

The Intellectual Property Office's calls for views on the European Commission's draft legislation to modernise the European copyright framework

Response from the Publishers Association

The Publishers Association (the PA) is the leading trade organisation serving book, journal, audio and electronic publishers in the UK, spanning fiction and non-fiction, academic and educational publishing. Our members represent over 80% of the UK publishing industry including global companies such as Elsevier, Wiley, Pearson, Penguin Random House, Hachette and the University presses, as well as many independent publishing houses.

The PA welcomes the opportunity to respond to the IPO's call for views on the European Commission's draft legislation to modernise the European copyright framework (Directive on Copyright in the Digital Single Market; Regulation and Directive to implement the Marrakesh Treaty).

DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

Summary

The PA believes the draft legislation achieves a good balance between protecting the needs of those who create and invest in intellectual property while ensuring that content can be accessed by those wishing to make use of it. The proposed reforms appear measured, limited, and targeted on areas which require some element of reform.

We do question the relevance of the draft legislation for the UK, following the process of copyright reform undertaken in 2014 following the Hargreaves Review, which saw the UK copyright framework updated to take into account the sort of technological changes this directive is designed to do.

A number of amendments and clarifications are required to ensure that there is no adverse effect on the publishing industry.

Measures to adapt exceptions and limitations to the digital and cross-border environment

Article 3: Text and data mining

Three important principles underpin the UK TDM exception: the user must have legal access, the results of the mining activity must only be put to non-commercial use, and publishers must be able to maintain control of their networks.

It is welcome to see the Commission include the need for research organisations to have lawful access in order to be able to carry out text and data mining and the inclusion in the actual legislation of the right for rights holders to apply measures to ensure the security and integrity of their networks and databases.

However, the Commission's proposal differs from the UK provision in an important area by not limiting the results of the text and data mining to non-commercial use. They have focused instead on limiting the beneficiaries of the exception to public interest research organisations, placing the emphasis on the non-commercial status of the miner, as opposed to the use the mined content is

put. This is disappointing and we remain of the view that the exception should only apply to non-commercial research, as it does in the UK.

Further amendments required include:

- ‘Lawful access’ requires further clarification and should be supplemented with the wording ‘...with the consent of the rights holder (or subscribed access)’.
- Users should be required to guarantee that any content copied in order to undertake the mining is securely stored. The designated public interest research organisations should provide information to rights holders on how they will store and secure the copies.
- Once mining has been performed, it should be a legal requirement that the copy be deleted.

Article 4: Use of works and other subject-matter in digital and cross-border teaching activities

The Commission’s proposal is, importantly, consistent with the UK’s exception for illustration for teaching which is subject to licence, with Article 4 noting that the exception may not apply if adequate licences are easily available.

It is disappointing, however, that this provision is not compulsory, particularly given that the exception itself is now to be made mandatory. Where rights holders offer licences to educational institutions, these licences should always prevail over the exception so that the commercial exploitation of educational works is not prejudiced. The ‘may’ in Article 4.2 should be replaced by ‘shall’.

Further amendments required include:

- It should be clear that only short extracts of works and not complete works can benefit from the exception.
- Access to the copied works should be limited to the students or pupils directly involved in the particular teaching activities where the work is used, and not to all students and pupils of the educational establishment.
- Access to the copied works should be limited to the duration justified by the illustrative purpose.

Article 5: Preservation of cultural heritage

It is our interpretation that Article 5 closely mirrors the UK exception which similarly permits cultural heritage institutions (museums, libraries and archives) to digitise copies of works for the purpose of preservation. The UK exception, however, contains an important provision which is missing in the Commission’s proposal which needs to be added – that institutions can only avail themselves of the exception if it is not reasonably practicable to purchase a replacement.

Further amendments required include:

- A clear definition as to what is meant by “permanent collection”. While Recital 21 attempts to define it as “copies owned or permanently held by the cultural heritage institutions, for example as a result of a transfer of ownership or licence agreement”, this is not sufficient in an age of digital subscriptions and other forms of access.

- A distinction must be made between works that are contained in and acquired permanently for the collections on the one hand, and works that are accessed via the servers of publishers or another third party and under conditions allowing access to the collection for a temporary period, on the other hand. This is because when the work is no longer accessible by the library, the work is no longer part of the permanent collection.

Article 11: Protection of press publications concerning digital uses

Any solution to provide legal certainty as to the position of publishers as rightsholders in the digital age should not be restricted to press publishers. Discriminating between different categories of publisher is unjustifiable and impractical. We cannot see the rationale in giving more protection to the investment of one category of publisher compared to others. The current distinction between press / magazines / journals / books is a 20th Century one. In the digital age, with the ability to provide continuous updating of content, this distinction becomes blurred. What is the difference between an online magazine continuously updated and upgraded and an online published learning resource enriched with web resources, media content and similarly continuously updated and upgraded? Or an academic journal which is constantly posting new materials, findings and discussion?

The Commission has stated many times that copyright law requires modernisation and should take into consideration the reality of media convergence which characterises the digital world. Recital 10 of the Information Society Directive recognises that “the investment required to produce products such as phonograms, films or multimedia products, and services such as ‘on demand’ services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment”. It is therefore hard to justify today the absence of publishing products in general from the list of creative products and services deserving this “adequate legal protection”.

Article 11 should be amended to cover all form of publishers.

Article 12: Claims to fair compensation

Article 12 proposes a fix to the situation which has arisen following the CJEU ruling in C-572/12 HP v Reibel. This judgment restricted the ability for publishers to receive compensation under the private copying levy. This Article will allow Member States to provide for such payment in their domestic legislation.

While this does not directly impact on UK, given our absence of a private copying exception, UK publishers do receive payment from European collecting societies when their works are copied in those jurisdictions. We, therefore, fully support this provision and support the call from our German colleagues for the passage of this Article to be expedited to avoid the damaging impact this ruling is having on German publishers.

Further amendments required:

- Proper recognition that publishers are rights holders. The following wording should be added: *Publishers are rights holders by virtue and to the extent of the transfer / licence of rights by authors.*

Fair remuneration in contracts of authors and performers

Articles 14 – 16: Transparency obligation; contract adjustment mechanism; dispute resolution mechanism

The PA fully supports the principles behind Articles 14-16; it is vitally important that authors are properly remunerated and properly informed as to how their works are being exploited. However, the Articles, as currently drafted, do not adequately reflect the different ways in which authors are currently remunerated (for example, between those who are paid an advance and then receive royalty payments and those who have been commissioned to write a particular piece of work for a fixed fee). It is also silent on other issues such as how long the transparency obligation outlined in Article 14 should apply.

‘Author’ can cover all creators of content, some of whom may not contribute in any way or in any material way to a work’s success (eg a photographer of an picture in the plate section, a cartographer creating one map, or someone drawing pie charts or graphs). Their contribution to a work’s success cannot be measured and indeed most works would succeed just as much without their contribution. It does not seem justifiable for these contributors to be entitled to claim further compensation in the same way as the main contributor(s) should a work be extremely successful.

In addition, publishers, for certain types of publication, need to be able to receive full assignment of copyright or an exclusive licence to address complexities of multiple-author works as well as allowing for effective protection of copyright. It is important in such instances to have a clear financial model that is not complicated by an open-ended requirement for transparency and potential further compensation to an author. This is not fair to the publishers whose business transactions and commercial models did not provide for this at the time, especially where there is assignment of copyright.

Any move to European models under which publishers cannot ask authors to assign their copyright (or even grant a licence for the full term of copyright) would also be contrary to UK copyright law which regards copyright as real property (real estate) which can be sold and / or disposed of outright. It is important for the UK to distinguish itself from EU countries which do not permit assignments or licence for the full term of copyright.

There are many voluntary initiatives in the UK, such as the [Publishers Association Code of Practice on Author Contracts](#) and the [PA / AAA Good Practice Guidance for the Process of Agreeing Contracts](#). The PA even operates an [Informal Dispute Resolution Service](#), supported by the Society of Authors, as a means of settling disputes quickly, informally and cheaply. We believe non-legislative solutions such as those outlined above should be explored more fully before legislation is introduced.

Cross-cutting concerns

Recent rulings from the CJEU have raised the prospect of access under one exception, triggering access under a subsequent exception. The clearest example of this can be found in C-117/13 *Ulmer v Darmstadt* where the CJEU deemed it permissible for a private copy to be made (under the private copying exception) of content accessed via the dedicated terminal in a library exception. A number of other combinations of exceptions could be envisaged which would take the effects of exceptions far beyond what was initially envisaged.

The Commission must take this opportunity to make it absolutely clear that such ‘exception linking’ is not permitted and clarify in legislation that exceptions cannot be strung together – that the accessing of content under one exception does not then give the user the right to make further use of that content under another exception; each exception stands alone.

We recommend the following wording is added to the Directive:

The accessing of content under one exception does not give the user the right to make use of that content under another exception.

DRAFT LEGISLATION TO IMPLEMENT THE MARRAKESH TREATY

The growing availability of ebooks provides a wonderful opportunity for people with print impairment - whether blind or partially sighted, dyslexic, or without sufficient dexterity to handle printed materials - to become customers for mainstream published products.

Books are becoming more accessible directly, particularly in trade publishing (RNIB research shows that in 2012 84% of the most popular 1,000 books in the UK were available in braille, audio and large print using accessible ebooks) - but, in some areas, responding to initial requests from or for print disabled people is as vital as ever. The Publishers Association is working on several initiatives to help publishers respond to requests on behalf of people with reading impairments, particularly visually impaired people, in order to facilitate access to their material.

We support the Marrakesh Treaty but believe the UK government should press for the following changes to be made to the draft legislation to ensure the Treaty’s provisions are properly implemented:

1. Commercial availability to be considered before the exception applies.

The UK exceptions do not apply to works which are commercially available on reasonable terms by or with the authority of the copyright owner. This corresponds with the options for WIPO members provided in Article 4 (4) Marrakesh Treaty. UK publishers have systems in place to cater for the needs of print impaired persons.

Not only are publishers best placed to produce accessible formats (technically and legally, also taking into account the views of the authors), their involvement makes the production of accessible format copies more cost efficient; the experience in the UK reflects this. In fact, for some publishers it is their commercial business to cater specifically for print impaired person (e.g. library large print publishers). Allowing the creation of large print editions when a commercially available version is suitable would undercut that business and would be a disincentive for publishers to make books more accessible from the start, rather than on request. The Directive should include express reference to commercial availability.

2. Lawful access

An important element of the Marrakesh Treaty and the UK Regulations is that the beneficiary should have lawful access in order to benefit from the exception. This ensures that correct recompense for at least the original copy reaches the author. This ensures a balance between the required exception to copyright and the right of an author to benefit from sales of their work.

The requirement of lawful access in order for making of accessible copies by authorised entities needs to be introduced.

3. Trusted intermediaries as authorised entities.

In our experience, the cooperation of representatives of the print impaired persons and publishers has been very successful. The relations in the PA Accessibility Action Group are based on trust which has been established over many years. This trust is key to facilitating the cooperation needed to produce accessible format copies and has been recognised since the 2010 Memorandum of Understanding on access to works for dyslexic or visually impaired readers promoted by the European Commission.

It is a failure of the Directive to not refer to the Memorandum of Understanding and its core principle of trusted intermediaries as the entities authorised to make all the acts needed to produce accessible format copies (which also, importantly, sets out how an entity becomes 'authorised'). Trusted intermediaries are currently part of the activities of the Accessible Books Consortium, a multi-stakeholder partnership comprising WIPO organisations that serve people with print disabilities and organisations representing publishers and authors. The ultimate objective of this Consortium is to increase the number of books available worldwide in accessible formats and make them available to people who are visually impaired. Its trusted intermediary services (TIGAR) provide a practical application of cross border exchange of accessible copies through an international network of authorised entities. It is a missed opportunity that the Directive does not refer to this established practical application, particularly given it is something we have had established in the UK for several years now.

*The Publishers Association
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