

EUROPEAN COMMISSION - INFORMATION SOCIETY AND MEDIA DIRECTORATE-GENERAL

PUBLIC CONSULTATION ON CONTENT ONLINE IN THE SINGLE MARKET

RESPONSE SUBMITTED BY THE BRITISH LIBRARY

1. INTRODUCTION

- 1.1 The British Library welcomes the opportunity to contribute to the EU Commission's consultation on online content in the single market. The digital revolution has exploded business models across the information sector and creative industries and the traditional intellectual property framework is straining to cope with the implications of increased routes to access creative content and services. The British Library welcomes the public consultation as, in our experience, IP is an issue of increasingly wide relevance and which requires co-ordination at EU level in order for the European market to thrive.
- 1.2 The focus of our response is on those areas we have identified in the traditional copyright regime as in need of updating to create the conditions necessary for Europe's creative industries to thrive in the global marketplace.

2. THE BRITISH LIBRARY

- 2.1 The British Library was established by statute in 1972 as the national library of the United Kingdom. The British Library is the main custodian of the nation's written cultural heritage and one of the world's greatest research libraries. The Library is an integral component of the UK's national research infrastructure and it plays a correspondingly significant role in ensuring the research excellence of the UK and in supporting creativity and innovation. The Library's incomparable collections have developed over 250 years; they cover three millennia of recorded knowledge and represent every known written language and every aspect of human thought. The Library is the beneficiary of legal deposit, and it also purchases widely with a £16m annual budget for material of research value.
 - 2.1.1 Sir Isaac Newton said "If I have seen further it is by standing on the shoulders of giants". This is what the BL seeks to assist its users to do. In 2004/05, more than 5.25 million British Library collection items were consulted by, or loaned to, academic researchers, business researchers, and private individuals. The Library has decades of practical experience of operating within the library privilege and fair dealing provisions of the current legislation and hence has a keen appreciation of the complex balance of rights in copyright law.
 - 2.1.2 The Legal Deposit Libraries Act 2003 has extended the Library's legal deposit entitlement to digital items.
 - 2.1.3 The British Library is emerging as a centre of excellence for developing tools and solutions for the management of, and access to, digital information. Its Digital Object Management Programme, which is being developed to provide the Library with the means of handling the ever-increasing number of digital items (with a multiplicity of access rights) in its collections, will contain digital rights management

technology which will support the interests of library users, rights owners, and the Library itself.

- 2.1.4 The Library's Chief Executive, Lynne Brindley, was a member of the commission that produced the RSA Adelphi Charter (www.adelphicharter.org) on creativity, innovation and intellectual property. In addition she sits on the High Level Expert Group on Digital Libraries chaired by Commissioner Viviane Redding, where she is already making an important contribution on some of the issues relevant to this consultation.

3. THE IMPORTANCE OF BALANCE IN THE ONLINE EUROPEAN MARKET

- 3.1 The British Library agrees that the creation of an open and competitive single market for online content must be one of the key aims of the EU's i2010 initiative. In order to deliver this, the regulatory framework must balance the rights of creators to be recognised and rewarded for their work and the public interest in ensuring access to information and ideas. Getting the balance right across the EU will be intrinsic to our success in the global market place, for without reward there is nothing to be gained by innovation, and without access to the ideas that have come before, there is no inspiration for the future. This balance, between copyright protection and fair dealing exceptions (including library privilege), has served us well in the analogue age. The challenge now must be to translate this balance for the regulation of business models based on the new digital media.
- 3.2 The issue of where and when material should be accessed free, versus where and when it should incur a fee, has emerged as a crucial one for the emerging business models. While digital technology has increased the ability to circumvent copyright (as seen perhaps most notably in the 'digital piracy' currently affecting the film and recording industries), it has also delivered greater means to protect it (through DRMs and TPMs). It is the delicate and vitally important area at the centre of the traditional IP balance, where it is legally permitted to access information for free, that has become contentious.
- 3.3 Libraries have a long-held and pivotal role at this fulcrum of the balance; working to protect the rights of creators to be rewarded for their work and enabling access to information and ideas regardless of the ability to pay. A book and its digital copy are both equally valid and relevant research items yet there are different opinions on the applicability of fair dealing rights to them. Without clarification on this crucial area, access to material by researchers (the creators and innovators of the future) and the wider public could be eroded as a price is increasingly attached to more and more granular levels of knowledge.
- 3.4 The WIPO Copyright Treaty of 1996 maintained that digital is not different for the application of fair dealing exceptions and library privilege and this should be born in mind in the development of any future EU regulation.

4. CHALLENGES TO MAINTAINING THE IP BALANCE IN THE DIGITAL AGE

- 4.1 Licences emerging as the key transaction method.

- 4.1.1 In the digital world licences, rather than contracts of sale, are emerging as the key transaction method. Many of these licences deliver lower-level access and copying rights than would have been available under fair-dealing within copyright law. Reviewing a random sample of thirty licences offered to the British Library by publishers, we discovered that twenty-eight were more restrictive than the rights assured under current fair dealing exceptions. It must be of concern that, unchecked, this trend to affix a price to more and more granular levels of information will drastically undermine the access to information and ideas necessary for long-term creative output.
- 4.1.2 The British Library considers that future regulation should make it clear that contractual agreements cannot override existing statutory rights.
- 4.2 Digital Rights Management (DRMs) and Technical Protection Measure (TPMs)**
- 4.2.1 The emergence of DRMs (software that can be embedded in a work to manage use of an item) and TPMs (software embedded to control and limit the use of an item) are powerful new tools now at the disposal of the creative industries. (The two types of software are often confused and there is distinct lack of clarity in the debate about when each term is relevant). DRMs are given total protection under EU Directive, with no exceptions for legal circumvention in the interests of disabled access, long-term preservation or where the DRM prevents fair-dealing use. DRMs do not have to expire, and can effectively prevent the work reverting to the public domain at the expiry of the copyright period. In addition, as the Library prepares for the legal deposit of UK produced digital items we are discovering that DRMs can pose a real, technical threat to our ability to conserve and give access to the nation's creative output in perpetuity. This is neither in the interests of continuing innovation and creativity, nor is it in the public good.
- 4.2.2 At an EU level there must be a clarification of the distinction between TPMs and DRMs that are designed for the creation and management of Rights Management Metadata. The latter will be essential to all stakeholders if copyright clearance mechanisms are to be simplified.
- 4.3 Orphan works**
- 4.3.1 The issue of orphan works is already being reviewed by the High Level Group as an urgent issue across the creative industries. The Library believes that enlightened change to the law would facilitate not only important commercial opportunities for publishers, broadcasters, artists and so on, but also the reproduction of such works in research and academic fields. We believe that there would be a tangible economic and public good benefit if a provision were established to streamline the process of seeking rights clearance to deal with the use of orphan works whereas at present many works are, arguably, unnecessarily 'locked up'.
- 4.3.2 While there is virtual unanimity around the need to tackle orphan works, debate continues around the most appropriate mechanism to do so. The preference of the British Library would be for 'light touch'

regulation around requirements to trace rightsholders and reasonable damages where orphans have been used and the rightsholder reappears. This is as opposed to a 'national rights clearance' model, which in addition to driving business models further down the licensing track (as per point 4.1 above) has also been found, in the Canadian experience, to be ineffective in unlocking volume of orphan works.

4.4 Term of copyright

- 4.4.1 Many of the headline debates around regulating for economic success in the digital age have focused on the US decision to extend the length of the copyright term for sound recordings to 95 years. While the British Library takes no view on what the precise length of the copyright term should be, we would guard against any extension without a full assessment of the economic case to do so. Obviously the US position creates some distortion in the international marketplace, but that must be assessed against the overall economic loss generated by locking orphans away for longer. Research from the Library of Congress shows that less than 2 per cent of works have any commercial value at all 55-75 years after they were created and that more material is released by publishers when recordings enter the public domain than when they are orphaned and in copyright.¹
- 4.4.2 Our view is that copyright term for sound recordings should not be extended without empirical evidence and the needs of the whole of society being borne in mind.
5. A successful European research base is dependent on timely and effective access to the information, knowledge and ideas produced by other researchers, past and present. Success in innovation is dependent upon the effective flow of knowledge from the research community and the science base to SMEs and industry in general. Ensuring that these information flows - scholarly communication and knowledge transfer - work as effectively and efficiently as possible must be central to ensuring the long-term success of Europe's creative economy.

The British Library, October 2006

¹ Survey of Reissues of US Recordings. T. Brooks. Co-published by the Council on Library and Information Resources and the Library of Congress 2003. Copyright Term Extension: Estimating the Economic Values. E Rappaport. 1998.