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GREEN PAPER

Copyright in the Knowledge Economy

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1. INTRODUCTION

1.1. The purpose of the Green Paper

The purpose of the Green Paper is to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment. The Green Paper aims to set out a number of issues connected with the role of copyright in the "knowledge economy"¹ and intends to launch a consultation on these issues.

The Green Paper is essentially in two parts. The first part deals with general issues regarding exceptions to exclusive rights introduced in the main piece of European copyright legislation - Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("the Directive")². The other piece of copyright legislation that is relevant for the knowledge economy, Directive 96/9/EC on the legal protection of databases³, has been analysed in a separate report⁴. Nevertheless, some aspects of this directive, such as exceptions and limitations, will be addressed in this report as well.

The second part deals with specific issues related to the exceptions and limitations which are most relevant for the dissemination of knowledge and whether these exceptions should evolve in the era of digital dissemination.

The Green Paper will address all issues in a balanced manner taking into account the perspective of publishers, libraries, educational establishments, museums, archives, researchers, people with a disability and the public at large.

1.2. The scope of the Green Paper

In its review of the Single Market⁵ the Commission highlighted the need to promote free movement of knowledge and innovation as the "Fifth Freedom" in the single market. The Green Paper will focus on how research, science and educational materials are disseminated to the public and whether knowledge is freely circulating in the internal market. But the Green Paper is not limited to scientific and educational material. Material not falling within these

¹ The term "knowledge economy" is commonly used to describe economic activity that relies not on "natural" resources (like land or minerals) but on intellectual resources such as know-how and expertise. A key concept of the knowledge economy is that knowledge and education (also referred to as "human capital") can be treated as a commercial asset or as educational and intellectual products and services that can be exported for a high value return. It is obvious that the knowledge economy is rather more important for those regions whose natural resources are scarce.

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19. In 2007 the Commission published a report assessing how Articles 5, 6 and 8 of the Directive have been transposed by the Member States and applied by the national courts, see the Report on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC), available at http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm

³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28.

⁴ http://ec.europa.eu/internal_market/copyright/prot-databases/prot-databases_en.htm

⁵ COM 2007 724 final of 20.11.2007 - A single market for 21st century Europe

parameters but which has value in enhancing knowledge is also within the scope of this Green Paper.

The "public" addressed in this Green Paper comprises scientists, researchers, students and also disabled people or the general public who want to advance their knowledge and educational levels by using the Internet. Wider dissemination of knowledge contributes to more inclusive and cohesive societies, fostering equality of opportunities in line with the priorities of the forthcoming renewed Social Agenda.

A high level of copyright protection is crucial for intellectual creation. Copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large. A rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts and to encourage producers and publishers to invest in creative works (see recitals 10 and 11 of the Directive). The publishing sector makes an important contribution to European economy⁶. Copyright is also a policy in line with the imperative to foster progress and innovation. The Commission solicits the views of researchers on new ways of delivering digital content. These new modes of delivery should allow consumers and researchers to access protected content in full respect of copyright.

Existing copyright laws have traditionally attempted to strike a balance between ensuring a reward for past creation and investment and the future dissemination of knowledge products by introducing a list of exceptions and limitations to allow for certain, specific activities that pertain to scientific research, the activities of libraries and to disabled people. In this respect, the Directive has introduced an exhaustive list of exceptions and limitations. These exceptions are not mandatory for Member States however, and even if exceptions are adopted at the national level, Member States have often formulated exceptions narrower than those permitted in the Directive.

2. GENERAL ISSUES

The Directive has harmonised the right of reproduction, the right of communication to the public, the right of making available to the public and the distribution right. The basic principle underlying the harmonisation effort was to provide the rightholders with a high level of protection; hence the scope of exclusive rights was very broadly defined. Some stakeholders question whether the introduction of exclusive rights translates into a fair share of income for all the categories of rights holders. Authors (such as composers, film directors, and journalists) and, in particular, performers argue that they have not earned any significant revenue from the exercise of the new "making available" right in relation to the online exploitation of their works.

Apart from adapting the exclusive rights to the online environment, the Directive introduced an exhaustive list of exceptions to copyright protection, although there was no international obligation to do so. The primary reason for having such a list of exceptions appears to be to limit Member States' ability to introduce new exceptions or extend the scope of the existing

⁶ According to a survey conducted by the Federation of European Publishers, annual sales revenue of book publishing amounted to 22.268 million euro in 2004. More than 620.000 new books or new editions were published in 2004 and approximately 123,000 people are employed full time in book publishing. See <http://www.fep-fee.be/>

ones beyond what is allowed under the Directive. Gradually, in the legislative process, Member States introduced the current list of one mandatory exception and 20 optional exceptions.

The conditions of application of the exceptions are drafted in rather general language. Arguably, the approach chosen by the drafters has left Member States a great deal of flexibility in implementing the exceptions contained in the Directive. Apart from the exception on transient copying, national legislation can be more restrictive than the Directive as to the scope of exceptions. The list of exceptions as contained in the Directive has achieved a certain degree of harmonisation: creating an exhaustive list of exceptions does not allow Member States to maintain or introduce exceptions which are not listed.

In addition, Article 5(5) of the Directive provides that the exceptions and limitations permitted by the Directive are to be applied in certain special cases, which do not conflict with the normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder. This provision is known as the "three-step test".

The formulation of Article 5(5) reflects the Community's international obligations in the area of copyright and related rights. The three-step test is set out in similar terms in Article 9(2) of the Berne Convention⁷ and, most importantly, Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPS Agreement")⁸, to which Community is a party⁹. The three-step test is therefore part of the international copyright framework which the Community and its Member States are bound to respect. It has become a benchmark for all copyright limitations¹⁰.

Questions:

- (1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions**
- (2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?**

⁷ Although the Community is not a party to the Berne Convention (and indeed could not be, since membership of the Berne Union is confined to States), it is required to comply with the Convention by virtue of Article 9 of the TRIPS Agreement.

⁸ That Agreement is found in Annex 1C to the Agreement establishing the World Trade Organisation.

⁹ Article 13 of the TRIPS Agreement, entitled "Limitations and Exceptions", is the general exception clause applicable to exclusive rights of the holders of copyright. Article 13 of the TRIPS Agreement has been interpreted by a ruling of the Dispute Settlement Body of the WTO concerning Section 110(5) of the US Copyright Act. The Panel held that the scope of any permissible exception under Article 13 should be narrow and should be limited to de minimis use. The three conditions, namely (1) certain special cases; (2) no conflict with the normal exploitation of the work; and (3) no unreasonable prejudice of the legitimate interests of the right holder are cumulative.

¹⁰ See the ruling of the Dispute Settlement Body of the WTO *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, of 15 June 2000.

- (3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?**
- (4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?**
- (5) If so, which ones?**

3. EXCEPTIONS: SPECIFIC ISSUES

The Green Paper focuses on the exceptions to copyright which are most relevant for the dissemination of knowledge, namely:

- The exception for the benefit of libraries and archives;
- The exception allowing dissemination of works for teaching and research purposes;
- The exception for the benefit of people with a disability;
- A possible exception for user-created content.

3.1. Exceptions for libraries and archives

As regards the libraries and other similar establishments, two core issues have arisen: the production of digital copies of materials held in the libraries' collections and the electronic delivery of these copies to users. Digitisation of books, audiovisual material and other content can serve a twofold purpose – preservation of content for future generations and making it available for end users online.

Under the current legal framework, libraries or archives do not enjoy a blanket exception from the right of reproduction. Reproductions are only allowed in specific cases, which arguably would cover certain acts necessary for the preservation of works contained in the libraries' catalogues. On the other hand, the library exception and national rules implementing it are not always clear on issues such as "format-shifting" or the number of copies that can be made under this exception. Detailed regulations in this respect result from legislative policy decisions undertaken at the national level. Some Member States have restrictive rules with respect to reproductions that can be made by libraries.

In recent years libraries and other public interest establishments have become increasingly interested not only in preserving (digitising) works but also in making their collections accessible online. If that were to take place, libraries argue, researchers would no longer have to go to the premises of libraries or archives but would easily be able to find and retrieve the required information on the Internet. Also, publishers state that they are digitising their own catalogues with a view to setting up interactive online databases where this material can be easily retrieved from the user's desktop¹¹. These services require payment of a subscription fee.

Under current copyright legislation, publicly accessible libraries, educational establishments, archives and museums benefit from two exceptions in the Copyright Directive:

- an exception to the reproduction right for specific acts of reproduction for non-commercial purposes (Art. 5(2)(c) of the Directive) and
- a narrowly formulated exception to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (Art. 5(3)(n) of the Directive).

3.1.1. Digitisation (preservation)

The exception from the reproduction right is limited to "specific acts of reproduction". Article 5(2)(c) thus stands out as the only exception explicitly referring to the first limb of the "three-step test", as codified in Article 5(5) of the Directive, which requires that exceptions be

¹¹ For example, Elsevier, a publisher of 2200 journals has set up ScienceDirect, a service through which 10 million scientists and researchers are granted desktop access to a service offering 8.7 million journal articles. In 2004, Elsevier launched the "Scopus" database which covers 16,000 journals from all key publishers in the areas of scientific, technological and medical publishing. They also provide an online service called "MD Consult" which targets health care professionals by bringing together the leading medical resources.

confined to "certain special cases". Accordingly, and as recital 40 of the Directive points out, this exception should be limited to certain special cases and not cover uses made in the context of online deliveries of protected works or phonograms.

The careful wording of this exception would thus imply that it does not provide libraries or other beneficiaries with a blanket exception from the right of reproduction. Reproductions are only allowed in specific cases, which arguably would cover certain acts necessary for the preservation of works contained in the libraries' catalogues. On the other hand, this exception does not contain clear rules on issues such as "format-shifting" or the number of copies that can be made under this exception. Detailed regulations in this respect result from legislative policy decisions undertaken at the national level.

Some Member States have restrictive rules as to the reproductions that can be made by libraries. The UK government is currently conducting a consultation¹² with a view to amending Section 42 of the Copyright, Designs and Patents Act (CDPA) which allows libraries or archives to make a single copy of a literary, dramatic or musical work held in their permanent collection for the purpose of preservation and replacement. The government proposes to expand the exception so as to allow for copying and format shifting of sound recordings, films and broadcasts and to allow for more than a single copy where successive copying may be required to preserve permanent collections in an accessible format.

As regards preservation of works, it is libraries, archives and museums that preserve works in a durable format. But to an increasing extent, private entities, such as search engines, are also involved in large scale digitisation efforts. As an example, the Google Book Search project was launched in 2005 with the aim of making the content of books searchable on the Internet¹³. Google concludes agreements with European libraries which cover digitisation of public domain works¹⁴. Publishers are also experimenting with free online access to parts or even full texts of books and are developing tools enabling users to browse the content of books¹⁵.

It must be stressed that activities of private entities, such as search engines, cannot benefit from the exception contained in Article 5(2)(c) which is limited to publicly accessible libraries, educational establishments museums or archives and only covers acts which are not for direct or indirect economic or commercial advantage. Digitisation involves the reproduction right¹⁶ because changing the format of a work from analogue to digital requires a

¹² <http://www.ipo.gov.uk/about/about-consult/about-formal/about-formal-current/consult-copyrightexceptions.htm>

¹³ <http://books.google.com>

¹⁴ See the information provided by the Oxford Library: <http://www.bodley.ox.ac.uk/librarian/CNIGoogle/CNIGoogle.htm>

¹⁵ For example, HarperCollins has recently launched a number of such initiatives, namely: the "full access" programme (full texts of selected books are available for free for a limited time), a "Sneak Peek" programme (readers are able to view 20% of the content of many books two weeks before their publication) and the "Browse Inside" programme (readers can browse 20% of the content of books after their publication). These are available at www.HarperCollins.com.

¹⁶ See the agreed statement concerning Article 1(4) of the WCT: "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention".

reproduction of the work. For example, a book has to be scanned before it can be digitised. If this scanning is undertaken by entities and in circumstances not covered in Article 5(2)(c), rightholders have to give prior permission for such a reproduction to take place. Similarly, making a digitised work available online requires the prior consent of the rightholder(s).

The scanning of works held in libraries for the purpose of making their content searchable on the Internet is commonly distinguished from linking, deep linking, interlinking or indexing which are activities that relate to works that are already available online. For example, with respect to hyperlinks (an electronic connection to a file placed on the Internet), the German Supreme Court held that works are not reproduced by linking or deep-linking (a link that leads the Internet user to another webpage within a website)¹⁷. In the American case of *Perfect 10 v. Google and Amazon*¹⁸, the court held that in-linking to the full-size image on another website, which does not require a reproduction of the original images, doesn't infringe the reproduction right. While some courts deem thumbnails, i.e. reproductions of small images to facilitate links to other websites on the Internet, to infringe the exclusive right of reproduction¹⁹, the Erfurt Regional Court²⁰ held that using thumbnails to establish links would not give rise to copyright liability if the work had been posted on the Internet by the rightholder or with his consent²¹.

It is often argued however that the Google Book Search project goes further than the search engine at issue in the German Supreme Court's *Paperboy*²² or the *Perfect 10* cases. The search engine in the *Paperboy* case established links to websites which contained protected works that were made available online with the rightholders consent. The *Paperboy* service relied on works made available by others and would no longer be able to create a link to a work that had been withdrawn by the rightholder. The service also did not entail the caching of the work as the link would no longer function once the original was withdrawn.

3.1.2. The making available of digitised works

Under current copyright legislation, publicly accessible libraries, educational establishments or museums and archives benefit from a narrowly formulated exception to the right of communication to the public or to making available to the public works or other subject matter, if this is done for the purpose of research or private study by means of dedicated terminals located on the *premises* of such establishments (Art. 5(3)(n) of the Directive).

¹⁷ BGH, 17th July 2003, case I WR 259/00, *Paperboy* (case decided before the implementation of the Directive).

¹⁸ Case 06-55405, 9th Cir., May 16, 2007.

¹⁹ Bielefeld Regional Court, 8 November 2005, JurPC Web-Dok. 106/2006 and Regional Court of Hamburg, 5 September 2003, JurPC Web-Dok 146/2004.

²⁰ Erfurt Regional Court, 15 March 2007, 3 O 1108/05 - Bildersuche Suchmaschine Haftung.

²¹ Following a similar line of argument, search engines are not asking for prior permission from copyright owners to index content of web pages. Search engines argue that, if a content owner does not want the content of the web page to be indexed, he can encode the message in a text file called "robots.txt" in order to opt-out and block the search engine from copying content. If no such technology is applied, they believe that this is tantamount to an implied licence for a search engine to copy and index.

²² BGH, 17th July 2003, case I WR 259/00, *Paperboy*.

This exception would arguably not cover the electronic delivery of documents to end users at a distance. As regards electronic delivery of materials to end users, recital 40 of the Directive states that the exception for libraries and archives should not cover "uses made in the context of online delivery of protected works or other subject matter".

3.1.3. *Orphan works*

An issue which came to the fore in large scale digitisation projects is the so-called orphan works phenomenon. Orphan works are works which are still in copyright but whose owners cannot be identified or located. There is a significant demand for the dissemination of works or sound recordings of an educational, historical or cultural value at a relatively low cost to a wide audience online. It is often claimed that such projects are held up due to the lack of a satisfactory solution to the orphan works issue. Protected works can become orphaned if data on the author and/or other relevant rightholder(s) (such as publishers or film producers) is missing or outdated. This is often the case with works which are no longer exploited commercially.

Apart from books, thousands of orphan works such as photographs and audiovisual works are currently held in libraries, museums or archives. The lack of data on their ownership can constitute an obstacle to making such works available online to the public and can impede digital restoration efforts. This is particularly the case with orphan films.

The issue of orphan works is mainly a rights clearance issue i.e. how to ensure that users who make orphan works available are not liable for copyright infringement when the rightholder reappears and asserts his rights over the work. Apart from liability concerns, the cost and time needed to locate or identify the rightholders, especially in the case of works of multiple authorship, can prove to be too great to justify the effort. This appears to be especially true for rights in sound recordings and audiovisual works that are currently kept in broadcasters archives. Copyright clearance of orphan works can constitute an obstacle to the dissemination of valuable content and can be seen as hampering follow-on creativity. However, the extent to which orphan works actually impede uses of works is not clear. There is a scarcity of the necessary economic data which would allow the problem to be quantified on the pan-European level.

The orphan works issue is currently being considered both at the national²³ and at the EU level. The US²⁴ and Canada²⁵ have also taken initiatives regarding orphan works. While approaches to this issue differ, the proposed solutions are mostly based on a common principle; a user has to perform a reasonable search in order to try to identify or locate the rightholder(s).

²³ E.g. in the UK "Gowers Review of Intellectual Property", there is a recommendation that the Commission amends Directive 2001/29/EC and introduces an exception for orphan works. Denmark and Hungary have developed solutions to orphan works (the Danish solution is based on extended collective licences and the Hungarian one on licences issued by a public body).

²⁴ The US Copyright Office published a report on orphan works in January 2006. Two bills were tabled on 24 April 2008 at the Senate and the House of Representatives (the "Shawn Bentley Orphan Works Act" and the "Orphan Works Act of 2008", respectively). Both bills are proposals to amend title 17 of the US Code by adding a section on "limitations on remedies in cases involving orphan works".

²⁵ The Canadian solution is based on non-exclusive licences issued by the Copyright Board of Canada.

The Commission adopted a recommendation²⁶ in 2006 encouraging the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works. A High Level Expert Group on Digital Libraries was established bringing together stakeholders concerned by orphan works. The Group adopted a "Final Report on Digital Preservation, Orphan Works and Out-of-Print Works" and a "Memorandum of Understanding on orphan works" was signed by representatives of libraries, archives and rightholders²⁷. The memorandum contains a set of guidelines on diligent search for rightholders and general principles concerning databases of orphan works and rights clearance mechanisms. Detailed solutions are to be developed at the national level.

The majority of the Member States have not yet developed a regulatory approach with respect to the orphan works issue. The potential cross-border nature of this issue seems to require a harmonised approach.

²⁶ Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, L 236/28.

²⁷ http://ec.europa.eu/information_society/activities/digital_libraries/hleg/hleg_meetings/index_en.htm

Questions:

- (6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?
- (7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?
- (8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

 - (a) Format shifting;
 - (b) The number of copies that can be made under the exception;
 - (c) The scanning of entire collections held by libraries;
- (9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?
- (10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?
- (11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?
- (12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

3.2. The exception for the benefit of people with a disability

People with a disability should have an opportunity to benefit from the knowledge economy. To this end they not only need physical access to premises of educational establishments or libraries but also the possibility of accessing works in formats that are adapted to their needs (e.g. Braille, large print, audio-books and accessible electronic books).

The Directive contains an exception to the reproduction right and the communication to the public right for the benefit of people with a disability. All Member States have implemented this exception, however, in some national laws it is restricted to certain categories of disabled persons (e.g. the exception only covers the visually impaired). Some Member States require payment of compensation to the rightholders for the use of works under the exception.

A common concern for disabled people is the costs, in terms of time and money, involved in making accessible copies of books which are only available in paper format or in a digital format which is not easily convertible to Braille. Rightholders believe that appropriate protection against piracy and misuse needs to be guaranteed, especially when it concerns the delivery of digital formats, which can be easily reproduced and instantly disseminated over the Internet.

Article 5(3)(b) of the Directive allows for non-commercial uses directly related to the disability and to the extent required by the disability. Recital 43 of the Directive stresses that Member States should adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works and to pay particular attention to accessible formats. The exception for the benefit of people with a disability is among the public interest exceptions where the Member States are encouraged to take appropriate measures, in the absence of voluntary measures taken by rightholders, to ensure that beneficiaries have access to works protected by technological measures.

All Member States have implemented this exception, however, in some national laws it is restricted to certain categories of disabled persons (e.g. in the UK²⁸ and Bulgaria it only applies to the visually impaired, in Latvia²⁹, Lithuania and Greece³⁰ it applies to visually and hearing impaired persons). In Lithuania, the exception is further limited to educational and scientific research purposes³¹. In Greece, the exception only covers reproductions and does not extend to communication of the works.

According to recital 36 of the Directive, Member States may provide for fair compensation when applying the optional provisions on exceptions. Some Member States, such as Germany, Austria and the Netherlands, require payment of compensation to the rightholders for the use of works under the exception. Given the cost of converting works to accessible formats and the limited resources available, the question arises as to whether beneficiaries of the exception should be required to pay compensation to the rightholders or whether they should be exempt from such an obligation.

²⁸ Sections 31A-31F of the Copyright (Visually Impaired Persons) Act 2002.

²⁹ Section 19 (1)(3) and section 22 of the 2004 Copyright Act.

³⁰ Article 28A of Law 2121/1993.

³¹ Article 22 (1)(2) of the 2003 Copyright Act.

According to a WIPO study³², a common concern is the expense and time needed to make accessible copies from books which are only available in paper format or in a digital format which is not easily convertible to Braille. The Directive does not require rightholders to make a work available in a particular format. The issue is how to supply relevant organisations with a non-protected digital copy for creating accessible formats in a way that addresses publishers' concerns about security and the protection of their copyright in the works.

There are examples of successful cooperation between publishers and organisations representing the visually impaired. In Denmark, e-books or audio-books produced by the Danish Library for the Blind are equipped with a unique ID which allows control of the use and of the work and the tracing of possible infringers. In France, agreements are in place between a not-for-profit agency BrailleNet and publishers for delivery of digital copies of works which are stored on a specialised secure server accessible only by certified organisations.

Rightholders believe that appropriate protection against piracy and misuse needs to be guaranteed, especially when it concerns the delivery of digital formats, which can be easily reproduced and instantly disseminated over the Internet. A feasible approach appears to be a system of trusted intermediaries, such as specialised libraries or organisations representing the disabled people, which can negotiate with rightholders and enter into agreements. Such agreements provide for different kinds of restrictions and assurances to the rightholders which are meant to prevent abuse.

A related concern is that the exception for people with a disability is not specifically provided in Directive 96/9/EC on the legal protection of databases³³. Article 6(2) of this Directive provides for exceptions for teaching or scientific research, and private use reproductions, but has no exception for disabled people. This raises the concern that the exception for people with a disability in Article 5(3)(b) of Directive 2001/29 could be undermined by invoking database protection on the basis that a particular literary work is simultaneously protected as a database. As pointed out in the Commission staff working paper of 19 July 2004, this situation might arise when the literary work, such as an encyclopaedia, is protected as a work and as a database simultaneously.

Questions:

- (13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?**
- (14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?**

³² Study on Copyright Limitations and Exceptions for the Visually Impaired prepared by J. Sullivan for the WIPO Standing Committee on Copyright and Related Rights (2006), p. 71-72.

³³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20-28.

- (15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?**
- (16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?**
- (17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?**
- (18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?**

3.3. Dissemination of works for teaching and research purposes

Both teachers and students increasingly rely on digital technology to access or disseminate teaching materials. The use of network-based learning accounts at present for a significant part of regular curricular activities. While dissemination of study materials through online networks can have a beneficial effect on the quality of European education and research, it may also carry a risk of copyright infringement where the digitization and/or making available of copies of research and study materials are covered by copyright.

The public interest exception for teaching and research purposes was designed to reconcile the legitimate interests of the rightholders with the wider goal of access to knowledge. The Copyright Directive allows Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public when a work is used "for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible." This exception has often been implemented in a narrow sense and distance or Internet-based learning at home is not covered. Also, the exception often only covers copying excerpts of the research material rather than the entire work. Sometimes Member States have opted for a teaching exception, while having no exception for research.

At the time of the adoption of the Directive, both traditional classroom instruction and modern e-learning methods were taken into consideration. Recital 42 thus states that Article 5(3)(a) may also apply to distance education. However, this is not further reflected in the wording of Article 5(3)(a) itself, as it contains neither the definition of the concepts of 'teaching', 'scientific research' or 'illustration' nor any further clarification as to the scope of the exception. Recital 42 refers to the non-commercial nature of teaching and scientific research as the determining criterion for the application of the exception, irrespective of the organizational structure and the means of funding of the institution where these activities are undertaken. The Directive has thus given to the Member States a large amount of freedom in implementation, allowing them to determine the boundaries of permissible use under the exception.

The use of works for purposes of illustration for teaching and scientific research is dealt with differently by the Member States. In some countries, such as Denmark, Finland, Sweden and France (until January 2009), the use of works for purposes of illustration for teaching and research is subject to the conclusion of extended collective agreements between the collecting societies and educational establishments. Despite the advantages of a system of extended collective licensing (the institutions can negotiate the contracts which are best adapted to their needs), this form of licensing presents the risk that no agreement or a rather restrictive agreement will be reached, thus creating legal uncertainty for educational establishments³⁴.

³⁴

This was the case in France, where five sector-specific agreements concerning the use of works for illustration in teaching and research activities were only concluded in 2005, following a joint declaration by the Ministry of National Education representing the educational institutions and the Ministry of Culture representing the rightholders. During the implementation process of the Directive, as a result of the intervention of educational establishments and in particular of universities, an exception governing the use of works for purposes of illustration for teaching and scientific research

In the Member States where the exception for teaching and research is reflected in the national law, the relevant provisions differ to a significant extent. While some countries extend the exception to the rights of communication and making available to the public (e.g. Belgium, Luxembourg, Malta, and France (as of January 2009)), others restrict it to the right of reproduction (Greece, Slovenia) or allow communication to the public only on the condition that it cannot be received outside the premises of the educational institution (UK). Germany, on the other hand, makes a distinction between teaching and research activities; for the former, it allows the use of protected works only for teaching in the classroom and by intranet where it is limited to a group of students attending a particular course. The approach towards research is less restrictive as the making available of works is permitted "for purposes of own research" and "to a limited number of participants"³⁵.

As regards the mode of copying, most Member States do not make any distinction between analogue and digital copies, and both of them are therefore covered by the exception. However, the wording of the Hungarian copyright act restricts the scope of the exception to analogue reproductions only. Also, in Denmark, there has been no agreement on digital copying between the collective rights managers and educational institutions. Universities and schools have been granted a license covering only the making of paper copies of excerpts of works. The only extended collective license which includes such activities as scanning, printing, sending by e-mail, downloading and storage has been issued with regard to the use of works on the Internet in so-called teacher training colleges.

Different treatment of the same act in different Member States may lead to legal uncertainty with regard to what is permitted under the exception, especially when teaching and research are carried out within a transnational framework. An increasing number of students and researchers prefer to have access to relevant learning resources not only in a traditional classroom environment, but also using online networks, without any constraints of time or geography. Provisions only allowing reprographic copying of works or requiring students to be physically present on the premises of the educational institutions do not allow these establishments to exploit the potential of the new technologies and engage in distance learning programs. As the Gowers Review points out: "this means that distance learners are at a disadvantage compared with those based on campus and thus these constraints disproportionately impact on students with disabilities who may work from remote locations. (...) The relevant copyright exception should be extended to allow passages from works to be made available to students by email or virtual learning environments."³⁶

Another divergence between the Member States concerns the length of the excerpts from works which can be reproduced or made available for teaching and research purposes. Thus, the exception could cover the whole work (Malta), journal articles and short excerpts of works (Belgium, Germany or France) or short excerpts of works only, no distinction being made between different types (and lengths) of works (Luxembourg). Concerning the last example, works such as journal articles can be considered in practical terms as being excluded from the

was for the first time introduced into the French Intellectual Property Code; this provision, replacing the previous contractual system will enter into force in January 2009.

³⁵ Section §52a of the UrhG (the German copyright act) also requires users to pay fair compensation to the rightholders for making a work available.

³⁶ Gowers Review of Intellectual Property 2006, para. 4.17 and 4.19

scope of the exception as there is normally little interest in using only a short fragment of a journal article for teaching and scientific research.

With regard to the institutions that could benefit from the exception for teaching and scientific research, the Member States have also adopted different solutions. While the German Copyright Act refers to "schools, universities, post-secondary institutions and non-commercial career-training institutions", other countries like the UK use the generic term "educational establishments" without any further details, whereas the French Intellectual Property Code does not give any indication as to the institutions to which the exception applies and follows the wording of Article 5(3)(a): "illustration for teaching and research". In Spain and in Greece the exemption only covers teaching, thus excluding research activities.

Apart from a certain degree of legal uncertainty due to limited harmonization, the above-mentioned differences can constitute a problem when students enroll for courses in other countries, within the framework of distance learning, or when teachers and researchers carry out their activities in several institutions located in different countries. Depending on the country, identical acts could be legal or illegal. The causes of this problem lie in the different ways in which Member States have implemented the exception into their national laws. Therefore, there have been calls to introduce a mandatory exception for teaching and scientific research, with a clearly defined scope in the Directive. For example, the Gowers Review recommends that the educational exception "should be defined by category of use and activity and not by media or location".³⁷

However, making the exception mandatory and further clarifying its scope does not imply its extension, because the interests of the rightholders must be taken into consideration. For instance, with regard to the exemption to communication to the public for purposes of illustration for teaching and research, the Gowers Review states that "it will be necessary to ensure that access to such (learning and research) material should not be generally available to the public"³⁸ but only to a restricted audience of students and researchers. In this vein, Recital 44 of the Copyright Directive states that "the provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter." The proper balance needs to be struck between ensuring an adequate level of protection of exclusive rights and at the same time enhancing the competitiveness of European education and research.

Questions:

- (19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?**

³⁷ Gowers Review of Intellectual Property 2006, para. 4.15

³⁸ Gowers Review of Intellectual Property 2006, para. 4.18

- (20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?**
- (21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?**
- (22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?**
- (23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?**

3.4. User-created content

Consumers are not only users but are increasingly becoming creators of content. Convergence is leading to the development of new applications building on the capacity of ICT to involve users in content creation and distribution. Web 2.0 applications such as blogs, podcasts, wiki, or video sharing, enable users easily to create and share text, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination. However, there is a significant difference between user-created content and existing content that is simply uploaded by users and is typically protected by copyright. In an OECD study, user-created content was defined as "content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices"³⁹.

The Directive does not currently contain an exception which would allow the use of existing copyright protected content for creating new or derivative works. The obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated. However, before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rightsholders of the original work.

There have been calls for the acceptance of an exception for transformative, user-created content. In particular, the Gowers Review recommended that an exception be created for "creative, transformative or derivative works"⁴⁰, within the parameters of the Berne Convention three-step test. The Review acknowledges that this would be contrary to the Directive and accordingly calls for its amendment. The objective of allowing such an exception would be to favour innovative uses of works and to stimulate the production of added value⁴¹.

³⁹ Participative Web and User-Created Content, OECD 2007, p. 9.

⁴⁰ Recommendation 11.

⁴¹ The Review clearly referred to "transformative use" under US law and to the example of sampling in the Hip Hop music industry. However, in US law transformative use alone is not a defence to copyright infringement. Instead, it is one of the conditions required for a use to qualify for the fair use defence under section 107 U.S. Copyright Act.

Under the Berne convention, a transformative use would be *prima facie* covered by the reproduction right⁴² and the right of adaptation. An exception to these rights would have to pass the three-step test. In particular, it would have to be more precise and refer to a specific policy justification or types of justified uses. It would also have to be limited to short takings (short passages, excluding particularly distinctive takings), therefore not infringing the right of adaptation⁴³.

Under the Directive, certain exceptions potentially provide some measure of flexibility in relation to free uses of works. Other than the previously mentioned exceptions, article 5(3)(d) allows quotations "for purposes such as criticism or review". Criticism and review are therefore only examples of possible justifications for quotations. This implies that article 5 (3)(d) can be given a broad scope, although the quotation must be limited to "the extent required by the specific purpose", and in accordance with "fair practice". The "specific purpose" of the commentary need not be the analysis of the work itself. However, a degree of taking which is fair in a commentary on that particular work may become unfair practice if it is for the purpose of commenting on a wider issue. Another exception allowing some measure of flexibility is article 5(3)(k) of the Directive which exempts uses "for the purposes of caricature, parody or pastiche". Although these uses are not defined, they allow users to reuse elements of previous works for their own creative or transformative purpose.

Questions:

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

(25) Should an exception for user-created content be introduced into the Directive?

4. CALL FOR COMMENTS

The combined operation of broad exclusive rights with specific and limited exceptions highlights the question of whether the exhaustive list of exceptions under the Directive achieves "a fair balance of rights and interests between [...] the different categories of rightholders and users"⁴⁴.

A forward looking analysis requires consideration of whether the balance provided by the Directive is still in line with the rapidly changing environment. Technologies and social and cultural practices are constantly challenging the balance achieved in the law, while new market players, such as search engines, seek to apply these changes to new business models. Such developments also have the potential to shift value between the different entities active in the online environment and affect the balance between those who own rights in digital content and those who provide technologies to navigate the Internet.

It is in these circumstances that the present Green Paper seeks all stakeholders' views as to the technological and legal developments described above. The questions submitted are of an

⁴² Article 9 Berne Convention.

⁴³ Berne Convention Article 12, Right of Adaptation, Arrangement and Other Alteration.

⁴⁴ Recital 31.

indicative nature only and stakeholders are free to submit comments on any other issues that are addressed or touched upon in this Green Paper.

Answers and comments, which may cover all or only a limited number of the above issues, should reach the following address by 30 November 2008.

markt-d1@ec.europa.eu.

If stakeholders wish to submit confidential responses, they should indicate clearly which part of their submission is confidential and should not be published on the Commission's website. All other submissions, not clearly marked as confidential, may be published by the Commission.