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STAKEHOLDER CONSULTATION ON EUROPEAN COMMISSION REFLECTION DOCUMENT “CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET: CHALLENGES FOR THE FUTURE”

This submission is made by the International Federation of Reproduction Rights Organisations (IFRRO¹). IFRRO represents and links Reproduction Rights Organisations (RROs) worldwide. RROs administer reproduction and other relevant rights, including certain forms of digital uses, in copyright text- and image-based works on behalf of publishers and authors, including visual artists. These rights are normally referred to as reprographic rights. Members of IFRRO include national RROs, and national and international associations of creators and publishers.

We will limit our comments on the possible EU actions for a Single Market for creative content online² to those matters which are most relevant to the IFRRO community, focusing on the text- and image-based sector. The submission follows the subheadings in Chapter 5 of the Reflection Document (Consumer Access; Commercial Users’ Access; Protection of Rightholders) after two introductory sections, on the text- and image-based sector and on collective management of rights, arising from statements made in various chapters throughout the document.

1. GENERAL REMARKS

The declared objective of the Reflection Document is “a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online”³. In this vein, it is a prerequisite that any potential solution ensures that access to and the making available of content is provided legally to works agreed to by authors and publishers, and on the basis of conditions and terms acceptable to them. The Reflection Document tends to emphasise the alleged interests of consumers and under-emphasise the interest of authors and publishers.

Also, we question the distinction made in the document between consumer access, on the one hand, and commercial access on the other. For instance, the discussions in 4.2 with respect to the territoriality of copyright and the discussions in 5.1 and 5.2 regarding multi-territory licensing seem to apply to both groups. We shall, nonetheless, observe the distinction in our comments.

¹ Interest Representative Register ID number: 91217342449-83.

² As listed in the Reflection Document of DG INFSO and DG MARKT, *Creative Content in a European Digital Single Market: Challenges for the Future*, 22 October 2009, section 5, pages 14 *et seq.*

³ Reflection Document of DG INFSO and DG MARKT, *supra*, page 3.

2. TEXT- AND IMAGE-BASED SECTOR, DIGITISATION AND MAKING AVAILABLE

The Reflection Document has some introductory remarks regarding the publishing industry, which requires some comments. Whereas the publishing sector differs from the music and audiovisual sectors in its functioning and the state of the online market, the Reflection Document does not clearly distinguish which actions should apply to which sector. As rightfully indicated, there are business models in the publishing industry for the online distribution of copyright works in commerce (in-print works). This includes making such works accessible via platforms offered by libraries. However, in addressing the issue of digitisation, distinction needs to be made between the respective sectors. Also, there is information in the document that would have benefited from having been presented more clearly.

Digitisation and preservation vs. making available

In nearly all EU Member States the legislation allows libraries to digitise works for preservation purposes. This is especially relevant to works which are not commercially available/out-of-print and orphan works, as these are usually not accessible in digital format from the publisher or the author. In all EU Member States, digitisation by libraries for the purpose of making available, as well as the making available over open networks itself, except for on dedicated terminals on library premises, requires the consent of the rightholders. Collective management organisations (CMOs), such as RROs, can, when mandated, license the large scale digitisation/making available of out-of-print works collectively on a voluntary basis.

Digitisation should be accompanied by appropriate registration of metadata

When digitising works, the library should register sufficient metadata to enable the subsequent search for and retrieval of them. This would further enable diligent search for rightholders to the works through clustering ahead of a request for authorisation to make it available, or for distribution purposes. It is crucial that copyright works are not being made available in a way that conflicts with the authors' and publishers' interests in commercialising it. In this respect it must also be taken into consideration that previous editions of a work that are out of print may, if they are made available without the rightholder's consent, compete with current editions that are in commerce.

Stakeholders have already agreed on guidelines for diligent search to rightholders⁴. Libraries and others should ensure that, when digitising a work, these guidelines are observed so as to register sufficient data to enable a diligent search for rightholders, when seeking authorisation to make works available. If required, more detailed guidelines for the metadata to be registered should be developed.

Solutions to digitising and making available requires stakeholder dialogues

Moreover, the Reflection Document refers to "Commercial projects" (in plural) being developed outside Europe for online distribution of literary works and e-books "without necessarily complying with EU copyright rules"⁵. It is not clear which projects the paper refers to. As this

⁴ Diligent Search Guidelines and Memorandum of Understanding, worked out and signed by the EC i2010 Digital Librarians High Level Expert Group; for further information, please see http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/-meetings/index_en.htm.

⁵ Reflection Document of DG INFSO and DG MARKT, *supra*, page 6, last paragraph.

statement appears to be one of the building blocks in the Reflection Document, it would have been appropriate to be more precise and also document the statement.

It seems, however, to include a reference to the Google Book Search Project, a project contested by authors and publishers with potential solutions only after years of litigation and from which most European books now are excluded, and on which there is a recent ruling in France against Google⁶. We recommend that the Commission continues its support for and looks for models from ongoing initiatives in Europe based on stakeholder cooperation, systems developed on the basis of quality metadata and cross-border access, with rightholder consent, such as EUROPEANA and ARROW⁷.

3. COLLECTIVE MANAGEMENT OF RIGHTS

Collective management is frequently referred to in the Reflection Document. It is therefore appropriate to offer some general introductory remarks regarding collective management in the text- and image-based sector and on Reproduction Rights Organisations (RROs).

As stated in the Reflection Document, collective management requires a sector-based approach. In the text- and image-based sector, publishers usually manage the rights for the main, primary exploitation of the works, including in the online environment, for instance for the sale of electronic publications. As further affirmed, collective management of secondary acts of exploitation is indeed a common practice.⁸ It is also indispensable to complement individual administration of rights when it is impracticable or impossible for rightholders to administer them individually. IFRRO members generally observe the IFRRO recommended Code of Conduct⁹, aiming at ensuring a level-playing field for all RROs in membership of IFRRO, whether in the EU or worldwide. The Code sets out the standards of service that rightholders and users can expect to receive when dealing with RROs, and promotes awareness of and access to information about copyright and the role and function of RROs in administering copyright on behalf of rightholders.

The digital environment

Collective management of rights is also a part of the solution for the digital environment, albeit the roles may gradually change, or be supplemented, as functions and services are modified or added to the current ones. Rights clearance of the use of orphan works through rights clearance centres will typically require collective management to be run by Collective Management Organisations (CMOs) such as RROs. Some RROs are already involved in orphan works administration. Copying and making available of out-of-print/commerce works can also be made possible by RROs. For instance, CLA, the RRO in the UK, licences and VG Wort, the German RRO, administers the transformation of material to alternative formats readable by visually impaired.

⁶ *Editions du Seuil SAS et al. v. Google*, judgment of 18 December 2009, *Tribunal de grande instance de Paris*; <http://www.juriscom.net/documents/tgiparis20091218.pdf>.

⁷ Accessible Registries of Rights Information and Orphan Works towards Europeana, shortlisted under the European Commission's *eContentplus* Programme; <http://www.arrow-net.eu/>. The project is partnered by 27 stakeholder representatives.

⁸ Reflection Document of DG INFSO and DG MARKT, *supra*, page 13.

⁹ <http://www.ifrro.org/show.aspx?pageid=about/codeofconduct&culture=en>.

4. CONSUMER ACCESS

There are business models, channels and licensing mechanisms for the publishing and creative sector, which allow broad access to works in a variety of forms and formats, both nationally and across borders. We agree with the Reflection Document when it states that special attention needs to be paid to orphan works and out-of-print/commerce works. In relation to this, a sector-specific approach to digitisation and making available of works is indispensable.

The European Commission (EC) i2010 digital libraries initiative's High Level Expert Group and its copyright subgroup developed a broad range of tools to address both orphan and out-of-print works issues. These comprise guidelines for diligent search for rightholders, model licensing agreements for the making available of works in secure and over open networks, and criteria for rights clearance centres and databases/registries. The EC-sponsored ARROW project, partnered by both rightholders and library representatives, aims at implementing these solutions, creating a system for the identification of rights, rightholders and rights status and building an orphan works registry. These are solutions that can and should be made use of when addressing orphan and out-of-print works issues.

Orphan works

An orphan works solution should observe the following basic criteria: (i) diligent search for rightholders of the work in the country of publication; (ii) legal certainty for users as well as rights clearers, as a minimum through the authorisation by a public body of the rights clearance centre to grant a licence for the use (reproduction including digitisation, making available, distribution) of the work; (iii) rights clearance centres to authorise the use of the orphan work, to be set up, governed and run by rightholders whenever they choose to be in charge of such centres; (iv) conditions to be established by rightholders of the same category of works.

We note that the Reflection Document mentions in particular the Extended Collective Licence (ECL) as a solution.¹⁰ This is a legal technique which may observe these criteria. It is a support mechanism for freely negotiated non-exclusive licensing agreements between users and an organisation representing rightholders in certain sectors for specific uses. Once the voluntary agreement is achieved on the basis of mandates from rightholders and comes into force, it is by law extended to cover the works of the same category of other rightholders that are not members of the organisation¹¹. It should, however, be noted that the ECL is but one of several possible solutions to address the orphan works issue that observes the criteria mentioned above. Other solutions may be found nationally.

Out-of-print works

The rightholders in most out-of-print works are known, so that they are not orphan works. The reasons why the authors and publishers have allowed the work to go out of print vary. In some cases, this may be because it contains ideas which cannot be sustained, in others, rightholders do not want an old edition of a work to compete with a new, commercially available, edition.

¹⁰ Reflection Document of DG INFSO and DG MARKT, *supra*, page 14, last paragraph.

¹¹ An example of such an agreement supported by ECL is the Norwegian Bookshelf-project; <http://www.kopinor.org/avtaler/avtaleomraader/nasjonalbiblioteket>.

However, usually the rightholders will have no objection to out-of-print works being made available in digital form. Rights clearance can proceed quickly and efficiently via RROs.

Contractual licensing and exceptions and limitations

Legal access to intellectual property is provided through direct licensing by rightholders (publishers and authors) or through collective licensing, for instance through RROs, when authors or publishers cannot or do not want to licence directly themselves. Licensing agreements can offer wide usage opportunities, based on tailor-made solutions.

Collective licensing is offered on a voluntary or a statutory basis, or a combination thereof. The EU Directive 29/2001 (“*InfoSoc Directive*”)¹² lays down community rules for the application of exceptions and limitations, especially in the digital environment. In particular, it establishes the vital principle that the rightholders should receive fair compensation for all uses of their works. RROs administer both rights under exceptions and exclusive rights.

In our view, no additional exceptions or limitations are needed in order to facilitate mass digitisation and making available by libraries, which is not a new phenomenon. More detailed norms on a Community level would not serve the purpose of improved access to copyright works in a changing technological and media environment. Collaboration between stakeholders can bring clear advantages in ensuring accessibility in constantly evolving usage scenarios. There are many examples which clearly demonstrate that solutions are best found on a voluntary basis through addressing the specific needs of those concerned, on the basis of existing copyright legislative frameworks. The Commission should therefore encourage and facilitate the use of the tools that have been developed jointly by the stakeholders, as well as dialogues built, *inter alia*, on previously agreed solutions to address the issue of orphan and out-of-print works.

5. COMMERCIAL USERS’ ACCESS

Current legislation no hindrance for multi-territory licensing

For the publishing and creative sector, current legislations are of no hindrance to the development of multi-territorial solutions. We disagree with the Reflection Document when it states on page 10 that “copyright has come increasingly into conflict with the imperatives of a borderless market”¹³. This statement is also in contradiction with another one in the same sub-chapter, on page 12, that “the present legal framework does not in itself prevent rightholders from commercialising their works on a multi-territory basis”¹⁴, a statement with which we agree.

Commercial users can generally ask for permission to use a work directly from the publisher or author and obtain it on a contractual and worldwide basis. Also, RROs are used to administer rights across borders on the basis of different legislations and models of RRO operation. This has been the norm for collective administration in the publishing and creative sector since their establishment in the 1970s. Challenges linked to this practice have been addressed and are being tackled also in the digital environment.

¹² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹³ Reflection Document of DG INFSO and DG MARKT, *supra*, page 10, last paragraph, lines 3 and 4.

¹⁴ Reflection Document of DG INFSO and DG MARKT, *supra*, page 12, second paragraph, lines 5-7.

A European Copyright Law

The document discusses whether a “European Copyright Law”¹⁵ would be required to create a more coherent licensing framework on a European level. We disagree with the assertion that it could be established on the basis of Article 118 of the Lisbon Treaty (TFEU), and even if sufficient unanimity could be achieved amongst EU Member States as to the nature of such a law having regard to the different traditions and systems among them (*droit d’auteur*, copyright, Extended Collective Licence, etc.), such extreme harmonisation is not necessary in order to promote the availability of digital content within the EU.

Efficient clearance mechanisms – key to legal access to copyright works

Assessing business models as well as collective management of rights for the digital environment requires a sector-by-sector approach. In respect of cross-border accessibility, the issue is whether multi-territory licensing is possible, i.e. whether rights and mandates are assigned to enable it, rather than if it actually takes place. We therefore agree with the Reflection Document that “[e]fficient clearance of relevant rights for online exploitation is a key issue for commercial uses.”¹⁶

The publication of books, journals, newspapers and the like is to a large extent language-dependent. With the exception of the English language, the publisher usually acquires pan-European/worldwide rights, and will be in a position to offer multi-territory licences. For the English language the licence would be at least pan-European. Equally, RROs are in a position to administer rights for secondary uses for foreign authors and publishers through the network of bilateral agreements with other RROs. The IFRRO-recommended Repertoire Exchange Mandate (REM) for digital licensing by RROs¹⁷ does not impose any territorial limitations, and a number of RROs already offer multi-territory licenses. There is therefore no need for additional Community rules to foster this. Key elements to facilitate cross-border offering of content are to maintain stable frameworks, including copyright legislation on a Community level, and to sustain and promote solutions developed by stakeholders through voluntary cooperation.

This being said, the business models for the digital arena are still under development. Among other things, it remains to clarify all roles of collective management to sustain the activities of authors and publishers. This is, however, a process that has started and it should be left to authors, publishers and RROs to map out the appropriate business models, roles and functions of the various players that facilitate access to copyright works.

The role of the Commission is to facilitate and enable the development of business models rather than to create them

The Commission should foster and facilitate the development of business models by the stakeholders, for instance *Gallica* in France, *Ebog* in Denmark and *Libreka!* in Germany. In relation to this, information on the rights concerned is invaluable. The ARROW project, partnered by rightholders, RROs and libraries, is developing a system for the information on rights, rightholders and rights status in works in the publishing and creative sector. This project, sponsored by the European Commission, represents a model for how the Commission could

¹⁵ Reflection Document of DG INFSO and DG MARKT, *supra*, page 18, third paragraph and footnote 49.

¹⁶ Reflection Document of DG INFSO and DG MARKT, *supra*, page 12, fourth paragraph, first line.

¹⁷ <http://www.ifrro.org/show.aspx?pageid=library/agreements%20between%20rros/rem&culture=en> .

facilitate the development of solutions and sustainable business models, including cross-border accessibility.

Nor do we see it as a task for the Commission to create mandatory rules on repositories of licences or repertoire¹⁸, or parameters for online licensing¹⁹ which would, in any event, require further research on commercial liability and competition issues. It should, however, be in the interest of both users and rightholders that there is a maximum of transparency around these issues. The IFRRO Board has adopted a Code of Conduct²⁰, principles for exchangeable mandates between RROs and basic criteria to comply with when soliciting negotiations of agreements with other RROs, in which transparency and information exchange are key elements. All IFRRO members are recommended to observe these instruments. IFRRO would therefore be willing to engage in a discussion with other stakeholders and the Commission to assess the current transparency and the need for improvement or for the development of further recommended general guidelines for CMOs.

6. PROTECTION OF Rightholders

As rightfully stated in the Reflection Document, the development of business models to enable easier access to copyright works requires adequate protection of rightholders²¹. Wider legal access to works can only be achieved through appropriate mechanisms which include direct licensing by authors and publishers and collective management of rights for secondary uses, combined with financial incentives, protection against infringement and copyright enforcement, including efficient combating of piracy and other forms of unauthorised reproduction. CMOs play an indispensable role in assisting authors and publishers to enable wider legal access to their works and in awareness raising and enforcement of rights.

Collaboration with Internet Service Providers (ISPs) to address copyright infringement and enforcement issues is welcome. The Commission could facilitate initiatives in this respect through financial contributions to awareness-raising campaigns. The use of filtering technologies by ISPs and others as well as systems to inform about authorised use (e.g. through search engines using the ACAP²²) are highly welcome and should be encouraged. These are mechanisms which help in enforcing contractual terms and preventing the networks from being used to infringe intellectual property.

The Commission should also encourage the investment in new business models. The establishment of a sustainable legal offer, reflecting the cultural diversity of the European written sector, can only take place in an environment ensuring the full respect of copyright and, therefore, the – financial – independence of creators. Against this background, we request that the Commission maintains a stable and predictable legal framework, promoting its rationale and its enforcement by all players.

¹⁸ Reflection Document of DG INFSO and DG MARKT, *supra*, page 17, third paragraph.

¹⁹ Reflection Document of DG INFSO and DG MARKT, *supra*, page 18, second paragraph.

²⁰ [http://www.ifrro.org/show.aspx?pageid=about/code of conduct&culture=en](http://www.ifrro.org/show.aspx?pageid=about/code%20of%20conduct&culture=en).

²¹ Document of DG INFSO and DG MARKT, *supra*, page 20, first paragraph.

²² Automated Content Access Protocol, <http://www.the-acap.org>.

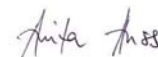
As to the governance and transparency of Collective Management Organisations (CMOs), we refer to what has been stated previously in this submission, in particular under 3., Collective Management of Rights, and the last paragraphs under 5., Commercial Users' Access. We thus agree that the rules and governing of CMOs should be publically available, as they normally are. That is not to say, however, that the rules should be uniform, since external rules are matters for each Member State in accordance with its legal and cultural traditions, and it is vital to maintain the principle that internal rules are determined democratically by the rightholders represented. If required, IFRRO would, nonetheless, be willing to engage in a dialogue on the current practices regarding transparency towards the rightholders and user communities.

We thank the European Commission for the opportunity to comment on the Reflection Document of DG INFSO and DG MARKT, "Creative Content in a European Digital Single Market: Challenges for the Future", and appreciate your consideration of our views. If required, we will be pleased to provide further information or answer any questions about this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Olav Stokkmo'.

Olav Stokkmo
Chief Executive

A handwritten signature in black ink, appearing to read 'Anita Huss'.

Anita Huss
General Counsel