutory licensing system.

¹³ Article 5.3(o) – Member States may provide for exceptions and limitations to the rights provided for in Articles 2 and 3 (reproduction and communication to the public) in the following cases :-
(o) use **in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses** and do not affect the free circulation of goods and services within the Community, without prejudice to other exceptions and limitations contained in this Article”.

¹⁴ Communication 16 April 2004 – The Management of Copyright and Related Rights in the Internal Market

The question of why the current legal position is not properly understood by consumers must be addressed in the broader education and awareness initiatives about the value of IP (of which we have highlighted the importance earlier in this submission).

The economic threats from private copying have become much greater for rights owners following the development of digital copying and transmission technologies.

The capacity for the “private, domestic, non commercial” activities of those who use digital technologies to copy and transmit copies of works, to “conflict with the normal exploitation of the work or other subject matter ... unreasonably prejudicing the legitimate interests of the rights holder “ is now of much greater significance than in an analogue world.

The law to date has enabled rights owners to choose to take a pragmatic view over enforcement of rights linked to uses which are on the periphery of the recognised copyright exceptions, and/or where the costs of enforcing rights would be disproportionate to the damage actually caused.

This does not mean that the rights have been ineffective. Far from it. They have acted as an important safeguard for the interests of rights owners.

It is therefore the wrong time to consider introducing a blanket “private use” exception which will upset (and potentially destroy) the balance of application of the existing copyright exceptions and limitations, whilst also undermining the ability of right owners to develop new on line licensing models linked to digital rights management systems which will provide choice and opportunities for consumers and rights owners alike.

An example is the way in which section 29 CDPA 1988 already provides for a fair dealing exceptions in respect of literary, dramatic, musical and artistic works for research, for a non-commercial purpose, and for the purposes of private study. The exceptions recognise the importance of qualifications applying, if the relevant copy is made by a person other than the researcher or the student. This helps to provide the right balance for application of the exceptions acknowledged and required by Article 5 of the EC Copyright Directive.

AOP believes that the framework established for the scope of permitted copyright exceptions and limitations set out in Article 5 of the EC Copyright Directive is flexible enough to ensure that the framework can adapt and apply in the digital age.

The way in which the range of exceptions and limitations recognised by Article 5 apply differently against the background of different commercial priorities for different types of copyright work, is important when considering how they each balance with the overriding “three step test” for application of any copyright exception or limitation¹⁵.

The concept of a “private use” exception fails to take account of the carefully balanced network of exceptions already recognised under laws applicable within the United Kingdom, and the different ways in which the recognised exceptions work to compliment the relationship between rights owners and consumers in different fields.

In this respect AOP endorses the approach of the High Level Working Group established by the European Commission to address the issue of Digital Rights Management. In its final report in April 2004 the Group recognised:

“The way forward is a system based on existing exclusive rights backed by technologies that ensure a secure environment where such rights can be licensed and enforced”

They also recognised: -

“Assessment of the situation needs to be done on a case by case basis in the context of specific devices and services, based on objective, transparent and non-discriminatory criteria.

The situation as regards application of DRMs and the amount of private copying effectively taking place in the context of such devices and services needs to be taken into account”.

So what is the alternative?

AOP believes that rights owners should be empowered to choose the extent to which individual rights owners, or groups of rights owners may wish to authorise private, non commercial use under licensing solutions involving the terms and conditions upon which copyright works are acquired or accessed by consumers in the digital world.

There is concern that the “private copying debate” has been focused on a lack of consumer clarity about the extent to which they are licensed/authorised to reproduce the copyright works in a CD for private use.

¹⁵ Article 5.5 EC Copyright Directive “The exceptions and limitations ... shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rights holder”.

It is submitted that this issue would be best addressed by the makers of commercial CDs being clearer about the circumstances on which they are prepared to authorise private copying in the terms of sale.

Such terms are already becoming established in the online music services through which consumers are able to choose from a number of ways in which to access recordings, with price and other conditions then dictating the levels of use which the consumers become entitled to dependent upon the service which they choose to sign up to.

AOP believes that this model will be particularly important for the online distribution of audio and audio visual programming in the future.

Technical protection measures and other DRM systems will play an important role in providing this choice.

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

In proposing the free market licensing solutions under (d) above, it is appreciated that the role of existing copyright levy systems must be considered.

Copyright levy systems have been recognised on the assumption that private copying of protected works cannot be controlled or monitored by individual rights owners.

With the introduction of technical protection measures and other digital rights management systems, this assumption can now be challenged.

Two questions then arise:

- (i) To what extent will rights owners choose to use technical protection measures as a means of controlling or monitoring copying of their works?
- (ii) If TPM's are applied will this result in consumers paying a levy for a work that cannot be copied.

For the first question, AOP strongly believes that a "one size fits all" approach would work against the overall interests of both rights owners and consumers.

Advances in technology have enabled means of communication traditionally the preserve of those involved in "professional" copyright work, to be opened up for use by a wider general public. Whilst owning copyright in the work that they

create, many members of the public are not interested in licensing the use of their work in a restricted way, because recoupment of their professional investment is not a driver for them. Instead they may choose to make their works freely available for use by others.

It is vital that this remains a choice which does not jeopardise the entitlement of other rights owners to choose how they wish to license use of their own works.

The licensing approach to private copying that we advocate will allow for this choice in the market, without unreasonably undermining the ability of rights owners to seek a return for the use of their work, if they wish to try and do so.

But if rights owners choose to apply TPMs to works, will this result in levies being paid for a work that cannot be copied?

AOP believes that this is a legitimate concern. However Article 5.2 (b) of the EC Copyright Directive provides for this concern by recognising that in calculating the amounts of "fair compensation" for acts of private copying the "application or non-application of technological protection measures" should be taken into account.

AOP believes that this will allow a licensing approach to private copying to be developed in a way that both consumers and rights owners accept.

If technical protection measures are applied by rights owners in a way that consumers do not like, they are likely to choose products where the application or non application of technical protection measures better suits their particular needs.

AOP is concerned that introducing the levy system within the UK is likely to be seen by consumers and hardware manufactures as a "tax" which should be fought against and reduced where possible.

If the tax is also an excuse for those critical of the copyright regime to continually "push the envelope" as to what is allegedly within the remit of private use, as opposed to use for which licences are required, this could act as a massive and costly challenge to rights owners.

The alternative of allowing operators of services to develop their own licensing conditions (which may in turn affect the licences acquired and payments made to programme makers and underlying rights owners or contributors to publications included in such services) will provide for a more flexible marketplace in the future.

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

The effectiveness of the “three step test” for copyright exceptions and limitations¹⁶ are nowhere better illustrated than in the field of education.

Generally AOP believes that the correct balance has been established under law applicable in the UK. However, rights owners have been concerned at the level of remuneration approved for certain licensing schemes as a result of Copyright tribunal decisions, when the rights owners see the licensed use as much more of a substitution for other licensing options that the Tribunal decision appears to recognise. In other words the licensing scheme is ordered to apply as a lower tariff that rights owners believe fairly reflect the value of their work.

Regardless of this the choice of ways to license rights already available to rights owners has enabled new projects such as Creative Commons licenses, and services making available certain material for copying and adaptation for educational use, to be developed. The choice has proved an enabling force, without unduly threatening the ability of rights owners to develop new (and sometimes parallel) goods and services through which to interest consumers in their work.

A good balance between the interests of rights owners and those of educational users was established in section 35 and paragraph 6 of Schedule 2 to the CDPA 1988¹⁷.

These sections recognised that certain acts could be carried out by or on behalf of an educational establishment without infringing copyright, unless there is a licensing scheme certified for the purposes of the Act, providing for the grant of licences.

This system has worked well for both educational establishments and rights owners¹⁸. In practice rights owners have been given the incentive to act collectively in order to operate an economically effective licensing scheme for the narrow areas of licensing provided by sections 35 and paragraph 6 of Schedule 2, whilst at the same time being able to preserve their entitlement to secure fair compensation for the uses licensed.

¹⁶ See Article 5.5 of the EC Copyright Directive – Apply in special cases – which do not conflict with the normal exploitation of the work or subject-matter – and do not unreasonably prejudice the legitimate interests of the rights owner.

¹⁷ Option afforded rights holders of either waiving rights or participating in a certified licensing scheme covering the off-air recording of broadcast works for educational use.

¹⁸ See the educational licensing scheme operated by The Educational Recording Agency Limited www.era.org.uk

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

The cost burden of archiving works in digital form will be a concern for AOP members.

Defining “electronic publications” which are to be subject to Legal Deposit rules when the publications do not comprise films or sound recordings will be important in helping to ensure that it is clear who will be responsible for the legal deposit of different types of work in an increasingly digital world.

“Archiving” and “access to archives” are different issues for rights owners. Rules under which consumers may have direct access to archives may challenge the three step test applicable to any copyright exceptions and limitations.

Care will need to be taken to ensure that the correct balance over access is maintained.

The concerns raised by the Federation of European Publishers to the recent Communication from the European Commission “2010: digital libraries”, are important¹⁹.

AOP supports the FEP submission and urges the UK Government to take the points raised into account as the debate concerning the 2010 digital libraries project progresses.

Copyright – digital rights management

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

AOP would refer to the recent PPA submission to the All Party Internet Group²⁰.

The legal protections for Digital Rights Management already recognised in law at both EU level and within EU Member States should be maintained. This should provide for the regulatory backdrop to application of technical protection measures and rights management information systems by individual companies.

¹⁹ FEP response to Communication from the European Commission “2010: digital libraries” – Appendix 3

²⁰ PPA submission to APIG – Digital Rights Management – Appendix 2

Government should support improved education and awareness about what intellectual property is and why it is important. The need for education and awareness is exemplified when the full range of products which might fall under the generic description of “Digital Rights Management” is properly considered.

Improving understanding and trust in the intellectual property system is not helped by the use of convenient terminology for a range of new products and services, with a variety of purposes, under the generic heading of DRM.

The difference between “protection” and “management” of rights and the different definitions of “technical measures” and “rights management information” recognised in section 296ZA and 296ZG of the CDPA (as amended) should be remembered and promoted in the context of any future debates over the role and application of these measures.

Improving interoperability of technical protection measures to reflect the license based solutions desired by rights owners is undoubtedly a challenge for the creative industries. However it is a challenge that is being addressed by industry through the work of groups such as the International Organisation for Standardisation and the International Electrotechnical Commission’s Moving Picture Experts Group, which has developed a series of MPEG standards for coded representation of digital audio and video.

Rather than introducing additional regulation at this stage, the Government should recognise that the market for Digital Rights Management solutions is a nascent one, and monitor developments in the market place. Much will eventually depend upon the application of DRM in ways that are accepted and embraced by consumers. Over regulation at this stage could lead to prescription of choice by regulation to the detriment of a long term open market.

Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

As previously indicated, AOP believes that the issue of “orphan works” warrants further review.

We refer to our comments under section 1 (h) above.

In particular, despite what we have said about the advantages of copyright existing without the need for registration, one of the difficulties when dealing

with clearance or licensing of orphan works is the lack of any comprehensive database of rights owners or publishers from which information about current owners can be sought.

This issue is being addressed by collecting societies, and much work has been done to improve databases including rights owner details which will help monitor increasingly micro payments to rights owners under blanket licensing agreements.

This work should be encouraged and supported by the Patent Office and Government.

(b) Do you have any suggestions on how this problem could be overcome?

Please see our comments under section 1 (h) above.

Coherence between competition policy and IP policy

**Should competition law have a greater role to play in regulating IP?
How would you see the system working?**

The questions raised in the Call for evidence would seem to conflate two separate issues. The first concerning the law of unfair competition and the second the general law of competition.

The former is a part of the law of intellectual property, but is of much greater scope in some European countries than is the case within the United Kingdom (where it is represented by the law of passing off).

As such the law of unfair competition supplements other intellectual property laws.

In contrast the general law of competition can act as a constraint on the exercise of intellectual property, as has most often been seen in European law (for example in the Magill case under Article 82 EC Treaty).

So, contrary to the suggestion implicit in the question "should competition law have a greater role to play in regulating IP?" we see competition law as already performing a considerable role in restricting the proper exercise of IP.

Parallel Imports / International Exhaustion

It is important to distinguish between copyright and trademarks in the context of this issue. International exhaustion has never been part of UK copyright law, and we do not believe that such status quo has ever seriously been questioned.

In contrast it is only in relation to trade marks that the effect of European Community law has been to change UK law so as to preclude international exhaustion. The main controversy in this area in recent years has thus been in relation to trade marks.

AOP is strongly opposed to any attempt to introduce international exhaustion for copyright. In any event, given the growth in the delivery of copyright works by online means, the issues associated with the distribution of physical copies of copyright works, such as exhaustion of rights, are becoming less important to the exploitation and use of such works.

Other issues – Review of the Database Directive

AOP has been concerned at the way in which the Commission has sought to consult with industry in a recent review of the Directive.

AOP has raised a number of concerns which must be addressed before any decision can be made to change or amend the scope of the Directive.

We refer to the recent PPA submission in this respect ²¹.

In particular we would stress the following points:

1. One of the key elements underpinning the growth of database-driven businesses is the existence of the *sui generis* right that protects database-driven companies, and which works alongside copyright to further assist publishers in safeguarding their high levels of investment.
2. AOP believes that were the *sui generis* protection to be withdrawn, the industry would reduce investment and either diminish in size and activity, or switch to a more favourable environment where that investment can be more readily protected.
3. AOP considers the Commission may not have considered fully the variety of ways in which the *sui generis* right has been utilised. Database protection as such does not necessarily lead to direct investment in the

²¹ See Appendix 4

creation of new databases, but instead can provide a climate for optimisation and investment in existing databases.

4. AOP does not believe there currently exists reliable and suitably extensive data on which to base a decision to repeal this Directive, nor withdraw the *sui generis* right, neither has the Commission evidenced any empirical data to justify such an outcome, as suggested by Options 1 and 2.
5. AOP considers there is, at some future stage, opportunity to consider further the implications of Option 3 of amending the *sui generis* right.
6. Given the lack of data available to the Commission before it considered the proposed options, including whether the Directive should be withdrawn, and given the clear high investment levels in such a large and economically important sector, AOP believes the Commission must conduct the fullest possible regulatory impact assessment before taking any further action.
7. The Commission should take into account that, when the *sui generis* right was introduced, it was not made conditional upon users having to account for the investment made specifically as a consequence of the new right.
8. The Commission should also take into account the considerable issues of commercial confidentiality that arise from individual companies being asked to disclose - where available - research and development data and their use of databases reliant upon the *sui generis* right.

AOP believes that repeal of the Directive or withdrawal of the *sui generis* right could indicate that the Commission considers this, and therefore by inference other IP or copyright protection, of low worth. AOP believes this could be detrimental to future development by sending the wrong signal as to the perceived value of intellectual property.

AOP would welcome an opportunity to work with the Patent Office and the UK Government both to review the existing market as part of any Regulatory Impact Assessment for change to the Directive, and also to assess the implications of evolving case law on the industry.

The Association of Online Publishers would welcome the opportunity to provide further background concerning the points raised in this submission, should the Review Team require.

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Gowers Review of Intellectual Property

Call for Evidence



Appendix 1

to

Response from the UK Association of Online Publishers (AOP)

21 April 2006

CREATE for the future

Intellectual Property (IP) tools for innovation, enterprise and reward in the 21st century.

One of the conditions for creating business success is making innovative products available to as many people as possible in sustainable way. A fair and flexible IP regime makes this viable in a globalised economy. The CREATE principles express key aspects of the value of IP in a modern economic and social setting.

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

R Respect for rights promotes investment in innovation. Creators, inventors and rights holders receive appropriate reward and respect for their work, which stimulates choice and 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, science, technology and creativity enhances diversity of choice and quality of life for everyone when properly balanced with reward for those creating and investing in new work.

T Trust between the creators, distributors and consumers of products that are built on intellectual property is vital for a creative and competitive economy.

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

Gowers Review of Intellectual Property

Call for Evidence



Appendix 2

to

Response from the Association of Online Publishers (AOP)

21 April 2006



Response from the Periodical Publishers Association to The All Party Parliamentary Internet Group inquiry into Digital Rights Management

20 December 2005

Introduction

The Periodical Publishers Association (PPA) welcomes the opportunity to respond to this public inquiry.

The PPA is the trade body for the UK magazine publishers. The association's membership consists of some 500 members who publish or organise over 4,300 products or services. These include over 2,500 consumer, business and professional magazines. PPA members also produce a large range of directories and websites, in addition to organising conferences, exhibitions and awards.

Many PPA members offer online services, including online versions of print publications and publications only available online, or through electronic transmission. Online publications also encompass consumer, business to business and contract magazines, and increasingly involve the use of new electronic rights management systems to help improve the provision of publications and services to subscribers.

The PPA therefore welcomes the recognition from the APIG that to portray the issues surrounding Digital Rights Management as merely a consumer versus publisher debate is misleading.

Ultimately, consumers and rights holders share the same objectives, involving affordable access to a wide range of content to satisfy effective demand for consumption across an ever increasing number of delivery platforms and devices. The successful use of electronic rights management systems, and technical protection measures will help to support these ambitions, stimulating new business models and creating opportunities for business to offer more choice to the consumer/citizen.

As APIG recognises, "DRM permits the creation of new business models where you buy the right to read a book just once, or pay a fraction of a penny every time you play a song. This allows publishers greater flexibility in the services they offer and leads to increased consumer choice".

This choice is proving increasingly important for the UK economy. In its response to the Recommendations of the Creative Industries Forum on Intellectual Property²², the government recognised the importance of helping people, both users and creators, to appreciate the value of Intellectual property as central to the future health of creative industries within the United Kingdom. Creative Industries recognised as one of the economy's fastest growing sectors contributing over £53 billion to the UK in 2002, accounting for 8% of GDP; supporting 1.9 million jobs and growing at an average of 6% between 1997 and 2002, double the rate of the economy as a whole.

²² Government's response – http://www.culture.gov.uk/global/publications/archive_2005/gr_cifip.htm

Summary

1. The PPA believes that the legal protections for “DRM” already recognised in law at both European level and within EU member states should be maintained, in order that industry can develop and offer an increasingly diverse choice of products and services for the consumer, including on line and digital publications.
2. Government should support improved education and awareness about the real scope of products which might fall under the generic description of “Digital Rights Management” in order that consumers are better informed about the ways in which such products can work to improve efficiency, and provide for consumer choice.
3. Copyright exceptions and limitations are applied in law only in special cases which do not conflict with a 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 enable and accommodate recent rapid technological developments and should continue to be recognised and observed.
4. No specific right for libraries to circumvent technological protection measures is necessary in the light of the discussions which are taking place between representatives of both libraries and rights owners, who recognise the mutual interest in ensuring the right environment to stimulate creativity and invest in new work in the future.
5. Rather than imposing forced exceptions to DRM systems for specialist groups, which serve to reduce incentives for investment in innovation, voluntary systems must be allowed to develop, bearing in mind that it is in the commercial interests of publishers to ensure that consumers are not alienated, and that effective demand for their products and services is maintained.
6. The market for DRM solutions is a nascent one. There are few nascent technologies for which there are not initial technical problems. Government and Parliament should continue to monitor developments in the marketplace, and the way that new technical protection measures and rights management information systems are brought to market, but recognise the careful balance of interest established by the framework already provided for under the EC Copyright Directive.

Education and awareness of the value of intellectual property

The government has committed to working with business leaders in order to embed the CREATE principles within their own corporate and social responsibility commitments. The CREATE principles were developed through the work of the Creative Industries Forum on Intellectual Property and were designed as a tool to promote the key aspects of the value of intellectual property in the modern economic and social setting. They cover the importance of:

Creativity

Respect for rights

Education about why the rights affect everyday lives

Access to work on fair terms

Trust between creators and consumers

Economic benefits from intellectual property, stimulating jobs, business and economic growth

“Respect” for rights and “Trust” between creators and consumers of intellectual property are particularly relevant for development of digital rights management technologies as the ways in which consumers can access and use copyright material become increasingly varied in the digital environment.

Improving understanding, respect and trust is not helped by misunderstandings about the range of new products and services, with a variety of purposes, which might be described under the generic heading of “Digital Rights Management”. Greater understanding is needed about the different products which can fall within a generic description of “Digital Rights Management”.

This will help to encourage the public to understand that, as in any business, there are some products which work more effectively than others, but it is completely wrong to suggest that because of unfavourable publicity over one product, this somehow means that all products under the same generic description are tarred with the same brush.

Understanding the difference between “technical protection measures” and electronic “rights management information”

APIG is urged to consider the important differences between “Technical Protection Measures” and electronic “Rights Management Information”. They all relate to “management” of “rights” in the “digital” environment and as such may be referred to as “DRM”.

However they have different functions for rights owners, and as such it is important that these differences are understood, and highlighted in the context of IP education and awareness campaigns in the future.

Essentially technological protection measures refer to methods which practically limit the ways in which a consumer can use a product or service. Rights management systems are effectively stock management tools. They enable use of work to be checked and payments to contributors of publications which involve a whole range of rights owners to be processed and properly paid. They provide for effective back office functions which in the end save costs and help ensure the competitive provision of products and services to the consumer.

The distinctions were properly recognised within Articles 6 and 7 of the 2001 Copyright Directive²³. Implementation of the distinctions has been recognised within the UK when implementing the Directive through adoption of the Copyright and Related Rights Regulations 2003.

Sections 296ZA to F of the Copyright Designs and Patents Act 1988 (as amended) now refer to “technological measures” as “any technology, device or component which is designed, in the normal course of operation, to protect a copyright work other than a computer program”.

Section 296ZG applies to electronic rights management information, Subsection 7 (b) describes this as “any information provided by the copyright owner or the holder of any right under copyright which identified the work, the author, the copyright owner or the holder of any intellectual property rights, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information”.

Government should therefore support improved education and awareness about the real scope of products which fall under the generic description of “Digital Rights Management” , in order that

²³ Directive of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society - 2001/29/EC.

consumers are better informed about the ways in which such products can work to improve efficiency, and provide for consumer choice.

Digital Rights Management and effects on traditional tradeoffs in copyright law

In its risk assessment for the 2003 Regulations implementation of the 2001 Copyright Directive, the Government recognised:

“Digital technology permits perfect copies of works to be made and transmitted almost instantaneously across national boundaries, and it is widely accepted that strengthening and harmonisation of basic rights is necessary in order to ensure that copyright laws can be in a position to cope effectively with the demands of the information society. In particular, the ease of unauthorised use of digital copyright material on the internet requires the introduction of common rules specific to online transmission and electronic copying, coupled with stronger sanctions and remedies to deal with wilful illegal activity when on a damaging scale. Effective legal protection is also required for technological measures which right owners are now applying to their works in digital formats and environments in order to protect these works against all infringements and assist in the management of rights.”

These key elements of the 2003 Regulations have been vital for the development of the new on line services since their implementation. They have stimulated the growth of new online products and services offering a legitimate alternative to the new threat of on line piracy and unauthorised use of copyright works.

The development of effective legitimate online music services has been an excellent example of how the safeguards provided by the Regulations work to benefit both consumers and creators.

This year IFPI have reported²⁴ :

In 2004 the available catalogue on the biggest legitimate online music services had doubled from around 500,000 tracks to around 1 million tracks.

The number of online services where consumers can buy music has increased fourfold to more than 230 worldwide, with over 150 of these services being in Europe.

Developments in broadband and speeds of online delivery, and data compression technologies, mean that the larger files involved for the transfer and communication of data have opened up opportunity for unauthorised use of files containing complete books or the contents of magazine publications, thus making the way in which the provisions in the Regulations have proved so important for the music industry all the more pertinent for publishers of magazines.

It is therefore vital that the legal protections recognised by the Copyright Directive are maintained and can be relied upon as the publishing sector offers increasingly diverse products and services including on line and other digital publications.

Balancing the right to license rights with copyright limitations and exceptions

Publishers and other rights holders have no long term incentive to alienate legitimate consumers, or to stifle growth of effective demand for new business models. It would be unfortunate if those who argue that the system for recognising and rewarding the creators of copyright works is

²⁴ IFPI online music report 2004.

outdated, succeed in promoting the current debate as one of rights holders versus consumers - this is not the reality.

Copyright exceptions and limitations have evolved over time, but the underlying principle established in International Treaties, and more recently within Article 5.5 of the Copyright Directive, must continue to be applied and supported.

This provides "Exceptions and limitations... shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder".

It is vital that this test continues to be applied when considering the ways in which copyright works can continue to play an effective role in the "digitally rich nation" which the government recognises it is important to promote.²⁵

Should new types of content sharing licenses (such as Creative Commons or Copyleft) need legislative changes to be effective?

Since the existing regime had enabled rights owners to choose whether they wish to license the use of their works by means of sharing licences such as those developed by Creative Commons, it is unnecessary to make legislative changes to permit them.

How should copyright deposit libraries deal with DRM issues?

The Legal Deposit Libraries Act 2003 provides important flexibility for the Secretary of State to make regulations concerning the legal deposit of works published in media other than print.

Discussions are taking place between representatives of publishers and libraries to ensure that, once a work has been deposited, it is able to be read and accessed subject to the agreed limitations of the deposit rules, and bearing in mind the test set out in Article 5.5 of the Copyright Directive (described above) which must apply to any copyright exceptions or limitations.

No specific right for libraries to circumvent technological protection measures is thought to be necessary in the context of these discussions.

How should consumers be protected when DRM systems are discontinued?

Legacy and migration challenges are commonplace in technology-based product markets and there are many feasible solutions.

The developers of technological protection measures must be able to decide upon the commercial viability of their own products. The fact that the owner of copyright material chooses to publish or distribute their work in conjunction with a technological protection system developed by a third party, should not mean that the owner of the copyright material takes on responsibility for the obsolescence of the third party product.

In reality technology solutions are often made "backwards compatible" precisely in order to address legacy concerns. The PPA sees no reason to believe that the market will not meet this

²⁵ Connecting the UK: the Digital Strategy – Cabinet Office – Prime Minister's Strategy Unit joint report with Department of Trade and Industry,

concern in a similar way without the need for additional policy intervention. The existing framework of consumer protection legislation should be sufficient to remedy any outstanding consumer concerns.

To what extent should DRM systems be forced to make exceptions for the partially sighted and people with other disabilities?

The concern behind this question was much debated during the process leading to adoption of the Copyright Directive.

The purpose of technical protection measures could very easily be undermined if specified groups of people were able to circumvent the measures on the grounds of relying upon recognised copyright exceptions.

Rights owners generally wish their works to be appreciated by a wide an audience as possible, within the recognised copyright regime.

In view of this, rights owners have been willing to make arrangements for accessible copies of works to be made available to visually impaired people.

The provisions now included in sections 31A and 31B of the Copyright, Designs and Patents Act 1988 (as amended) are good examples of how access can be accommodated without overriding the entitlement of rights owners to publish works in copy-protected electronic form.

What legal protection systems should DRM systems have from those who wish to circumvent them?

The provisions already included within section 296Z of the Copyright, Designs and Patents Act 1988 (as amended) should continue to be recognised.

Can DRM systems have unintended consequences on computer functionality?

Developers of technical protection measures will seek to ensure that new products are tested to avoid unintended consequences of use, in line with general consumer law. However, where unintended consequences do arise, it is submitted that existing consumer protection rules should provide the route to recourse.

The markets for new technological protection measures and electronic rights management systems are nascent ones. There are few nascent technologies where there are not initial technical problems. However the industry recognises that it has a responsibility to secure consumer confidence in DRM and has vital commercial incentive to ensure remedial action occurs quickly and efficiently when problems are brought to light.

It would be wrong to suggest that just because one product amounting to a technical protection measure delivers unintended consequences, that the development and marketing of technical protection measures themselves should be limited by changes to the law.

Does the UK Parliament have a role in influencing the global agenda for this type of technical issue?

The PPA refers to the summary at the beginning of this response, but in particular the PPA would submit that UK Parliamentary recognition and support for the value of copyright and other intellectual property, is becoming increasingly important within the digital knowledge economy.

Unless the government and Parliament are able to take a lead in promoting improved education and awareness about the value of intellectual property, and encourage respect for rights, the opportunities for the creative industries within the UK to continue to develop as world leaders will be eroded to the detriment of both the public and the creative industries themselves.

Recognising the ways in which DRM permits the creation of new business models, the UK Parliament should seek to help to remove barriers to industry efforts to delivery interoperable DRM solutions and to promote debate around all the CREATE principles and the economic issues surrounding challenges to the creative economy.

In the absence of effective debate with stakeholders it is difficult to reach conclusions on the scope for public policy intervention. The PPA therefore welcomes the contribution of APIG to this debate and would be happy to provide further evidence in support of the points raised in this response.

Andrew Yeates
The Periodical Publishers Association

Gowers Review of Intellectual Property

Call for Evidence



Appendix 3

to

Response from the Association of Online Publishers (AOP)

21 April 2006

FEP response to Communication from the European Commission “2010: digital libraries”

The Federation of European Publishers represents 25 national publishers associations of book and learned journals of the European Union and of Norway and Iceland. FEP is thus the voice of the great majority of book publishers in Europe.

Introduction

We welcome the fact that the European Commission gives us the opportunity to comment on the Communication “2010: digital libraries”(from now on the Communication) and the accompanying staff working paper²⁶ which deal with digitisation, online accessibility and digital preservation of Europe’s cultural heritage. Among the many stakeholders concerned by any digitisation of content by libraries, publishers feel that they will be one of the most affected ones by this exercise since it will target works they publish.

Publishers consider libraries as an essential link of the book chain and especially important when it comes to promote reading and the fight against illiteracy. **We strongly believe in the need to cooperate in any initiatives to promote these common goals.** Publishers are open to all options as long as it guarantees the right balance amongst rights holders and users through sustainable business models. By sustainable business models we mean that the author’s creativity and the publisher’s creative and financial investment are not undermined but on the contrary that they are promoted and properly rewarded. Otherwise digitization mainly benefits intermediaries with no input into creative content.

It is also important to keep in mind that Europe’s main goal at the moment is to become “the most dynamic and competitive knowledge based economy in the world” by 2010. The **revised Lisbon strategy** after the “Kok report” in 2004, confirmed that there was a need to focus on the economic context in order to afford our social and environmental model in the future. Against this background, we have to make sure that in order to succeed in boosting Europe’s creative economy, we must strike the right balance without hindering the functioning of the market or prejudice against future business models.

²⁶ **Communication** from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions: 2010 Digital Libraries (Brussels, 30.9.2005, COM(2005) 465 final) and **Commission staff working paper** (Brussels, 30.9.2005, SEC(2005) 1194)

Moreover, the subsidiarity principle (Article 5 of the EC Treaty) establishes that the Community shall take action *"only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community"*. This is the main condition for embarking on Community action. It is important that all stakeholders are consulted when engaging in such an ambitious project as the European digital libraries initiative and to keep in mind that cultural industries such as publishing have a very strong national basis. One of the reasons for this strong national link is the different languages in which works are published in each country.

Another basic issue highlighted in the Communication is that **digitisation of works can only be made available online if they are in the public domain or with the explicit consent of right-holders**. This is established in the current EU Copyright legal framework and it is not only a response to the need of compliance with international obligations but also the result of a balance between the rights of the creator and the user. This necessary balance aims to benefit society as a whole and it is, therefore, strictly the basis for any initiatives to digitise and make works accessible.

The said Communication says that a change in the legislation or agreements with the right-holders is required in order to digitise copyright material. **We believe changes in the current EU copyright laws are neither needed nor appropriate**. Indeed, if libraries require lending or making available digital books, publishers are already able to establish contractual agreements which will provide access for the users and payments/ remuneration for the rights holders.

The current legislative framework establishes **that it shall be a matter for legislation in the countries to permit the reproduction of such works in certain special case, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author**²⁷. Publishers believe that this provides for an essential basis for the development of sustainable business models, while responding to consumer's demands for a diversified supply of content online.

Digitisation and online accessibility

We understand that libraries want content to be digitised to make it more accessible to European citizens. This is a very laudable approach when it is done

²⁷ This is established in article 5.5 of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC)²⁷ and article 9 (2) of the Berne Convention

within the existing intellectual property laws. Books and other publications, which are still protected by copyright legislation, may only be digitised by certain libraries for specific purposes which are neither directly or indirectly commercial and they cannot be made available online. The book industry welcomed the recognition by the European Commission's Communication of this crucial condition.

- **In our view the most effective way to encourage digitisation and online accessibility of copyright material in Europe is allowing the development of contracts between rights holders and users.** Publishers want to give access to copyright digitised works as long as it is under contractual solutions. This guarantees remuneration for creators and allows business models to be sustained. The STM²⁸ community provides a good example of publishers giving access to works via contractual solutions. Elsevier²⁹ has given its repertoire to CCC³⁰ and CLA³¹ to license its digital works in the basis of contracts. We find another example in the New York Public Library which makes books, from classics to current best sellers, available to members in digital or audio form for downloading onto PCs, PDAs, CD players, and portable listening devices. Users can borrow up to 10 digital books at a time, and after 21 days, the material is automatically checked in and made available to others. The library is lending those books on the basis of contracts with rights holders (licenses)
- **In order to respond to consumer's demands for books in the internet, publishers are increasingly starting trials to digitise their own backlist making them available on the networks.** It is crucial that the European Commission supports publisher's trials and does not compete with them. This would encourage increased access to European books and innovative business models without risking unbalancing the whole book trade.

In this respect, we would like to refer you to the initiative of the Börsenverein des Deutschen Buchhandels called "**Volltextsuche**". The Börsenverein wants to have a feasibility study completed by the end of 2005, a realistic schedule and the necessary funds and political support to initiate a decentralized, publisher controlled repository for digitised content. The idea is the necessary response to ensure publisher's control of the full-text digital files of their works when these are made available in the internet. It is foreseen that by the middle of 2006 at least titles from

²⁸ Scientific, technical and medical publishers

²⁹ Elsevier is one of the world's largest publishers of scientific, technical and medical journals.

³⁰ Copyright Clearance Centre (US Reproduction Rights Organisation)

³¹ Copyright Licensing Agency (UK's Reproduction Rights Organisation)

around 100 publishing houses will be made available in a common repository for digitised content.

Another similar project is **"Bookstore"** by Holtzbrinck group in the UK. The mother company of MacMillan has recently launched a plan to develop an online repository for digital book content. It will enable publishers to deliver their content in several digital formats and deliver it via multiple channels. In the US, Holtzbrinck has already launched a web site geared specifically to libraries which will offer recommendations of the house's titles for teenagers and adults.

The **Danish Publishers Association has had negotiations with different companies to establish a portal with digital books.** In September 2005, the Association announced that it will recommend its members to conclude agreements with a syndicate that expects to launch an e-book portal in 2006. The syndicate will operate as a traditional bookseller, meaning that the publishers can deliver PDF-files without costs and will receive a percentage of the proceeds from every sale. It is expected that the main feature of the website will be textbooks and therefore the main users mainly students buying chapters of a book. On a long term scale fiction and non fiction could be available too. In the nearest future the role of the libraries and educational institutions will be discussed among the publishers and the syndicate. It is possible that the libraries are interested in buying digital books (licences) from the portal in order to lend them to the public on agreed terms.

In Sweden there is a similar initiative called "Elib AB" where publishers provide e-books under contractual terms. The company is owned by the publishers Piratförlaget and Bokförlaget Natur och Kultur and the internet bookshop AdLibris. Elib produces and distributes downloadable e-books for the Scandinavian market. The e-books are copy protected with Adobe's, MobiPocket's and Microsoft's DRM systems. The e-books are distributed to retailers (internet bookshops) and to public libraries websites. Since December 2004 Elib also distributes downloadable audio books in mp3 format to retailers (internet bookshops).

Other projects, dealing with access to copyrighted works are **"Cyberlibris"** and **"Cairn"** in France. The first one is a digital online library with 5700 titles online and 175 participating publishers. Users pay a subscription fee to use it and publishers receive remuneration. "Cairn" is an agreement of 9 human science publishers in France digitising and giving access to copyright works (older ones for free and recent ones under payment).

Another good example of publisher´s will to give access to content is the digital library, “**Miguel de Cervantes**” in Spain. In this case, the University of Alicante has launched a digital online library covering works of more than 400 Spanish-speaking authors. This project has been mainly financed by the private sector and has been developed in full collaboration with publishers. The digital online library includes only works in the public domain or works for which the consent of the rights holder is provided.

Finally we want to remark the participation of the Federation of European Publishers in a project to find solutions facilitating access to information to users who are either blind, visually impaired or impaired in some other way. The **EUAIN project** (European Accessible Information Network) is funded by the European Commission 6th Framework IST programme and co-ordinated by FNB Amsterdam. EUAIN brings together the different actors in the content creation and publishing industries around a common set of objectives relating to the provision of accessible information. It aims to provide content creators with support, tools and expertise to enable them to provide **accessible information for print impaired people**. Publishers believe that there is no need for an additional service while accessibility can become an increasingly integrated component of the document management and publishing process.

- **We believe it is of utmost importance to maintain the current legislation based on respect of copyright. It provides for a fair and balanced framework in which the said projects can properly take off and remain sustainable.** Otherwise, we risk unbalancing the whole book trade and setting obstacles to future business models. For example, in Germany, a consortium of libraries sharing scientific journals and lending individual articles against a fixed amount (not yet in conjunction with rights holders) has been preventing sales of subscriptions of these journals. Thus, making it virtually impossible to develop a sustainable business model for publishers to provide digital document delivery to their user’s.³².
- **In terms of organisational measures, authorities should encourage rights holders to develop their own projects** and respect their own choices as we have mentioned earlier:
 - To either keep their files, or to permit the presence of their digitized file on the server of a library or an aggregator such as Google Print for publishers under contractual provisions. It is necessary to point out the

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<http://www.boersenverein.de/sixcms/detail.php?sort=vt&order=desc&template=search&sv=subito>

difference between Google print for publishers and Google print for libraries which is not licensed and it is strongly disputed by authors and publishers.

- To give access to a copyright protected work either via the Internet portal or the intranet of a library against remuneration for the right holder and/ or against payment by the user (use of DRM), or sale of the electronic work via an online bookseller (use of DRM).

The Commission staff-working document says in page 7, "*publishers could have a crucial role to play*", we believe they will have a crucial role. This will be made possible by making sure that their effort and investment will be guaranteed. This would be in line with the Lisbon agenda and the "better regulation" initiative which aims to avoid duplication of work and cut red tape to strengthen European industry's competitiveness.

Concerning Government's digitization initiatives, the Commission should encourage them to be selective and coherent regarding public domain works, and to engage into a dialogue with right-holders, especially concerning copyrighted works, while respecting copyright and allowing DRMs.

Publishers would support a pragmatic approach encompassing the already existing initiatives so as to foster the emergence of real services providing access to works of the European cultural heritage. One should not "reinvent the wheel", and it would notably be totally counterproductive to create a new portal starting from scratch or to duplicate already existing search engines

Moreover, **national programmes are a positive way forward and should be further** developed to facilitate the appropriate funds to those developing digitisation and of works. In France for instance, the National Book Center helps publishers digitize their backlists, and other public authorities also propose programmes for the development of digital contents.

At EU level, we **applaud those Commission initiatives described in the Communication such as eContentplus**, which facilitates funds to develop metadata enriching already existing contents, or "Culture 2000", facilitating the development of translations or organization of events. Along the same lines, the EU seventh Framework Programme provides for available funds to develop research on new technologies, in which the production of contents is not included as such.

Nevertheless, currently there are no EU programmes foreseen to support the publishing industry. We are therefore asking the European

Commission for a real book support policy, in particular for the development of digital content:

? Via the eContentPlus programme and the upcoming Lifelong Learning Programme (Key-Action 3):

- Through aids for the training of book professionals in the field of digitalization tools;

- Through the continuation of the support to the adoption of standards for paper and electronic publications;

- Through support to digitization of existing work

? Via dedicated programmes:

- Through programmes supporting the interconnection and the structure of databases;

- Through dedicated programmes for financing the development of digital contents.

- **Orphan works** is an issue, which concerns publishers as much as it does users and other stakeholders. When publishing a work, often publishers are confronted with works which he/she cannot identify.

- Canada has since 1990 a system in place that addresses the issue of orphan works. Anybody seeking permission to use orphan works must ask the Canadian Board for a license to do so. The Board grants a license if they consider that enough efforts have been made to find the copyright owner. It also collects fees in a fund from which the owner will be paid if this person ever surfaces and makes a claim. We find the Canadian system proportionate in the sense that it does not put the burden on the copyright owner but enables a neutral body to manage those rights.

- In fact, the French Authors Association (SGDL) is currently considering undertaking a similar project. It would consist of setting up a system which could help publishers having difficulties finding a right-holder. The SGDL has the possibility to ask for a certain amount of money so as to be able to undertake the investigation and possibly to remunerate the right holder in case he/ she is finally found and, if necessary, could officially endorse that the publisher is acting in good faith.

The European Commission should encourage the development of similar initiatives in other Member States. The main issue for publishers when dealing with orphan works is finding practical solutions. It is essential that those seeking permission to use the works proof that they have really made a serious attempt to find the copyright owners and they have been unable to trace them.

- As to the question the Commission asks in the Communication wondering **how to improve transparency and visibility of public domain material and other material available** (in order to facilitate its online availability): we believe that algorithms developed by search engines should in any case focus on the relevance of the works and not any other criteria.

Preservation of digital content

During the years 1996-2005, FEP has engaged in a joint Committee with the Conference of European National Librarians (CENL³³) to develop guidelines for system of voluntary "legal" deposit for offline and online works. According to the document adopted by both CENL and FEP, **solutions to further access including making available online can be found as long as business models are respected (See Joint Statement in Annex)**

- **CENL/ FEP Committee has been working to develop guidelines for voluntary schemes** so as to help other national libraries, while taking into account each country's notion of national heritage. During the summer of 2005, the CENL/FEP Committee completed the revision of the Statement on the Development and Establishment of Voluntary Deposit Schemes for Electronic Publications. The Statement in Annex reflects the progress made by national libraries in this respect and the increased level of cooperation between libraries and publishers. It notably proposes guidelines concerning access to deposited publications, the production of copies, the download of deposited copies, and copies for preservation purposes.

In order to foster the dissemination of such good practices, the European Commission could financially help CENL and FEP bring their expertise to the national libraries of the new and some of the old Member States. Besides, as expressed in the CENL/ FEP statement, it is crucial that the initiatives undertaken by national libraries may clearly distinguish between their missions of preservation and those of accessibility, as they correspond to different technical, legal and economic rules.

- We encourage further development of funding programmes at national level for publishers who may have to adopt new standards for their works to be preserved in the long term. Indeed, recommended formats for preservation are very different from communication formats (usually

³³ CENL is a Foundation under Dutch law with the aim of increasing and reinforcing the role of national libraries in Europe, in particular in respect of their responsibilities for maintaining the national cultural heritage and ensuring the accessibility of knowledge in that field. Members of CENL are the national librarians of all Member States of the Council of Europe. The conference currently consists of 45 members from 43 European countries. The European Commission has subsidised various CENL projects

heavier, involving specific software or sophisticated databases, and therefore more complicated and more likely to deteriorate in the long run). Preservation by libraries may therefore imply that information describing documents may be incorporated as early as possible in the process, and that documents may be provided under an appropriate standard format by publishers. While this may constrain publishers to choose a totally digital production chain and to enrich their documents with metadata, they should not bear the costs entailed by this process of legal deposit of electronic publications.

- **The risk of overlapping requests for legal deposit is not higher for CD-ROMs and online publications than for paper books.** Some national libraries are already cooperating within the International Internet Preservation Consortium, exchanging best practices on technical methods and relevance of contents. In France, for instance, the legal deposit of electronic publications mainly consist of a robot collecting content on its own, so that the legal deposit will only happen in minor cases when the robot cannot go as far as “the deep web”.
- FEP believes **European legislation for national deposit schemes is not the way forward in Europe** because its legal traditions in regard to this issue vary considerably from one EU Member State to the other. In the Netherlands, for example, there has never been a national deposit scheme (not even for printed books) but it has always been done on a voluntary basis because there is an awareness of the necessity to preserve books. Another difference is the number of copies which must be submitted to the national library (4 and soon 2 in France, 6 in the UK, 13 in Portugal, 2 in Denmark etc)

In our view, a proposal at European level to harmonise legal deposit would clearly conflict with the subsidiarity principle which, as we mentioned before is one of the pillars of the Community policy making. There is no need to harmonise when the rules in place function well and that is the case for legal deposit (at least for books). Solutions are long found at national level and work efficiently via international cooperation.

Conclusion

Digitising initiatives should be examined closely and be undertaken in full cooperation with rights holders and in full respect of copyright laws. We must take into account that even if it may seem harmless nowadays, the future technology will surely allow the use of devices in which we can read digital books or print on demand will be much more available. Therefore the economy of

books might change and future business models could be killed even before they are born.

In the Communication the Commission points out the “spin- off” which digitisation efforts will have for other industries such as the traffic on the internet or firms developing digitisation technologies. We understand that the information society must work for all, users and industries. Different business models can be established and the user may not necessarily be the only one paying. For instance, subscription or lending systems can be considered. Public authorities can also contribute to financing licenses. But if you are to encourage publishers to bring to life new, innovative and creative works, you need to reward their investments. Likewise, the online music stores would not exist if libraries were to offer free (and legal) downloads of copyrighted works.

In view of future developments, we have to make sure that any digitisation projects are read in light of the normal exploitation of works. If books are to be lent electronically online from libraries in the future, all measures should be taken to make sure that the business model can continue to develop and contribute to the growth of the European economy. In order to do that, we want to choose whether or not to have a contract with a library or an online portal, and to restrict uses by reader via technological protection measures.

Publishers want the books of their authors to be read by the largest number of people and make them widely accessible. Physical books or in site consultation of digital books in libraries might be a more realistic option for copyrighted material in some cases. Furthermore, publishers are working to find solutions to allow, under contractual provisions, access to the works they publish and will continue to do so.

We encourage the European Commission to keep coordinating projects such as TEL or Gallica that provide an added value by digitising public domain works. For copyright works, rights holders, users and their intermediaries (libraries) need to work together to find acceptable solutions permitting access with remuneration to the rights holders.

Finally we want to point out that Publishers are ready to engage in a dialogue and we stress the need to work on the basis of reliable impact assessments before the development of any EU initiatives. FEP would also appreciate to be a member of the forthcoming High Level Group on Digital Libraries.

Gowers Review of Intellectual Property

Call for Evidence



Appendix 4

to

Response from the Association of Online Publishers (AOP)

21 April 2006

The first evaluation of Directive 96/9/EC on the legal protection of databases



Response from the Periodical Publishers Association

March 2006

Who we are

The Periodical Publishers Association (PPA) welcomes this further opportunity to make comments on the first evaluation report of the Directive 96/9/EC on the legal protection of databases.

The PPA is the trade body for UK magazine publishers. The association's membership consists of some 500 members who publish or organise over 4,300 products or services. These include over 2,500 consumer, business and professional magazines. PPA members also produce a large range of directories, databases and websites, in addition to organising conferences, exhibitions and awards.

Databases are at the heart of almost every aspect of the diverse magazine business and its competitiveness and profitability. Databases facilitate publishers in both their marketing strategies and their use of advertising space.

A recent UK study shows that the business and professional media sector is worth €25 billion to the UK economy, and the value in the EU is estimated to be well in excess of €200bn, having more than doubled over the past eight years.

Data provided by key members in confidence to PPA, shows that as much as 30 per cent of their costs involve the creation, compilation and maintenance of databases, which grossed up, suggests an annual investment of at least €60bn across the EU.

Summary of PPA's position

- A. One of the key elements underpinning the growth of database-driven businesses is the existence of the *sui generis* right that protects database-driven companies, and which works alongside copyright to further assist publishers in safeguarding their high levels of investment.
- B. PPA believes that were the *sui generis* protection to be withdrawn, the industry would reduce investment and either diminish in size and activity, or switch to a more favourable environment where that investment can be more readily protected.
- C. PPA considers the Commission may not have considered fully the variety of ways in which the *sui generis* right has been utilised. Database protection as such does not necessarily lead to direct investment in the creation of new databases, but instead can provide a climate for optimisation and investment in existing databases.

- D. PPA therefore supports Option 4, retention of the right through maintenance of the status quo.
- E. PPA does not believe there currently exists reliable and suitably extensive data on which to base a decision to repeal this Directive, nor withdraw the *sui generis* right, neither has the Commission evidenced any empirical data to justify such an outcome, as suggested by Options 1 and 2.
- F. PPA considers there is, at some future stage, opportunity to consider further the implications of Option 3 of amending the *sui generis* right.
- G. Given the lack of data available to the Commission before it considered the proposed options, including whether the Directive should be withdrawn, and given the clear high investment levels in such a large and economically important sector, PPA believes the Commission must conduct the fullest possible regulatory impact assessment before taking any further action.
- H. The Commission should take into account that, when the *sui generis* right was introduced, it was not made conditional upon users to account for the investment made specifically as a consequence of the new right.
- I. The Commission should also take into account the considerable issues of commercial confidentiality that arise from individual companies being asked to disclose - where available - research and development data and their use of databases reliant upon the *sui generis* right.
- J. PPA believes that repeal of the Directive or withdrawal of the *sui generis* right could indicate that the Commission considers this, and therefore by inference other IP or copyright protection, of low worth. PPA believes this could be detrimental to future development by sending the wrong signal as to the perceived value of intellectual property.
- K. PPA would welcome an opportunity to work with the Commission, both to review the existing market as part of an RIA, and also to assess the implications of evolving case law on the industry.

The value of the industry

A recent UK study by GfK NOP on "*Professional Media: connecting business*", which was commissioned by the Business Information Forum, shows that the business and professional media sector is worth €25 billion to the UK economy.

This sector is almost entirely database-driven through data capture, analysis and sales, and subscription-based marketing. The UK is acknowledged as representative of business to business activity throughout the EU and the developed world, and the value of the business and professional media industry in the EU is estimated to be well in excess of €200bn, having more than doubled over the past eight years.

Market activity

Data provided by key members in confidence to PPA, shows that as much as 30 per cent of their costs involve the creation, compilation and maintenance of databases, which grossed up, suggests an annual investment of at least €60bn across the EU.

A recent survey of magazine publishers by FAEP, the Brussels-based organisation representing national magazine publisher associations indicates that:

- 80% of publishers make their data available as a database;
- 50% published more databases in 2005 than in 2000; and
- 80% have increased the amount of data content in databases since 2000.

PPA does not concur with suggestions that the creation of the *sui generis* right has had adverse effects on competition. Conversely, PPA considers that the introduction of the right has provided a catalyst to publishers - particularly the business and professional sector, but also SMEs less equipped to self-manage rights protection - to invest more heavily in the production and use of databases.

PPA notes with interest that US publishers are currently lobbying for the introduction of the *sui generis* right in the USA.

PPA believes there is ample evidence to demonstrate that, in its entirety, this Directive has played an extremely important role in the development of the EU information society and made the EU a more desirable environment in which to develop this important industry sector.

PPA March 2006

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