ENPA

Copyright Working Party
18 September 2006, Oslo, Grand Hotel
9h00 to 12h00

Agenda

1. **Welcome by the Chairman and adoption of Minutes of previous meetings**

2. **Copyright and employment**
   Discussions and finalisation on ENPA analysis on copyright and employment
   Agreement on an official ENPA decision for the Directors Round Table, the Executive Committee and the General Assembly
   See Annex 1

3. **Digital Libraries**
   Discussions on Commission's Recommendation on digital libraries and on ENPA draft letter to Professor Ricolfi
   Definition of key-issues relevant for ENPA in view of the next meeting of the Commission's High Level Group and the Copyright sub-group
   See Annex 2 and ENPA draft letter to Professor Ricolfi

4. **Rights management**
   Update on Commission's future plan on levies, private copies and DRMs and discussions.

5. **Content online**
   Discussion on ENPA draft response to the Commission's questionnaire.
   Identification of key-issues to be raised by ENPA.
   See Annex 4 and ENPA draft response to the Commission's questionnaire

6. **For information**

   - Commission's Studies on review of the acquis and Copyright Directive – Berlecon Research questionnaire
   - WAN Task Force on search engines and publishers –
     See Annex 5
   - IFRRO –
     See Annex 6
   - WIPO – Discussion on whether ENPA needs to nominate a new representative
     See Annex 7

7. **Next meeting**

ATTENDANCE LIST

Chairman: Kees SPAAN (Netherlands - Nederlandse Dagbladpers)

João AMARAL (Portugal – Associação Portuguesa de Imprensa)
Margaret BORIBON (Belgium – Journaux Francophones Belges)
Denis BOUCHEZ (France – Syndicat de la Presse Quotidienne Nationale)
Frank CULLEN (Ireland – National Newspapers of Ireland)
Laurence DERIJCKE (Belgium – Vlaamse Dagbladpers)
Alex FORDYN (Belgium – Vlaamse Dagbladpers)
Katalin HAVAS (Hungary – Magyar Lapkiadok Egyesulete)
Satu KANGAS (Finland – FinnMedia)
Federico MEGNA (Italy - Federazione Italiana Editori Giornali)
Henrik MUNTHE (Norway - Norwegian Media Businesses' Association)
Tom NAUTA (Netherlands - Nederlandse Dagbladpers)
Paula QUEIROZ PINTO (Portugal - Associaçào Portuguesa de Imprensa)
Santha RASAIAH (United Kingdom – Newspaper Society)
Holger ROSENDAL (Denmark - Danske Dagblades Forening)
Arvid SAND (Norway – Mediabedriftenes Landsforening)
Fiona VENING (Netherlands - Nederlandse Dagbladpers)
Helmut VERDENHALVEN (Germany – Bundesverband Deutscher Zeitunverleger)
Heinz WITTMANN (Austria – Verband Österreichischer Zeitungen)
Marzena WOJCIECHOWSKA (Poland – Izba Wydawców Prasy)

ENPA Secretariat: Valtteri NIIRANEN - Sophie SCRIVE - Hannah McCAUSLAND

ANNEX 1

ENPA analysis on copyright and employment

This paper is based on the resolution that has been discussed at the General Assembly 5 May 2006 in Helsinki and a thorough analysis made by the task force appointed at the Copyright Working Party 23 May 2006. Additionally, Alex Fordyn has produced a very helpful paper with further arguments for a common ENPA position.

The objective of the paper is to identify the different legal options that ENPA could choose for its position and which could also meet the different expectations of the ENPA members. In addition the paper should form the basis for a possible external ENPA position paper.

In the following the term "journalists" include journalists, photographers and cartoonists as well as other editorial staff.

I – Scope of ENPA action, what do we want to achieve?

- **The specific situation of employed journalists compared to freelancers/independent entrepreneurs**

In the best of all worlds newspaper publishers acquire all rights from both employed and freelance journalists working for a newspaper company.

Asking for freelancers' rights weakens ENPA's position, though, as some arguments are depending on the difference between employed and freelance journalists, e.g. the question of who is carrying the economic risk when producing editorial content. Therefore, it seems necessary to have a clear distinction between employed and freelance journalists in relation to rights: Either the journalist choose to work for himself/herself as an independent entrepreneur with all the natural consequences of this independence (no instruction from a superior and full economical benefit from copyright in the works *but* lack of certainty regarding salary and pension etc. and full responsibility for making the necessary investments in equipment such as pc, digital camera etc.) or the journalist choose to work for someone else with the opposite consequences including less or no benefits from copyright.

For the sake of consistency in ENPA's argumentation we propose to limit the scope to cover *employed* journalists, which is also in accordance with the ENPA Copyright Working Party's position at the latest meeting 23 May 2006. Interpretation of employment should be left to national legislation.

- **The need to be neutral – avoiding reference to a specific sector e.g. the written press, the media or the publishing sector**

Although it might be simpler – from a lobbying point of view – to ask for a change in copyright legislation that only applies to e.g. the written press this will not be sufficient as it will limit newspaper companies in situations where works are not originally made for the written press. Moreover, if we argue that the "normal system" in trades and industry is that the outcome of the employees' production belongs to the employer, it can be perceived as inconsistent with this argumentation to limit ENPA's proposal to a certain sector. Finally, it is contrary to the normal principles for drafting legal texts, namely that the wording is made as neutral as possible.

A neutral provision on copyright and employment will therefore potentially apply to *all* employed authors and performers, not just journalists. Nevertheless, in practice only very few authors and performers are employed outside the media sector but rather work as independent entrepreneurs. Some important exceptions exists, though, e.g. university professors and to some extent musicians in orchestras.

The fact that only few employees outside the media sector would be covered by this proposal is very important as it distinguishes journalists from other authors and performer groups. This fact should therefore be clearly underlined.

- **The need to focus on economic rights without including moral rights in the discussion.**

The employers' exclusive exercise of the *economic* rights to works created in the course of employment is equally important to all ENPA members.

When it comes to the question of whether to include *moral* rights in the scope or not it is important to recognize that in some countries moral rights do not apply to publications such as newspapers, whereas in other countries moral rights apply to all works.

In countries where moral rights apply without giving rise to specific problems for publishers it seems wise for newspaper publishers to demand the economic rights while reassuring authors that they can retain their moral rights. Nevertheless, since this solution is not acceptable to ENPA members in countries where moral rights do not apply it cannot form the basis for a common position. For the purpose of accommodating all ENPA-members' needs, the proposal should therefore simply avoid taking a stand on moral rights and leave it to the national legislation to deal with this question.

- **The need to consider the different concepts and solutions**

Different concepts are being discussed when searching for a solution regarding copyright and employment – (presumption of) ownership of rights or (presumption of) transfer of rights.

It is important to understand that these different concepts are used because each of them match an underlying legal system:

In the UK and Ireland the employer is "the *first owner* of any copyright in the work subject to any agreement to the contrary" cf. section 11(2) of the UK 1988 Copyright, Designs and Patents Act and section 23(1)(a) of the Irish Copyright and Related Rights Act 2000. In the Netherlands the employer "shall be deemed the *first author*" of a work "unless otherwise agreed", cf. article 7 in the Dutch Copyright Act. In these countries the copyright is therefore vested in the employer as a starting point and it becomes natural to describe this as a presumption of "ownership of rights".

In most other European countries where the author or performer is the rightsowner and where there are no provisions on copyright and employment other than the one deriving from the EU directive on computer programs,[1] it is necessary to *transfer* the economic rights to the employer. A provision on transfer of rights could – in theory – impose a compulsory transfer of rights from the employee to the employer but in respect of the basic principle of freedom of contract is must be modified or limited to a *presumption* of "copyright transfer".

[1] Directive 91/250 of 14 May 1991 on the legal protection of computer programs article 2(3) reads: "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to *exercise* all economic rights in the program so created, unless otherwise provided by contract." Directive 96/6 of 11 March 1996 on the legal protection of databases uses the same wording in recital 29.

As a common denominator ENPA should avoid using the terms ownership of copyright or presumption of copyright transfer but rather use the wording known from the directive on computer programs, namely that the employer shall be entitled to *exercise* the economic rights.[2]

- **The need to distinguish the labour aspect from the economic perspective of copyright**

In some EU countries, publishers need to enter into collective negotiations at national or company level with the union of employed journalists to achieve a collective agreement on the reuse of their content in new media and on the remuneration or compensation for such reuse.

In this context, the collective negotiation for the acquisition of rights by the publishers from their employees is closely linked to labour law and contract law in the scope of employment. This connection has been confirmed by the Commission's staff working paper on the review of the legal framework in the field of copyright and related rights: "Regarding such cases, harmonisation would not be a straightforward copyright issue but would also bear relevance to labour law and the economic relationship between the parties of an employment contract. In this respect, Member States hold fairly divergent views on the need for harmonisation, and often point at severe political difficulties in agreeing a harmonised line."

With regard to labour law, ENPA had a cautious approach at EU level especially on social dialogue. It is important that social dialogue in the newspapers' sector remains at national level and is not promoted at EU level as it would result in collective negotiation with EFJ – the European Federation of Journalists – with all the consequences that this could have on national market and labour law. In addition, as mentioned in the Commission's staff working paper, Member States have political sensitiveness in the field of labour law which does not fall under internal market legislation. According to the EC Treaty, payment is not part of EU competence which therefore belongs to the exclusive competence of Member States.[3]

In consequence, ENPA should therefore avoid linking the exercise of economic rights by the employer with the question of collective negotiations and remuneration which would belong to the national level and not to the European level.

- **The need to avoid a discussion on remuneration or fair compensation**

Remuneration and compensation are different concepts: the first one could be considered as salary (i.e. between an employer and an employee), the second one is generally used in the EU legal framework in relation to exceptions/limitations.

The notion of remuneration is closely linked to the issue of labour law and working conditions. It is important for ENPA to keep this issue separate from the need for employers to exercise economic rights. The main reason is that employed journalists already benefit from remuneration with their salaries and other advantages due to their employment situation. In this respect, the right for the employee to receive compensation or additional remuneration from the exercise of copyright by the employer is not justified contrary to a freelance journalist who would bear the economic risks.

[2] A slightly different wording can be found in Regulation 6/2002 of 12 December 2001 on Community designs article 14(3): "However, where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, the right to the Community design ***shall vest in*** the employer, unless otherwise agreed or specified under national law."

[3] Article 137 of the EC Treaty

The question of fair compensation/remuneration is a sensitive one in the field of copyright as it is part of various EU copyright legislation as an indispensable way to compensate or remunerate the right holder from any use of his content by a third party.

However, neither the Directive on computer programs, nor the Database Directive when referring to the exercise of economic rights in the scope of employment mentions this notion of fair compensation or equitable remuneration. This confirms the difference between copyright exercise in the scope of employment and copyright relationships between an independent author (like a freelancer or a writer) and a publisher where fair compensation from copyright is the only source of revenue for this independent author.

- **The need to find a solution which respects existing laws in UK, Ireland and the Netherlands where publishers enjoy a better legal regime**

When analyzing the provision on exercise of rights in the directive on computer programs it is clear that this (1) is neutral re. the interpretation of employment, (2) is neutral re. the legal systems in the member states, (3) does only relate to economic rights, not moral rights and (4) respects freedom of contract.

The directive was adopted in 1991 and implemented in the national legislations during the following years. Apparently, the UK was able to implement the directive without making changes in the 1988 UK Copyright, Designs and Patents Acts with negative effects for publishers. It therefore seems fair to assume that a provision on employers' exercise of economic rights in other copyrighted works along the same lines will be acceptable for British, Dutch and Irish newspaper publishers, unless the mere fact that ENPA "opens Pandoras box" and proposes another arrangement for copyright and employment across the European Union will result in less favourable legislation for those publishers.

- **Draft proposal for ENPA position on exercise of economic rights**

The above argumentation leads to the following draft proposal for an ENPA position on the exercise of economic rights in works created by journalists in newspaper companies.

> **Where a literary or artistic work[4] is created by an employee[5] in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise[6] all economic[7] rights in the work so created, unless otherwise provided by contract[8].**

II – 10 positive reasons for the publishers' exercise of rights

- Modernized and competitive European copyright legislation
- Increased European cultural production
- Better competitiveness with (other European and) non-European competitors
- Stronger internal market
- Quicker response to market demands/needs (new media channels)
- Increased accessibility for lawful users
- Higher use of new medias' potential in the information society
- More efficient management of created works

[4] Neutral re. type of works. The wording might render a specific provision on computer programs superfluous.
[5] Neutral re. the interpretation of employment.
[6] Neutral re. the legal systems in the Member States.
[7] Only economic rights, not moral rights if such applies.
[8] Respects freedom of contract.

- Easier enforcement of copyright
- Better economy equals more jobs for journalists and photographers

III – Which EU instruments?

As there is not a specific copyright instrument targeting the publishing sector, it would be difficult for ENPA to start from nothing and ask for a brand new instrument on the topic of copyright exercise in the scope of employment. In addition, the tendency in DG Internal Market is to limit the number of new legislation for the purpose of simplification and better regulation. Furthermore, a single instrument on this issue could also put too much attention or focus on it, which could increase difficulties and counter lobbying for ENPA to achieve a good result.

In this context, it is necessary to examine the current EU legislative framework on copyright and use this existing framework to envisage changes on the basis of ENPA position.

In July 2004, the Commission published the above mentioned staff working paper on the review of the EC legal framework in the field of copyright and related rights and launched a consultation. In this staff working paper,[9] a paragraph is dedicated to copyright ownership:

> **"3.2. Ownership**
> Despite the number of international conventions in the field of copyright and neighbouring rights protection, the initial ownership of rights has until now not been subject to systematic international regulation. Also at Community level, rules on initial ownership exist only in respect of cinematographic and audiovisual works as well as computer programs and databases.
>
> One of the reasons for the scarcity of international and Community rules governing the initial ownership is the sensitivity of the issue and the fact that it is so closely associated with the foundations of copyright and the objectives of the copyright regime in a given country. Vital national interests and subsidiarity reasons are often invoked to contest the need for further harmonisation. Inside the EU, different concepts regarding ownership exist. However, the need for harmonisation has been absent so far because – despite the different concepts – the actual allocation of ownership in practice very often follows a fairly similar path in all Member States.
>
> From the point of view of the functioning of the Internal Market, perhaps the most significant uncertainty regarding the ownership of rights in cross-border situations arises from differences in rules on the ownership of works created in the course of employment.
> Regarding such cases, harmonisation would not be a straightforward copyright issue but would also bear relevance to labour law and the economic relationship between the parties of an employment contract. In this respect, Member States hold fairly divergent views on the need for harmonisation, and often point at severe political difficulties in agreeing a harmonised line.
>
> **At this point, it would seem advisable to analyse the issue further and, in particular, identify specific situations where harmonisation would yield added value and address Internal Market needs."**

[9] See the Commissions' staff working paper at
http://ec.europa.eu/internal_market/copyright/review/consultation_en.htm

Considering that this issue has been included in the review of the EU acquis in the field of copyright, ENPA should therefore focus on the existing EU legal framework which is currently reviewed by the Commission, despite the fact that paragraph 3.2 on ownership is today outside the current acquis, as indicated in the staff working paper.

π The Directive 2001/29/EC on copyright in the information society

The Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society is a horizontal Directive covering all content sectors, ie music, audiovisual, books, newspapers, magazines, etc.

It does not contain any particular measure referring to the exercise of copyright in the scope of employment or to copyright ownership or to transfer of rights. However, it could be the best place if ENPA asks for an EU measure on the exercise of rights in the scope of employment as it would not focus in particular on the publishing industry but on any sector that could be covered by such measure. The benefit of this measure could therefore be shared by other content sectors as well, and not only the publishing industry.

The Commission has mandated a study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society: "The purpose of the study is to consider how Member States have implemented the Directive into national law, with a particular emphasis on certain provisions of the Directive. These provisions form the basis of the review clause in Article 12 of the Directive. The results of the study will assist the Commission in evaluating whether the Directive, as currently formulated, remains the appropriate response for the continuing challenges faced by all stakeholders including rightsholders, commercial users, consumers, educational and scientific community in the digital market for goods and services."

π The recasting of the EU legislative acquis on copyright

In 2006/2007, the Commission is not only reviewing the Directive 2001/29/EC but has also launched a review of the other six Directives that composes the EU copyright framework.

The Commission has launched a study on the recasting of the copyright for the knowledge economy. In the call for tender, it has provided the following description:

> "Copyright is an integral part of the knowledge economy. In order to meet the goals of growth and competitiveness set out in the Lisbon Agenda and to reconsider the adaptations already made for copyright to the digital environment, copyright must benefit from an effective and sound legal framework that stimulates creation, encourages innovation in new technologies and succeeds in motivating consumers to buy creative works and use information society services. In addition, the role of copyright in relation to user groups such as the educational and scientific communities, needs to be re-examined to ensure that the right balance has been struck among stakeholders. The purpose of the study is to review the existing legal framework for copyright in the following 6 Directives (91/250/EEC, 92/100/EEC, 93/83/EEC, 93/98/EEC, 96/9/EC, 2001/29/EC) to evaluate how copyright can contribute to achieving the Lisbon goals. The results of the study will assist the Commission in its future policy decisions for copyright."[10]

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The interesting part of this recasting with regard to the copyright and employment issue could be:
- the Lisbon objectives for growth, competitiveness and the need to reconsider the adaptations already made for copyright in the digital environment and encourage innovation in new technologies
- the review of the Directives on computer program and protection of databases which both include the entitlement for an employer to exercise employees economic rights.

Concerning these two Directives, it is necessary to indicate that the Computer program Directive has a mandatory provision requiring that the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract (Article 2§3). The Database Directive leaves to the discretion of the Member States the possibility to stipulate in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created unless otherwise provided by contract (Recital 29).

The mandatory measure in the computer program Directive is of course preferable compared to the Database Directive as it ensures more legal certainty: Member States have an obligation to comply with it.

However, it would be difficult for ENPA to ask for a measure on copyright and employment in this package as these six directives are not dealing specifically with newspapers' content. Nevertheless, the Database and Computer Directives can be used a models/best practice examples.

π **The Commission's Communication on content online**

This is an initiative which will be launched by DG Information Society and Media (Commissioner Reding) and not DG Internal Market (Commissioner McCreevy) who is responsible for EU copyright policy.

Although the scope and objectives of the Content online initiative are not yet defined, the Commission gave indications at ENPA General Assembly in Helsinki in May 2006:

> "Digitisation and the subsequent convergence of digital technologies have transformed the content creation and copyright environments and have given rise to a potentially huge market for content. The Commission will continue to contribute towards the development of innovative business models for the distribution of content. The take-up of Content Online Services should achieve digital technologies' full potential in terms of creation, dissemination and access to 'rich' online content, which in turn favours the development of the information space and the content industries. The Commission will continue its support to prevent illegitimate use of copyright protected content. To ensure adequate protection of copyright protected content is a condition for the availability of 'rich' online content. To tackle the aforementioned issues, the Commission has planned, for the fourth quarter of 2006, a Communication on Content Online. As to the scope of the Communication on Content Online, we are still in the process

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of fact-finding, but it is clear that the Communication should stress the aim of promoting the Competitiveness of the Content Industry. In order not to exclude certain types of content or business models, the consultation preceding the Communication will start with the broadest possible scope (for instance by including sports rights). Possible specific issues to be examined could be: network neutrality and transparency, DRMs and interoperability, and how to promote a Single European Content Market."

The content online initiative could be a good context for ENPA to raise awareness from DG Information Society on the need for publishers to be able to reuse easily content on different platforms and services. It is essential for the competitiveness of the industry but more importantly for the possibility to ensure users with a wide access to newspaper content, wherever they are and with as many devices as possible.

However, it is not certain that this initiative could provide the adequate legal response to the issue of copyright and employment. However, it could be a good context to involve DG Information Society in this debate as the Content online initiatives could deal with the obstacles that prevent content to be easily accessible to users.

- **Ask for a Commission's recommendation or a study?**

This would be the less valuable option in terms of results as it would not be equivalent to a legal measure which has binding effects on Member States. Nevertheless, this approach may not be neglected if we observe that neither the Commission, nor the EP or the Member States are ready to tackle the issue of copyright and employment at this stage.

A Commission's recommendation could be used as first step before legislation. It is a soft law approach to avoid having a heavy and long legislative process and to give to Member States a flexible way to adapt to the measures recommended by the Commission. The Commission has already used this approach with the rights management of musical works. The recommendation adopted by the Commission may be followed a legislation if Member States do not adapt to it.

A study mandated by the Commission might be of course the less satisfying. Its advantage could be to provide a clear picture of the situation in the different Member States on copyright and employment. The Commission could also use such a study for a better understanding of the situation in the different Member States. However, it could also have a reverse effect if it comes to the conclusion that nothing should be done at EU level or that the legislation should change but in the opposite way, ie a more favorable legislation for employees. This may not give a chance to have a good public debate at EU level.

IV – Other relevant aspects

- **The needs to be aware of journalists' counter lobbying**

The European Federation of Journalists has presented various arguments to oppose the exercise of economic rights by publishers.[11] They raise the following concerns:

- authors' rights system is better than copyright system
- both employees and free lancers should be considered as being authors
- need for equitable remuneration
- the non respect of moral rights

[11] See EFJ's pamphlet "Authors' rights – copyright in a democratic society" at http://www.ifj.org/pdfs/pamphlet.pdf

- author's rights protection is a human rights and is the basic labour right for free negotiations
- collective agreements are good for licensing
- both freelancers and employees should have right for collective bargaining regarding authors rights and use
- negative impact of exercise of rights in the scope of employment on free lancers
- harmful effects on user and society
- lowering quality of content
- legislation supporting collective rights management societies and collective licensing
- role of EU and WIPO to preserve authors' rights system

V – Key action-points and next steps for ENPA Members:

- ENPA members are invited to discuss with their board on whether and how ENPA can lobby on this important issue at political level in the EU institutions and with national governments.

- The objective for ENPA is to obtain that the EU copyright legislation – ideally the Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society – contains a mandatory provisions requiring that where a literary or artistic work is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the work so created, unless otherwise provided by contract.

- The next meeting of ENPA Copyright working party in Oslo on 18 September will discuss and agree on this ENPA position. The Directors Round Table on 19 September will also aim to achieve Directors' agreement on this position and will prepare the dossier for the Executive Committee meeting in Zurich on 28 September.

- Finally the ENPA General Assembly in Berlin on 10 November will definitely endorse ENPA position and ENPA lobbying at EU and national political level.

This paper has been elaborated in Brussels on 20 June 2006 by:

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Holger Rosendal, Danske Dagblades Forening
Sophie Scrive, European Newspaper Publishers' Association

ANNEX 2

Commission's Recommendation on Digital Libraries – Press release 25/08/06

Commission calls on Member States to contribute to the European digital library

The European Commission today urged EU Member States to set up large-scale digitisation facilities, so as to accelerate the process of getting Europe's cultural heritage on line via the European digital library. In a Recommendation on digitisation and digital preservation, it calls on Member States to act in various areas, ranging from copyright questions to the systematic preservation of digital content in order to ensure long term access to the material.

"Our aim is to arrive at a real European digital library, a multilingual access point to Europe's digital cultural resources", commented Information Society and Media Commissioner Reding. "It will allow, for example, Finnish citizens to easily find and use digital books and images from libraries, archives and museums in Spain, or a Dutchman to find historical film material from Hungary online".

At present only a fraction of the cultural collections in the Member States is digitised. A common effort is necessary to speed up the digitisation and online accessibility of the material in order to arrive at the necessary critical mass. With the Recommendation just adopted, the Commission invites the Member States to take concrete steps in this direction.

By 2008, two million books, films, photographs, manuscripts, and other cultural works will be accessible through the European Digital Library. This figure will grow to at least six million by 2010, but is expected to be much higher as, by then, potentially every library, archive and museum in Europe will be able to link its digital content to the European Digital Library (see IP/06/253). The online availability of Europe's rich and diverse cultural heritage will make it usable for all citizens for their studies, work or leisure and will give innovators, artists and entrepreneurs the raw material that they need for new creative efforts.

The measures put forward in the Recommendation come on top of the financial contribution that the Commission already has set aside for the digital libraries initiative in the EU's Research & Development programmes and in the *eContentplus* programme. The Commission will co-finance amongst other things a network of centres of competence on digitisation and digital preservation (see IP/05/1202). Europe's libraries, museums and archives are taking the lead in a range of projects starting this year which will add to the building blocks for the European digital library.

The European Digital Library is a flagship project of the Commission's overall strategy to boost the digital economy, the i2010 initiative (see IP/05/643).

The text of the Recommendation on digitisation and digital preservation can be found on the i2010 Digital Libraries Initiative web site at:
http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm

See also MEMO/06/311 of today

The portal of The European Library can be accessed at:
http://www.theeuropeanlibrary.org/portal/index.htm

ANNEX 3 - CONTENT ONLINE

Making Europe's online content market more competitive: Commission opens public consultation - Commission's press release 28 July 2006

A public consultation on ways to stimulate the growth of a true EU single market for online digital content, such as films, music and games, was launched by the European Commission today. The Commission intends to encourage the development of innovative business models and to promote the cross-border delivery of diverse online content services. It is also keen to ascertain how European technologies and devices can be successful in the creative online content markets. Input to this consultation will help shape a Commission Communication on Content Online, due to be adopted at the end of the year. The deadline for replies is 13 October 2006.

"Supplying content on line, such as films, music and games, not only helps to make Europe's culture more accessible, but will also be a tremendous opportunity for Europe's content industry to expand its own markets", noted Information Society and Media Commissioner Viviane Reding. "Easy access to, and secure distribution of, online content is a crucial challenge. I expect input to today's consultation to identify clearly any remaining obstacles to a competitive, pan-European online content industry which the EU needs to tackle. Only a cross-border market for online content, in which authors, artists and creators are able to reap a fair reward for their talent and skills, will enable Europe's content sector to compete with other continents."

The public consultation "Content Online in Europe's Single Market" launched by the Commission today intends to pave the way for a true European single market for online content delivery. Online content can play a crucial role for the growth of Europe's sector for information and communication technologies (ICT) and media. Western European online content-sharing frameworks and markets are expected to triple by 2008 (with the user/creator part growing tenfold). These developments are expected to multiply across the sector, already accounting for 8% of EU GDP today.

Questions asked in the Commission's content online consultation include: Which economic and regulatory barriers do online content services face in Europe's single market? How does the competitiveness of Europe's online content industry compare to that of other world regions? Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? Is progress needed as regards interoperability of digital rights management (DRM) systems in Europe? The consultation started today follows earlier Commission initiatives to develop a European single market for the delivery of online music services (see IP/05/1261).

The Commission launches its consultation on content online against the background of the rapid convergence of audiovisual media, broadband networks and electronic devices. The availability and take-up of high-speed "broadband" connections is making it easier for consumers not only to access a wider range of creative digital content than would have been imaginable ten years ago, but also to create content themselves. At the same time, broadband's ability to handle vast quantities of data enables European companies to offer new content and services and to create additional markets.

The creation of an open and competitive single market for online content is one of the key aims of the EU's i2010 initiative – a European Information Society for growth and jobs, started by the Commission on 1 June 2005 (see IP/05/643). In July 2005, industry leaders from the ICT and media sector had agreed to work with the Commission on an "Agenda for Unlocking Europe's Digital Economy", in which the promotion of media content markets through effective rights protection, licensing arrangements and encouraging legitimate use of content was given priority (see IP/05/900). A first concrete example of how challenges for Europe's online content industry can be tackled is the European Charter for the Development and the Take-up of Film Online, initiated in May 2005 by Commissioner Reding and endorsed by film makers and business leaders on 23 May 2006, at the Europe Day of the 59th Cannes Film Festival (see IP/06/672).

The content online consultation launched today also aims to identify stakeholder views on self-

regulatory initiatives such as the Film Online Charter, to assess whether the initiative could be used as a model for similar initiatives in other online content sectors, and to evaluate whether regulatory measures at EU level are required to ensure the completion of a true EU market for online content without borders.

The deadline for replies to the content online consultation – which is open to industry, in particular content and internet service providers, consumer organisations, in particular from the "Internet community", regulators and all interested parties – is 13 October 2006.
Further information on the public consultation and the consultation document can be found at: http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm

ANNEX 4

WAN Task Force on search engines and publishers

ACAP
Automated Content Access Protocol

A briefing paper for publishers on a project in planning

Executive summary

All sectors of publishing face a "search engine dilemma". The value of search engines to users – and to those who publish on the network – is incontrovertible. However, search engine activities can be very damaging to specific online publishing models. The undifferentiated model of permissions management (essentially either allowing or forbidding search of content) is inadequate to support the diverse present and future internet strategies and business models of online publishers.

At the beginning of 2006, the major publishing trade associations established a Working Party, chaired by Gavin O'Reilly, Chairman of the World Association of Newspapers, to consider the issues that this has raised. As a result, the World Association of Newspapers and the European Publishers Council are planning a project which will develop and pilot a technical framework which will allow publishers to express access and use policies in a language which the search engine's robot "spiders" can be taught to understand. This will make it possible to establish mutually beneficial business relationships between publishers and search engine operators, in which the interests of both parties can be properly balanced.

The project is provisionally called ACAP (for Automated Content Access Protocol).

ACAP will develop and pilot a system by which the owners of content published on the World Wide Web can provide permissions information (relating to access and use of their content) in a form in which it can be recognised and where necessary interpreted by a search engine "crawler", so that the search engine operator (and perhaps, ultimately, any other user) is enabled systematically to comply with such a policy or licence.

This paper is intended to brief publishers on the outline of this project and to encourage their active support and participation when the project is launched in September 2006.

Background – the "search engine" problem

At the beginning of 2006, the major Europe-based publishing trade associations – including the World Association of Newspapers (WAN); the European Publishers Council (EPC); the European Newspaper Publishers Association (ENPA); the International Publishers Association (IPA); the European Federation of Magazine Publishers FAEP); the Federation of European Publishers (FEP); the World Editors Forum (WEF); the International Federation of the Periodical Press (FIPP) and Agence France Presse – established a Working Party to consider the issues that are posed by search engines for publishers, and to look at ways in which mutually beneficial relationships can be established between publishers and search engine operators, in which the interests of both parties can be properly balanced.

All sectors of publishing have a "search engine dilemma" (even if we disregard the particular problems that book publishers have with mass digitisation programmes). Search engines are an unavoidable and valued port of call for anyone seeking an audience on the internet. Search engines sit between internet users and the content they are seeking out and have found brilliantly simple and effective ways to make money from that audience. They have become so dominant that no individual website owner is large enough to have any serious impact on their commercial fortunes.

The benefits of powerful search technology to both users and providers of content are well recognised by publishers – although even "mere" search functionality can have a negative

impact on some publishing business models. At the same time, publishers are aware that search engines are, in following their business logic, inevitably and gradually moving into a publisher-like role, initially merely pointing, then caching and, finally, aggregating and "publishing" and perhaps even creating content themselves, while using publishers' content at will.

In the current state of technology, there can be none of the differentiation of terms of access and use which characterises copyright-based relationships in publishing environments, whether electronic or physical. The search engines can and do reasonably argue that, since their systems are completely automated, and they cannot possibly enter into and manage individual and different agreements with every website they encounter, there is no practical alternative to their current *modus operandi*.

Whether this (technological and political) gap is there by design or by accident, the search engines are able to make their own rules and decide for themselves whose interests are worth considering.

If publishers are to take the initiative in establishing orderly business relationships with the search engine operators, the response must be to help them to address the problem, both to fill the technical gap and ensure its political implementation. To paraphrase the former copyright adviser to the UK Publishers Association Charles Clark's famous claim that "the answer to the machine is in the machine", the challenges that are created by technology are best resolved by technology. Since search engine operators rely on robotic "spiders" to manage their automated processes, publishers' web sites need to start speaking a language which the operators can teach their robots to understand. What is required is a standardised way of describing the permissions which apply to a website or webpage so that it can be decoded by a dumb machine without the help of an expensive lawyer.

In this way, one of the search engines' most reliable rationalisations of their "our way or no way" approach will have been removed, and a structure which embraces and supports the diverse present and future internet strategies and business models of online publishers will have been created.

As a result of the work of the Working Party, a proposal was made to develop a permissions based framework for online content. This would be a technical specification which would allow the publisher of a website or any piece of content to attach extra data which would specify what use by search engines was allowable for that piece of content or website. The aim will be for this to become a widely implemented standard, ultimately embedded into website and content creation software.

Following the commissioning of a brief feasibility study, WAN and EPC have taken the initiative to establish a project to develop and pilot this framework to express publishers' access and use policies. A detailed plan for this project – provisionally called ACAP (for Automated Content Access Protocol) – is currently in development.

This paper is intended to brief publishers on the outline of this project and to encourage their active support and participation when the project is launched in September 2006.

ACAP – the vision

ACAP will develop and pilot a system by which the owners of content published on the World Wide Web can provide permissions information (relating to access and use of their content) in a form in which it can be recognised and where necessary interpreted by a search engine "crawler", so that the search engine operator (and perhaps, ultimately, any other user) is

enabled[12] systematically to comply with such a policy or licence. Permissions may be in the form of

- **policy statements** which require no formal agreement on the part of a user
- **formal licences** agreed between the content owner and the search engine operator.

There are two distinct levels of permissions which need to be managed within this framework:

- The **permission** given to the search engine operators for their own operations (access, copy and download, cache, index, make available for display)[13]
- The **delegation of rights** given to the search engine operators to grant permissions of access and use to search engine users (search, access, view, copy, download, etc)[14]

Although these can be managed within the same framework, it is important that the differences between them are recognised.

Use Cases

We include two informal Use Cases which are illustrative of the type of challenge that we seek to solve through ACAP.

Use Case A: newspapers

Newspaper publisher A would like all search engines to index his site, but only search engines X, Y and Z may display articles (because they have paid a royalty) on their news pages, and then only for 30 days. All images must be fully attributed as they are in the newspaper. The newspaper publisher uses articles syndicated by other newspapers and news agencies and cannot grant permission for those items, to the extent of the third party rights. Articles should not be permanently cached.

Use Case B: books

Book Publisher B invites search engine operators X, Y and Z to index the full text of his latest college text books. The web site where the full text is stored should not be made visible to search engine clients. He wishes that search engine users can browse only 2 pages of a maths book, but 20 pages of a philosophy text book. Search engine users should be able to buy individual chapters for private use, at $5 and $3 per chapter respectively.[15]

Business requirements

Although it will be an integral part of the ACAP project to further develop and confirm the business requirements of publishers for the operation of the framework, significant progress has already been made in identifying the high level business requirements against which any technical solution must be measured. In summary, the solution must be:

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[12] Note that there is no question of **enforcing** compliance on the search engine. There is confidence that creating a **capability** of compliance is sufficient in business to business relationships.

[13] There is a further distinction to be made here between modifying the behaviour of the crawler (in terms of what it crawls) and modifying the behaviour of other elements of search engine operation (in terms, for example, of what is cached).

[14] In which case, of course, we are talking of the search engine at least in part enforcing compliance with the permissions granted by the content owner (simply in terms of what is presented to the user and under what conditions). In terms of enforcement, there is a considerable difference between business-to-business and business-to-consumer relationships

[15] It is a reasonable assumption that at least some of the activities described here (such as selling individual chapters of books) would be effected by referral from the search engine to publisher B's web site rather than being transacted by the search engine operator. It is also possible that browsing constraints could be applied in the same way, although this is a little more uncertain.

- **enabling not obstructive:** facilitating normal business relationships, not interfering with them, while providing content owners with proper control over their content
- **flexible and extensible**: the technical approach should not impose limitations on individual business relationships which might be agreed between content owners and search engine operators; and it should be compatible with different search technologies, so that it does not become rapidly obsolete.
- **able to manage permissions associated with arbitrary levels of granularity of content**: from a single digital object to a complete website, to many websites managed by the same content owner
- **universally applicable:** the technical approach should initially be suitable for implementation by all text-based content industries, and so far as possible should be extensible to (or at the very least interoperable with) solutions adopted in other media
- **able to manage both generic and specific**: able to express default terms which a content owner might choose to apply to any search engine operator and equally able to express the terms of a specific licence between an individual search engine operator and an individual content owners
- **as fully automated as possible**: requiring human intervention only where this essential to make decisions which cannot be made by machines
- **efficient:** inexpensive to implement, by enabling seamless integration with electronic production processes and simple maintenance tools
- **open standards based**: A pro-competitive development open to all, with the lowest possible barriers to entry for both content owners and search engine operators
- **based on existing technologies and existing infrastructure**: wherever suitable solutions exist, we should adopt and (where necessary) extend them – not reinvent the wheel

The approach taken should also be capable of staged implementation – it should be possible for initial applications to be relatively simple, while providing the basis for seamless extension into more sophisticated permissions management.

Although the scope of the project is initially limited to the relationship between publishers and search engine operators, a framework which meets these requirements should be readily extensible to other business relationships (although details of implementation would not be the same in every case).

The Pilot Project

The ACAP pilot project is expected to last for around 12 months. In outline, it anticipated that the project will:

- confirm and prioritise the business and technical requirements with the widest possible constituency: agreement with all stakeholders is essential if the project is to succeed in the long term
- agree which specific Use Cases should be implemented in the pilot phase of the project, starting with a relatively simple approach
- develop the elements of the technical solution: it is anticipated that this will primarily involve the development of standards for policy expression, although it will also be necessary to develop the tools for the implementation of those standards
- identify a suitable group of organisations willing and able to participate in the pilot project; it is currently anticipated that this could involve four or five publishers and

one of the major search engines; participants will need to be in a position to dedicate technical and time resources to the project to enable it to succeed

- pilot the standards and the tools, to prove the underlying concepts

In parallel with the development of the technical solution, a significant stream of project work will involve the development of a *sustainable governance structure* to manage and extend the standards (and any related technical services) which will be needed after the project phase of ACAP is complete.

To avoid duplication of effort, ACAP will also establish liaisons with relevant standards developments elsewhere. In particular, the project is already in contact with EDItEUR[16] with respect to its development of *ONIX for Licensing Terms*; and, in view of the significance of identification issues, with the International DOI Foundation.[17]

Next steps

It is anticipated that the project will be launched publicly in September 2006; there is a great deal to be achieved between now and then, and at launch it will be possible to be much more explicit about plans and expectations. However, it is very important that the publishing community as a whole is ready and willing to respond positively when the project is launched.

The feasibility study commissioned by WAN, EPC and ENPA concluded that this project is technically feasible – and indeed requires little in the way of genuinely new technology. Rather, it requires the integration and implementation of identification and metadata technologies that are already well understood. It is also possible to chart a developmental path which does not demand that every element of the framework must be in place before any of it can be usefully implemented.

However, this is not to suggest that everything will be simple, not that it can be achieved without cost. A significant part of the project cost will have to be borne by those organisations that agree to participate in the pilot, in the development of their own systems; however, there will also be central costs, to which it is hoped that other publishers will be prepared to contribute.

If you have any questions about this project, or would simply like to express your support, please contact: info@the-acap.org

16 www.editeur.org

17 www.doi.org

ANNEX 5

IFRRO Strategic Focus Group - Remit

Draft of 8 August, 2006

Acknowledging that there are

- several hundreds of millions of works consisting of books, journals and magazines, and their constituent chapters and articles, in print and out of print, in all languages, to which users may want access. An individual article may have a relatively high value, but to only a relatively small market
- over 800 million internet users
- clearly enormous issues of scale, value, and complexity
- reasonable grounds to assume that, for our industry, the direct licensing model will not be the only model
- solid reasons to believe that all users of published material will not have access to all electronic content, only through their schools, universities, and employers, which will always subscribe direct
- more changes yet to come, and that significant new market opportunities will open up as a result – if rightsholders are prepared to grasp them.

Considering that the 6 core principles of the "copyright circle" are

- strong laws, based on the three-step test of the Berne Convention, containing few exceptions.
- rightsholder control of their own moral and economic rights
- RROs generally should and will operate under rightsholder mandates
- licences must be user friendly: that means fair, good value, and with few or no exclusions – exclusions invite infringement
- infringement must be countered with robust enforcement
- copyright awareness and education

Considering further that the environmental factors include:

- explosive increase in scientific knowledge
- pressure on institutional funding
- open access
- flexible learning
- individual ownership of personal/professional development goals
- "24/7"
- work-life balance
- north-south divide
- legislative solutions to copyright problems

The Remit of the Strategic Focus Group (SFG) shall be to

1. develop a shared vision for digital licensing solutions in the publishing industry in the digital environment, which include individual and collective licensing and administration of rights
2. identify the roles of the different players and their representatives including those of RROs
3. support the vision with a business plan
4. pull together the resources necessary to make the plan reality

The SFG shall further act as a referee group to IFRRO when developing (a) digitisation mandate(s) for RRO as well as other digital licensing solutions which involve RROs, carry out a PEST (political, economic, social and technical) analysis relevant to the print media sectors.

ANNEX 6

WIPO

UPDATING **BROADCASTING** RIGHTS (SCCR)

At the 14th session of Standing Committee on Copyright and Related Rights (SCCR) from May 1 to 5, WIPO Member States agreed on a framework to enable them to take forward negotiations on a treaty to protect the rights of broadcasting organizations.

Resolving what had been a sticking point, they agreed that issues relating to webcasting and simulcasting would be dealt with separately in a parallel process, leaving the main process to concentrate on questions relating to the rights of traditional broadcasting and cablecasting organizations. Member States agreed to hold an additional session of the SCCR ahead of the annual meeting of the WIPO General Assembly to strengthen consensus on questions relating to the rights of traditional broadcasters and cablecasters, so that the General Assembly in autumn 2006 would be able to recommend the convening of a diplomatic conference to conclude a treaty in 2007. The questions of webcasting and simulcasting would continue to be examined at a meeting of the SCCR after the General Assembly.

"We are very pleased that Member States have been able to agree on a framework to move forward in their work on these important questions," said WIPO
Deputy Director General Rita Hayes. "We are very encouraged by the constructive and cooperative spirit of the discussions, which show a serious willingness on the part of the Member States to find balanced solutions to these questions." Delegates agreed that the 15th session of the SCCR would be confined to the protection of broadcasting and cablecasting organizations in the traditional sense. Discussions would be based on a revised draft basic proposal, prepared on the basis of existing documents and proposals and taking into account discussions of the Committee.

Delegates also agreed that a revised proposal on the protection of webcasting and simulcasting would be prepared on the basis of the Basic Proposal (SCCR/14/2) and other existing proposals and taking into account the discussions at the 14th session.

Main documents of the 14th session included:

Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations Including
Non-Mandatory Appendix on the Protection in Relation to Webcasting (Ref. SCCR/14/2)
Working Paper for the Preparation of the Basic Proposal for a Treaty on the Protection of Broadcasting Organization (SCCR/14/3)
Proposal by Colombia (SCCR/14/4)