

Brussels, 29th February 2008

FEP response to the European Commission's Communication on Creative Content Online in the Single Market

FEP is an independent, non-commercial umbrella association of book publishers associations in the European Union. FEP represents 26 national associations of book publishers of the European Union and of the European Economic Area. FEP is the voice of the great majority of publishers in Europe. Founded in 1967, FEP deals with European legislation and advises publishers' associations on copyright and other legislative issues.

We welcome the possibility to comment on the Communication on Creative Content Online and the fact that the Commission is seeking further input from stakeholders in view of the adoption of a Recommendation. FEP believes that the European publishing industry, as one of the largest contributors to creative content in Europe with a twenty two billion Euro yearly revenue, should continue to be part of the current discussions on content online. For this reason we urge the Commission to include FEP in the future "Content Online Platform" which has been announced in the Communication.

I. Executive Summary

FEP response to the Commission Communication on Content Online points out in its introduction that the specificities of the book market have to be considered to foster the availability of online services in the publishing sector. Furthermore, copyright is the cornerstone of the publishing business models and no changes in the current copyright legal framework should be envisaged.

Certain challenges are identified in the Communication to foster content online:

- i) Availability of creative content and active licensing – the availability of consumer friendly devices to read electronic books is essential for the success of online publishing. However, publishers are increasingly experimenting with new business models to offer content online such as Libreka in Germany. In order to accelerate digitisation in Europe, there is a need to find ways to facilitate identification of rights holders and orphan works are identified in the Communication as a main concern. FEP will participate in a European project called Arrow, which is a pragmatic approach to develop infrastructures to exchange rights information at EU level. Publishers are also involved at national level with libraries and other stakeholder to deal with the issue of orphan works.
- ii) Multi-territory licensing for creative content – Publishers usually acquire world wide rights in a specific language except for the UK and Ireland so the issues identified in the Communication for other sectors are different for the publishing sector. Furthermore, the natural starting point for publishers in the digital environment is individual management. ACAP is an open non-proprietary standard developed by the industry to communicate permissions for access and which will facilitate direct licensing of digital works.
- iii) Interoperability and transparency – FEP favours interoperability of DRMS and publishers choice to use DRM or not. It is also important to develop easily understood labelling systems. Publishers favour the existence of a plurality of reading devices and online retailers.
- iv) Legal offers and piracy - Online piracy is becoming very worrying for publishers too. Certain measures can be taken to improve fight against piracy such as correct implementation of existing legislation (e.g. Enforcement Directive) or improved cooperation with all stakeholders including ISPs or search engines. Publishers are not part of the recent French Memorandum of Understanding due to the specificities of the sector but a specific working group is currently preparing recommendations on digital books.

II. Introductory comments

- In the introduction to the Communication, the Commission identifies certain sectors as “creative content distributed online” referring to, inter alia, online publishing. It is important to stress that nowadays even if there is a digital presence in the publishing world, most of the market concerns either analogue works or a “mixed” offer. It is rarely the case that publishers offer their content exclusively online or only in digital form except maybe for the specific case of scientific, technical and medical publishers.

Some of the challenges identified in the paper, for e.g. orphan works, show clearly that the problem is not for those works that are online but for works that are in analogue form. One of the most important factors that will determine whether online publishing will take off is the availability of digital devices and the end of fiscal discrimination for digital books.

- “Updating and clarification of legal provisions that hinder online distribution of creative content while acknowledging the importance of copyright” is one of the objectives that, according to the Communication, the policy maker must consider to transfer creative content to the online environment (page 4). We want to stress the importance of respecting copyright as absolute pre-requisite for the development of an online legal book market. In this sense we welcome the Commission’s acknowledgement of the value of copyright.

Furthermore, we believe that the current EU Copyright legal framework, including the system of limitations to exclusive rights, strikes an effective, workable balance that is tried and tested over many years, and which must be preserved in the new digital environment. Right holders need to be able to exploit books online and if exceptions were extended to allow, for example, downloading of a book from a library through internet then there would be no incentive at all for publishers to invest and a great part of actual produced content nowadays and potential content would cease to be produced (not achieving at all the desired effect by the Communication to foster creative content online). Recital 40 of the 2001/29 Directive (which is the cornerstone of EU copyright legislation) rightly acknowledges that since there is no space barrier in internet, exceptions must be much more carefully weighed.

We see no viable alternative to the current copyright system and we therefore believe that changes to the 2001/29 Directive or any reopening of the system of exceptions should not be an option. Testing of new business model and fostering agreements and trust among actors of the chain are proving to be more effective than any change of copyright legislation currently.

Besides, the European Commission should contribute to the respect of this regime by setting up and encouraging Member States to establish communication campaigns against “the myth of free content” aiming at raising awareness on the justification of copyright among the general public, and in particular teenagers.

III. – Comments to the challenges identified in the Communication to foster content online

- **The first challenge the Commission Communication identifies is availability of creative content and active licensing of rights.**

From the point of view of the publishing sector one precision should be made, being that the development for online content services still depends very much on the availability of reading devices for e-Books. Even if the publishing world is moving inevitably towards digital it is premature at this stage to hold that online content is a nascent market in the case of books. We have to first wait for consumer friendly devices to be both in the market at a reasonable price and accepted by consumer to see the market take up as has been the case for other sectors.

However publishers are increasingly working on ways to offer creative content online and there are digitisation initiatives led by publishers all over Europe. Some examples are Libreka (www.libreka.de) in Germany which is a central full-text online book search platform. Previously known as Volltextsuche-Online, it is industry lead and operated by MVB (Marketing- und Verlagsservice des Buchhandels GmbH) from the German Book Trade Association (Boersenverein des Deutschen Buchhandels e.V.). It will initially provide full-text searching, together with useful sale and marketing resources for booksellers but eventually it will also develop e-commerce availability of the service (in order to allow ordering of books, either in print or digital form).

Furthermore, DILVE (www.dilve.es) is a technological platform for the management and distribution of the bibliographical and marketing information of Spanish books in print. It has been launched by the Association of Spanish Publishers (Federacion de Gremios de Editores de España) and the Foundation German Sanchez Ruiperez. It is a service which allows publishers with a single load operation, to manage and distribute their data to as many entities and agents as they wish. Participating at the moment are 400 publishing houses and 50.000 titles are being digitized. Other examples are Bookstore (<http://www.mpsbookstore.co.uk>) or Harper Collins (www.harpercollins.co.uk) in the UK which are both digital warehouse which allows publishers to make content available for search a purchase online.

In France, Gallica 2 (<http://gallica2.bnf.fr/>) has been elaborated in order to integrate copyright protected content within the French branch of the European digital library. For such works, libraries should perform the role of information mediators which is that once libraries provide information to the user on the basis of their expertise about information sources, they should be reoriented towards a commercial website where the book could be accessed from. For example, Numilog (www.numilog.com) is one of the companies gathering electronic books of several publishers on its technical platform. Numilog digitises books, distributes them online and ensures safety of contents via DRMs. Another good example is Ebog (www.ebog.dk) which is a Danish private initiative from Forlæggerforeningens Sektion for Undervisningsforlag/SFU (Section of Educational Publisher in the Danish Publishers Association). This successful commercial company sells e-books directly to customers, publishers or libraries.

A particular issue addressed in this part of the Communication is **orphan works** and the need to facilitate the identification and location of rights holders. FEP has taken part of the discussions of the copyright subgroup of the High Level Group for Digital Libraries that has so far worked on key principles to find solutions for orphan works, out of print works as well as for digital preservation.

Publishers are also users of orphan works and they understand that it is necessary to help improve the tools in place in order to facilitate the use of these works. However an absolute requisite for publishers at the moment, and until a fully automated solution is available, is that rights clearance on a title by title basis must be carried out, (otherwise it will not be possible to know whether the owner can or cannot be located). In our view, one of the key issues to be determined is which tools and mechanisms are available in order to carry out a reasonably diligent search to find the right holder. We understand that it is essential to provide easy and workable mechanisms to ascertain the status of the work in question. For this purpose, FEP will participate in a European project from the EC eContentPlus programme under the name of ARROW to test practical solutions¹.

The aim of ARROW is to develop technical and social infrastructures for the exchange of rights information and the creation of clearing mechanisms for literary works, especially orphan works and out of print books, and interoperable access to digital content offered by public institution and private organisations. The core results expected at the end of the project are a distributed network of sources for information on copyright status and data about European literary works, to be used in the process of digitisation to facilitate the identification of relevant right holders. Another key result should be a set of guidelines on applicable standards for content identification to foster interoperability between private and public collections (regardless the right statuses and the type of access provided).

The main underlying idea in Arrow will be that independent business models and public collections should co-exist making it possible for the user to access the content irrespective of its origin. According to the work description of the project, *the rights information infrastructure will facilitate the search for right holders and the identification of public domain works, orphan works, out of print works and other copyrighted works, thus helping to manage a key risk in the digital library initiatives – a black hole of missing works that are impossible to digitise because they are in copyright but could be released for inclusion and access if only the rights information infrastructure existed. The broad involvement of right holders, collective management organisations and libraries provides critical mass to approach the problem at pan-European level. Though inevitably the system will be based upon specific use-cases, it will envisage from the beginning a full European perspective.*

¹ The project will gather the following partners: AIE (Associazione Italiana de Editori) as coordinator, BNF (Bibliothèque Nationale de France), IFRRO (International Federation of Reproduction Rights Organisations), FEP (Federation of European Publishers), BL (British Library), NUK (Narodna in Univerzitetna Knjiznica), BNE (Biblioteca Nacional de España), DNB (Deutsche Nationalbibliothek), MVB (Marketing und Verlagsservice des Buchhandels), FGEE (Federación de Gremios de Editores de España), NUMILOG, CINECA (Consorcio Interuniversitario per il Calcolo Automatico dell'Italia Nord Orientale), CLA (Copyright licensing Agency), NLN (National Library of Norway), UIBK (Universität Innsbruck) and EDL (European Digital Library).

At national level publishers are engaging in internal discussions with other actors of the book chain such as libraries to test ways that fit their national situation in order to facilitate licensing systems for orphan or out of print works. In France, following the suggestion of the publishing and visual arts sector, the High Level Copyright Committee (Conseil Supérieur de la Propriété Littéraire et Artistique) is about to recommend to the government to facilitate the rights clearance of orphan works through the establishment of compulsory collective licensing of such works. Discussions between industry and government are also actively under way in the UK. In Germany negotiations between the German Book Trade Association (Börsenverein des Deutschen Buchhandels e.V.) and the German National Library (Deutsche Nationalbibliothek) are still ongoing. In Denmark the government has taken steps to amend the copyright act in order to make it possible to make general licence agreements on orphan works

- **The second challenge identified in the Communication is multi-territory licensing for creative content.**

The issue of copyright territoriality is substantially different for book publishing because publishers normally acquire world wide rights in a specific language, with the exception of the UK and Ireland². Each linguistic version of a book normally has world wide rights attached to it and therefore multi-territory licensing is already a reality for the book publishing sector. The Commission staff working paper mentions in page 7 that certain actors such as ISPs, film industries etc including publishers should make use of multi-territory licensing and clearance. We understand that the Commission refers to music publishers; however this should be clarified in order to avoid any confusion.

FEP wants to highlight that especially when it comes to the digital world, the natural starting point for publishers is individual management. As has been pointed out above, some rights holders, have been actively experimenting and investing in new digital publishing models through individual management. The key issue is that rights holders generally have the freedom to choose how to manage their digital rights and if they have mandated a Reproduction Rights Organisations (RRO) to deal with certain uses (usually secondary rights), they can withdraw them from the RRO whenever they deem appropriate.

RROs don't sell books to bookshops or other retailers and at least in a foreseeable future, they will not licence electronic books directly to users nor to retailers. This will remain the prerogative of publishers, who are best placed to know the market and have invested in the publication of the work. And even if RRO were charged to manage the rights on behalf of the rights holders in the primary market, they would then act as agents and compete with other distributors.

² In the case of versions of a book in the English language, US and UK publishers have traditionally agreed in their publishing deals that they would keep exclusive rights for certain territories. The UK publishers tend to retain exclusivity for the UK and other countries of the former Commonwealth and US publishers keep them for North America (including Canada). The rest of the world was an open market. However, due to the free movement of goods and the principle of community exhaustion in the EU (which does not apply to online goods) this situation has changed, being now possible to put a US edition lawfully on sale in any EU country and then re-import it into the UK. Therefore, unless publishers in the UK negotiate EU wide rights, there is a serious risk that this European industry will suffer great losses opening the EU market for cheap US editions. Even if the principle of community exhaustion does not apply to online goods, the fact that selling physical books in the internet is becoming a major trend link to the uncertainty as to whether books will be read on the internet, makes this situation a worrying issue for European publishers.

In terms of facilitating direct licensing of digital works, ACAP³ (Automated Content Access Protocol) is a market driven solution that is being developed by some publisher's associations in an effort to help make digital content widely available. ACAP is an open, non-proprietary standard through which content owners can communicate permissions for access and use to online intermediaries making more content available to users through these while continuing to invest in new business models. As the Commission recognises in its Staff working paper ACAP represents a win-win situation for all stakeholders.

● **Thirdly, the paper deals with Interoperability and transparency of Digital Rights Management**

DRM are enablers of new tailor-made users' models allowing market driven options to reward authors and publishers. Therefore FEP favours publisher's choice to decide whether they want to make use of DRM or not. FEP agrees with the Commissions Communication in that providing customers with easily understood labelling systems on interoperability and usage restrictions is an essential condition for customers to make an "informed choice". We have started discussions with European consumer organisations on this topic and we intend to continue doing so.

Moreover, we believe that interoperability of DRMs, but also the possibility for consumers to use different reading devices, online platforms, software and formats are necessary for a good functioning online book market. Even if we still need to achieve the full potential of interoperable DRM systems, reading devices such as the ones offered by Amazon or Sony, whose readers can only read contents downloaded from their respective websites are contrary to the publishers' needs and may disappoint users. Furthermore, a plurality of online retailers is also essential in an online book market because otherwise we face the risk of hindering free competition (by the imposition of a certain price policy) and possibly barriers to freedom of expression.

In the Commission staff working paper on Content Online (page 7) there is a paragraph criticising DRMs referring to consumer associations claiming that these are preventing them from exercising statutory rights. We would like to clarify that limitations to exclusive rights should not be confused with statutory rights. The recently published report on the 2001/29 Directive clearly states that certain uses are subject to exceptions or limitations to exclusive rights (and not statutory rights).

● **Finally the fourth issue the Communication deals with is legal offers and piracy**

Online piracy has become a growing problem for the publishing sector in the last few years and it has slowed down considerably the development of legal online offers. In Germany for example, 11 % of files that were exchanged in the biggest P2P-Network ("BitTorrent") in 2006 were ebooks (7%) or audio books (4%).

In our view, certain measures are necessary to improve the fight against online piracy in Europe such as correct implementation of legislation aimed at enforcing IP rights. The EU Enforcement Directive needs to be implemented correctly to allow rights holders to effectively go through the civil road and not just limit it to the criminal root. For example, in Germany publishers have

³ <http://www.the-acap.org/>

expressed serious concerns as to how Art. 8 of the Enforcement Directive (right of information) shall be implemented. The right of information is essential to fight piracy because it grants right holders the possibility under civil law to obtain the relevant information about infringers from Internet Access Providers. However, this article is being implemented in Germany under judiciary reservation, which means a time delay for publishers, in addition to the costs of EUR 200 per information request. In addition, the right of information is – unlike foreseen in the Directive - only supposed to be applicable if, besides the Internet service provider, the infringer has acted on a commercial scale. An equivalent proof is not, however, technically possible in modern peer-to-peer systems, which the Börsenverein has had clarified in its expert opinion⁴.

Furthermore, in order to fight piracy effectively, it is important that the existing rules protecting IP are correctly balanced against other legislation like data protection or the limitation of liability of ISPs (in the Ecommerce Directive) without rendering useless the existing instruments for right holders to pursue such infringements. Another important point, also mentioned in the Communication, is the revision of the Telecom Package and the reference in it to respect of copyright protected content and the obligation for ISPs to inform subscribers of the obligation to respect copyright. We believe that these instruments should include provisions like these ones to effectively improve cooperation with all stakeholders. We cannot miss this unique opportunity.

FEP also believes that cooperation agreements among all involved actors, including search engines, are essential against the fight against piracy. However whatever the solutions are, these must be effective in the near future. If pirated works in the internet continue to be the rule in the next few years, publishers will find it extremely difficult to invest in legal offers that will end up in illegal P2P file sharing networks.

An interesting example of cooperation is the Memorandum of Understanding that has recently been agreed in France between music and film producers, ISPs and the Government. Even if the book sector was not involved (because of specificities of the sector, such as it's less mature digital market), it is remarkable that ISPs have been involved for the first time as part of the solution to fight against piracy. In particular, FEP strongly supports the recommendation of the MoU consisting of “generalizing the low VAT rate to all cultural products and services” (see below). In essence, FEP supports the agreement's idea of i) stimulating the expanded availability of legal content while ii) putting in place pedagogical and effective measures to prevent and discourage mass piracy in the online environment. However, publishers totally disagree with the recommendation of the MoU consisting on the withdrawal of DRMs and formulated for the music and audiovisual sector whose market has its own specificities. More recently, the French President decided to launch a new mission in order to obtain recommendations for the book (see response to Content Online from the French Publisher's Association, SNE, for more details).

⁴ The German Federal Ministry of Justice is also using the implementation of the Enforcement Directive to make another change in the Copyright Act: the costs incurred by the rights owners for sending a warning notice through its attorneys could only be claimed from the infringer in the amount of EUR 50 under certain conditions (first warning, uncomplicated case, insignificant infringement, action outside of business transactions). This thus results in a cap on the reimbursement of the costs of warning notices. In fact, publishers in Germany incur costs of EUR 400 to 600 per warning notice. Under the draft bill of the government, the difference would then have to be borne by the publishers.

IV. Comments to other issues in the Staff working paper relevant for book publishers

(We understand that these are not priorities for the Commission, however due to its importance for the book sector we will briefly comment on them):

- **VAT**

The Staff working paper includes the issue of disparate VAT rates in Europe between electronic and printed books. This is indeed one of the main hindrances for the development of content online. If discrimination between electronic and paper publications continues, it will inevitably have an influence on the newly born online publishing market. VAT rates for online publications should be lowered while ensuring that printed publications are not endangered of losing reduced rates.

- **Lack of search engine's respect of copyright protected work**

The recent Belgium case law on access to online newspapers consent without authorisation by Google is included in the Staff working paper as one of the issues raised by newspaper publishers in the previous consultation. We would like to point out that French book publishers are waiting for a Judgement from the French Courts on a case concerning the scanning and making available to the public of French works in copyright by Google without the necessary license from the rights holders. This deprives publishers from commercially exploiting their works themselves - works that are the result of contractual agreements signed with their authors – or in a voluntary partnership with Google or with any other online actor.

- **Access for people with disabilities**

The European book publishing industry understands the need to provide works accessible for disabled. For this purpose FEP has been an active member of several EU funded programmes (EUAIN in the past www.euain.org and ProAcces at the moment) to bring together the different actors in the content creation and publishing industries around a common set of objectives relating to the provision of accessible information. In the UK, scoping and pilot projects for accessibility to digital files for visually impaired people and other disabled people are under way, with the support of the Royal National Institution for the Blind and the UK Government.⁵

- **Access to funding**

FEP believes that the scope for EU funding should be broadened to a wider range of cultural sectors, including the book sector, than those mentioned in the Staff working paper. Such programs should notably cover the development of digital content and the digitization of already existing content, whose creation and preservation often surprisingly implies higher costs than paper publications.

⁵ In Annex to the FEP response, we have included a Common Statement from FEP and the European Blind Union on the importance of ensuring the accessibility of digital content online



Annex to FEP submission to Content Online

29 February 2008

EBU and FEP common statement

The quick development and take-up of ICT is creating tremendous opportunities, but also challenges, for blind and partially sighted people in accessing information online. On the one hand, for those people who are dependent on accessible information, the creation and provision of well-formatted digital content is essential. On the other hand, publishing industries, right holders and service providers are wary of security issues and constrained by economic realities.

For this reason, the European Blind Union and the Federation of European Publishers have started working together to address accessibility issues. This work has served to inform the EUAIN project (www.euain.org) and the drafting of recommendations (known as deliverable 3.2)* with regard to the interplay between national copyright exceptions and technological protection measures.

Both organisations strongly believe work still needs to be done to ensure the accessibility of digital content online and would welcome the European Commission's support to put forward and develop human, technical and financial solutions. This will be achieved by building trust between stakeholders notably through secured platforms and developing the appropriate technologies.

*The EUAIN project (European Accessible Information Network) is funded by the eInclusion thread of the European Commission 6th framework IST programme and co-ordinated by FNB Amsterdam. The report published in 2007 aimed to examine the current state of play in respect of access and protection in the digital age. In particular, deliverable 3.2 examines the interplay between national copyright exceptions (as permitted in Article 5.3b of the European Copyright Directive) and the requirements of Article 6.4.1 which are designed to prevent beneficiaries of exceptions from not being able to enjoy those exceptions as a result of TPM.

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