

Contribution to the European Consultation on content online **13 October 2006**

A. Introduction

The European Federation of Magazine Publishers (FAEP) is the representative trade association of the European periodical press. We represent national magazine trade associations from EU Member States, as well as corporate members such as Time Warner and Reader's Digest. In total, we represent the interests of 15,000 publishing companies, turning out more than 50,000 titles per year, directly employing nearly 200,000 EU citizens (with a multiple of that figure involved in the upstream and downstream activities) and with annual turnover in the EU in excess of 40 billion Euros¹.

Magazines reach an average of 80% of all EU adults. The periodical press is a key element of Europe's cultural heritage and makes up an essential part of the pluralistic mix of information, entertainment and academic achievement. The market is dynamic and new launches are very frequent – magazine publishers operate on the cutting edge of societal developments and address all facets of life. As such, the periodical press industry is a key player in the *knowledge economy* so loudly touted by the European institutions.

Electronic make-up, advanced printing techniques and online publishing have, in recent years, forced magazine publishers to progressively adapt part of their organisation and processes, and to develop new business models. While the main part of our editorial content is still delivered to readers in paper form, an increasing amount of this content is offered to readers online. In some cases the online offer is complementary to the print product, while in other cases it is a direct replica of the print version (.pdf publications sent via email or to be downloaded from websites, for example).

Press publishers face numerous challenges when moving online: creation of new systems of managing and delivering content; organisational changes and training costs; elaboration of new editorial/publishing processes; high costs of promotion and referencing among the leading search engines and portals; and implementation of the related techniques.

Periodical press publishers were among the first media to bring their content online and the sector continues to invest heavily in offering online content to Europe's citizens. This experimentation, innovation and investment of periodical publishers in the digital environment is taking place at a time when many other players are doing the same and there are changing expectations among European readers, in particular the young age group, representing the future of readership.

As explained, the online market for the periodical press is evolving, developing and changing at a very fast pace. It implies new added costs for Publishers, who are still

¹ The periodical press industry includes retail magazines, specialist magazines, business to business magazines as well as scientific and academic journals.

experimenting with new on line business models and do not know how the market will look in the future.

For these reasons, FAEP warmly welcomes the European Commission consultation asking online content providers to determine what policies at European level are necessary to help the taking off of new business models.

B. Detailed response to the Commission questionnaire

a. Legal Burdens

To the question 17 (**Are there any legal or regulatory barriers which hamper the development of creative online content and services?**) we would like to underline that regulatory burdens, heavy social costs and taxation levels within the European Union which are not reflected elsewhere in the world (particularly those applicable to new on line services originating outside the EU but receivable within the EU) make it difficult for companies operating within the EU to compete on equal terms with the U.S. and other regions. The European Union should monitor these imbalances and consider how fairly to reduce these burdens to free its creative and media industries to compete on a level playing field in a global marketplace. At the same time, it is vital that the EU takes a lead in ensuring that territories outside the EU adopt the International Treaties in place for the recognition and effective enforcement of intellectual property rights (particularly the Agreement on Trade-Related Aspects of Intellectual Property Rights – the TRIPS Agreement).

More specifically:

1. Fiscal policy

Publishers are going through the development of an enlarging content offer, ranging from the traditional print versions of magazines to the proposal of similar and/or enhanced content online. Whilst publishers can base their business model on line from advertising resources in different cases, they also develop other ones based, for example, on subscriptions.

The development of the Internet era and the new tax legislation which applies to the provision of services on line brings potential imbalances for publishers as they seek to evolve their traditional print business models to embrace the technology which will allow them to deliver their products to consumers more effectively and efficiently in the future.

In several European countries, the printed press benefits from a lighter tax system, in application of the 6th directive of 17 May 1977 and of its annex H, which enables a reduced VAT rate on “newspapers and periodicals”, without imposing the criteria of materiality of these press products.

Until recently, the VAT rate applied to online press was subject to interpretation, given the phrasing of the directive 2002/38/CE of 7 May 2002 (article 9) and of its annex L, as “the delivery of images, texts and information” cannot be sufficient to define press along

with the multiple suppliers of content online. The regulation of 17 October 2005, which is to be applied from 1 July 2006, closed the possibility for Member States to apply a reduced VAT rate to online press, as the regulation links “newspapers and periodicals online subscriptions” as well as “digitised content of books and other electronic publications” to the rather vague definition stated in the L annexe : “supply of images, texts and information, and making database available”.

This situation subjects the press to unfair competition; the press already has a declining trend in its readership as well as a high fixed costs business model, difficult to sustain in a stagnating advertising market, where advertisers are dispersing fixed budgets through an increasing number of media channels.

This increase of unfair competition in the online world, parallel with the decrease in revenues in the print environment will have a negative impact on European publishers' ability to invest in valuable digital content. It will consequently strongly undermine the crucial role European publishers play in enhancing a democratic society.

Fiscal incentives will enable publishing companies to keep producing and offering consumers quality content.

Member States should be able to decide themselves whether to grant the possibility for reduced VAT rates to be applied to online press. EU-level intervention in the fiscal area is harmful to further investment and innovation of periodical publishers online.

2. Media Policy

European culture and democracy are based on the freedom of opinion and freedom of the press that were achieved through several centuries of struggle. The common value of freedom of expression has enabled cultural diversity and economic performance.

By definition, this freedom implies the right to free expression, subject to subsequent accountability in the courts, through the enforcement of general laws.

a. Audiovisual and Media Services proposal for a directive

Basically, this freedom can be applied to all media, with the sole exception of broadcasting. However, the proposed Audiovisual Media Services (AVMS) Directive (COM (2005) 646) proposes extending rules developed in the broadcasting environment to all audiovisual media services in the EU.

Characterised as a restrictive exception, television broadcasting is the only medium that is subjected, as a rule, to broad state intervention and any extension, albeit partial, of the latter to other media cannot be justified. Typical examples of this intervention include the requirement of licenses, the supervision of content by authorities and the denial of full freedom of opinion due to restrictions on communication that are imposed for political reasons. It has been accepted, until now, that the Television Directive necessarily limits these restrictive regulations to television, as an exceptional case, thereby respecting the priority given to the freedom of other media. The current situation would not change

even if the said directive were to incorporate television services delivered via other broadcasting channels (IPTV or web-TV).

EU media policy should build on these values by reducing restrictions to content and advertising in media to support the future platform of user-driven information and communication and maintain the EU as a leading market place for the creative media industry.

However, the widening of the scope of the Directive to include non-linear audiovisual media could extend restrictions that are typical of the broadcasting sector beyond television, to media entirely different to broadcasting. This could affect all “on-demand” audiovisual media services such as web sites that offer editorial information in audiovisual formats. The current and necessary freedom that exists for this kind of service would be reduced in many ways by the envisaged regulations. There exists the danger of a structural reversal in the relationship between the freedom of press and opinion, as the rule, and the restrictive regulation of broadcasting, as the exception. It is misconceived to apply licensed regulatory concepts to unlicensed media.

b. advertising regulation

An inherent part of the freedom of expression and of the freedom of the press is the freedom of commercial communication. Restrictions of public speech on economical matters should not be allowed.

Besides, at a time when the competition for advertising revenues is increasingly dispersed across existing and new media channels, Europe's magazine publishers are clearly concerned about any potential loss of revenues through measures (compulsory or otherwise) which would affect the ability to carry advertising and other commercial communications in our publications, both paper and digital. The adverse impact of such a loss would undoubtedly have negative consequences for the funding of an independent press throughout Europe. The cover and subscription prices for our content goes nowhere near covering the costs of producing such content. High quality journalism and quality content can only be paid for from advertising revenues.

Every week and month, hundreds of millions of European citizens consume magazine content because it reflects and caters for their own desires, interests and beliefs. Obviously, it is not in publishers' interests to alienate their readers. We are, therefore, naturally sensitive to the need for high standards in advertising that helps retain the trust our readers have in our titles. We reiterate our full and committed support for the ongoing work to enhance existing and develop new effective systems of advertising self-regulation throughout the internal market.

In this sense, we would also like to underline that the promotion of advertising self-regulation by the European Commission should not be seen as an indirect way to encourage industry to self-regulate to the point of not advertising at all. This would remove the right for companies to promote themselves, goods and services responsibly and would be an entirely unacceptable end result for the economic well-being of the media.

3. Legal Affairs Policy

i. ROME II

Of major concern to publishers with the Rome II proposal is the issue of defamation and personality rights. In the Commission proposal, it was possible that potential victims could sue publishers using the applicable law of any country in Europe – so called “forum shopping”.

FAEP and publishers have been arguing for a “country of origin” rule for defamation, where potential victims could only sue according to the law of the country where the publisher is based. This would provide the minimum legal certainty for publishers.

The Council text adopted by Council of Justice Ministers at the beginning of June this year now excludes defamation from the scope of Rome II – this would mean that a status quo as regards cross-border defamation cases/applicable law will be maintained. It is not an ideal solution for the media, but it is the very least we would have accepted from among the other negative options being discussed.

However, the agreed text provides for a review of the Regulation 4 years after its adoption. The review article (26a) makes a particular mention for the review process to examine cross-border defamation in the EU.

Furthermore, an important clause granting primacy to Internal Market legislation (such as the E-Commerce Directive) was deleted by the Council.

ii) Data retention

In the context of combating terrorism and organised crime, the European Commission proposed a directive which would set down a minimum amount of time that providers of publicly available electronic communications services or of public communications network must retain data and the circumstances under which they must disclose this data in order to prevent, investigate, detect and prosecute serious criminal offences.

This proposal for a directive on the retention of data processed in connection with the provision of public electronic communication services, amending directive 2002/58/EC was adopted on 15 March 2006.

We understand the need to fight against terrorism by all means and support it. However, no comprehensive consideration has been given to the matter of investigative journalism in Europe.

The retention of traffic data from telephones, mobile phones and the Internet during a year lead to the creation of vast databases. For journalists and the media in Europe, it means that government authorities could routinely monitor and find out about the identity of sources and other journalistic research activities. Investigative journalism is essential to an open and democratic society and can only carry out its function if sources are protected. With this directive, every source of information will have to fear that their identity could be exposed. Without the certainty of protection, the number of sources will

diminish. This represents a serious threat to democracy as it weakens its Fourth Pillar by gravely affecting press freedom.

4. Intellectual property regime

European legislation regarding the intellectual property regime is, besides the remarks we will make hereinafter, satisfactory to FAEP members and no changes should be foreseen by the Commission.

However, to protect content created by publishers, recognition of intellectual property rights is not enough. Indeed, proper enforcement of the legislation is necessary to benefit fully from the granted rights.

Indeed, due to the quickly evolving value of content in the information society, adequate enforcement is pivotal. Content that is made available loses its market value in a few days, yet the available procedures to stop infringements of the IP rights on this content take months. Given the special technical and economical environment, special enforcement rules are of utmost importance and hence justified.

i) Database directive

The publishing industry is entirely dependent on building, maintaining, marketing from and selling data of every conceivable kind: it is one of the cornerstones of the information economy in which Europe is an international leader.

Estimates from these businesses show that as much as 30 per cent of their costs involve the compiling and maintenance of databases: an investment which could be around €60bn annually in the EU.

One of the reasons for the growing success of database driven businesses in the EU is the existence of the *sui generis* right, which underpins the huge investment in these companies.

The fact that the European Commission has even considered removing this right has sent shock waves through the industry and is forcing companies to revisit their investment proposals for the future.

FAEP strongly contests the suggestion that the creation of the *sui generis* right has had adverse effects on competition. Completely to the contrary, FAEP members believe that the introduction of this right has provided a catalyst to publishers (in particular SMEs and the business and professional publishers) to invest more in the production and use of databases.

All market players have tighter marketing budgets than before because of the growth of other media channels. Publishers therefore have become considerably more selective in how they do their marketing: using databases is one of the main elements in their decision-making in this regard.

We believe there is ample evidence to show that the right has played an extremely important role in the development of the information society in the EU and made the EU a desirable place in which to develop these important businesses.

Therefore, the sui generis right attributed to the creator and investor of a database should be maintained as for magazine publishers, databases play a fundamental role in contributing to the success of the Lisbon strategy.

ii) Digital Libraries

Copyright and related rights provide incentives and opportunities for publishers and for the society at large. It is recognition of copyright which enables publishers to make works available, ensuring remuneration for their investment and the sustainable delivery of creative content. Publishers' investments in the collection of information and the delivery to the public conduct them to play an important role in democratic society.

We support the widest possible economically viable dissemination and diffusion of the works we publish, be it through digital platforms or high street retailers. Recognising this many of the works published by our members are increasingly available in digital formats. Some sectors have largely migrated from paper to electronic media, like B2B.

Publishers invest in creativity and take financial risks before releasing a work of the mind. Together with the authors, our ability to engage in the creative process is dependent upon the ability to be paid for this investment. Therefore, it is crucial that any digitisation by libraries for purposes than strict preservation, particularly when digitisation is to lead to possible access by members of the public to digital copies or the making available of such copies through digital communication systems, must be done with the explicit permission of the rights holders, including the authors, producers and publishers. This will ensure sustainability of new business models which can involve both libraries and publishers which in turn will promote future creativity, investment in new works and thereafter enable the public to have access to a wide range of creative works.

Should a public sector European digital library wish to provide access to European content, it should do so through contracts between rights holders and users in the same way as is common practice for physical content and always in a manner not interfering with the normal exploitation of such content by the rights holders, as foreseen by applicable European and International law. This will encourage increased access to European works and promote the development of innovative business models without risk of unbalancing the whole creative sector.

b. Piracy

Question 21: To what extent does your business suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector of activity?

We suffer from both physical and online piracy. Some well known magazines directly after publication are copied, printed in enormous quantity and sold in a very short time in

certain eastern European countries and throughout Asia. We also suffer from online piracy where pirates copy the entire magazine and make it freely available to download on websites. Of particular concern is the unauthorised use of mast heads and trademarks developed by our members for new publications, when third parties seek to benefit from the investment of goodwill of our members without respect for their intellectual property rights.

Intellectual property is the cornerstone of publishing industries and the measure by which the people who contribute to creativity can be remunerated. The production of new creative content is usually made possible by the reinvestment of revenues from existing creative content. Yet this virtual circle is threatened by the increasing illegal use of intellectual property.

The EU must provide a strong legal foundation, based on copyright, if it wants to have the internationally competitive creative industries that are at the root of a world class knowledge economy.

The EU and national governments need to do more to track down and pursue illegal use of intellectual property rights. There is an urgent need to create a stronger deterrence against IP crime and online infringement, through a combination of effective legislation and greater government commitment to enforcement activity.

Just because intellectual property is intangible, it doesn't mean that it has no value. The EU has a role to play in helping to educate consumers about the importance of copyright.

The EU should seek agreements with third countries that counterfeiting and piracy are criminal offences that should be treated no less seriously than other criminal offences such as forgery, theft and fraud.

c. Digital Rights Management systems (DRMs)

Question 29: Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

While some publishers do or intend to use them, some others do not use DRMs for economic reason (it is too expensive, in particular for the many thousands of SME publishers) or for security reasons as it does not always prevent illegal use.

The legal protections for DRMs already recognised in law at both EU level and within EU Member States should be maintained.

Rather than introducing additional regulation at this stage, the Commission should recognise that the market for DRMs is a nascent one, and monitor developments in the market place. Consumer acceptance will play a role in DRMs application.

Interoperability is a priority for publishers if the consumer is to have a variety of creative content available on different platforms. The publishers strongly support interoperability.

This should not be done at the expense of security. Secure DRM solutions need a system-wide support so that continuity of security is maintained across platforms.

Publishers are addressing ways in which rights management information systems (using digital rights management can be made more transparent and efficient both for users and consumers. A number of initiatives are under discussion including the project to develop an Automated Content Access Protocol. It is hoped that the project will be launched with the backing of the World Association of Newspapers, the European Publishers Council and the International Publishers Association in the later part of the year.

d. Licensing, rights clearance, rights holders remuneration.

Question 16 – How should the distribution of creative content online be taken into account in the remuneration of the rights holders? What should be the consequences of convergence in terms of right holders' remuneration (levy system, new forms of compensation for authorised/unauthorised private copy, etc)?

Increased copying or dissemination of works without payment of licence fees or remuneration on a structural base will not benefit to the content industry. For every primary or secondary right conferred, publishers must obtain return on their investment. The content industry generates jobs and investment in the neighbouring sectors: paper, distribution, advertising, ISP's, ICT equipment, etc.

In most EU Member states, to remunerate exceptions to the right holders exclusive right, especially the private copy exception, a levy system has been implemented reflecting previous practical difficulties in controlling the use made by the consumers as it would intrude on their privacy and as it is difficult to enforce on individual basis. Levy systems have proved to be a solution that provide for fair remuneration. This is why most EU Member States have introduced or expanded these systems in the past years.

It is true that in the digital environment, the development of technical protection measures and rights management information systems makes it possible for rights owners or service providers (with appropriate consents from consumers) directly to commercialise secondary rights. However, these technologies are challenging, both technically and economically, for the many SME publishers to introduce. Furthermore, from a psychological point of view, there is also the issue of consumer acceptance.

There are no DRMs for paper editions, and the mere availability of DRMs for digital copies is no guarantee that they can be adopted by the market. The Commission must therefore pursue very warily the case for eliminating levies.

Whilst foreign rights holders often receive their remuneration via their local collecting societies under bilateral reciprocal representation agreements, it is not always the case. No rules prevent them from demanding remuneration directly in foreign countries

Different distribution policies in different Member States can give the impression that what is recognised as “fair remuneration” in one Member State is not recognised in the same way in another Member State.

Reasons for different distribution policies and rules should therefore be disclosed and be as transparent as possible.

In its consultation on copyright levies in a converging world, the Commission suggest that “in a convergent environment the analogue era distinctions between transmission, consumption and copying will merge and become meaningless”. This is not accepted. Copyright law recognises a number of distinct restricted acts. Copyright owners have exclusive rights in relation to each of these restricted acts in every phase of the commercial and communication chain. The value that rights owners choose to attribute the different acts when one or more are licensed simultaneously is a matter for commercial practice.

Publishers should remain free to choose between collective or individual management of their right and between different management systems (if there are, for example, different collective management organizations in each country).

Question 14: Would creative business benefit from Europe-wide or multi-territory licensing and clearance? What would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

FAEP is naturally concerned with the economic welfare of its member companies. Online editions in particular clearly offer the possibility of providing content and services to the single market. It is therefore necessary that publishers have the *right* to grant multi-territory, indeed pan-EU, licenses, but this cannot become an *obligation* as that would foreclose all sorts of other cross-border partnership options that a publisher might prefer.

It is therefore necessary that publishers are not prevented by collecting societies from developing multi-territory licensing. 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.

The important role played by collecting societies which operate at local level must not be forgotten. It is important that collecting societies can continue to be able to operate within local and niche markets in ways which enable the efficient administration of rights where, in the absence of collective licensing, it would be impractical or uneconomic for an individual rights owner to attempt to issue relevant licenses on a one to one basis.