EPC European Publishers Council

Submission from the European Publishers Council to the Independent Review of Intellectual Property and Growth – The Hargreaves Review - March 2011

1. The European Publishers Council (EPC)

EPC is a high level group of Chairmen and Chief Executives of leading European media corporations whose interests span newspapers, magazines, books, journals, online database and internet publishing as well as in many cases significant interests in private television and radio. A full list of EPC's members is attached.

The publishing sector as a whole is the largest creative industry in the UK. At the heart of the sector lies a diverse range of companies that combine creativity, innovation and application with constantly evolving methods of production and distribution. By way of example from only two parts of the publishing sector in membership of the EPC, UK newspaper publishers invest over £1bn per annum in developing content which is published in print and a variety of online formats. The UK STM sector is responsible for some £800m of export sales from the UK. That investment is protected by the law and leveraged via many revenue sources.

The internet inevitably brings with it the end of traditional ways of doing business, of high barriers to entry, of incumbency rights. Nevertheless, this does not imply that copyright has somehow become an outmoded concept. There may be many who would like it to be so – and some with strong commercial interests that it should be so. But before we allow them to undermine what copyright has created, we should think very hard about what we would be losing in its destruction through new exceptions. Instead we need to find ways of managing copyright that go with the grain of technology rather than falling back on cross-grained attempts to maintain a vanishing status quo.

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*We welcome this opportunity to contribute to the important work being undertaken by this Review to: "*focus upon the question at the heart of this review.....namely: what, if anything, should we do to change the UK's IP system in the interests of promoting more rapid innovation and economic growth?"

*In particular we wish to set out the EPC's "Big Idea for the Digital Agenda": **The Answer to the Machine is in the Machine**. Following a rigorous review process carried out by DG Information Society, our project has now been selected by the European Commission for promotion at the European Digital Assembly to be hosted by Vice-President, Commissioner Neelie Kroes and the European Commission in Brussels on 16-17 June, 2011. This is set out at Section 4.*

2. Adapting IP to the challenges of the internet

- ***The Internet Doesn't work that way***

This is a refrain all too commonly used to provide an apparently incontrovertible excuse for behaviour that in any other context would simply not be acceptable. We rarely seem to stop long enough to ask "*Why* doesn't the internet work that way?" However, we can longer afford to leave that question un-asked.

In the context of this *IP Review*, we must recognise the long term implications of the collapse of respect for the most basic precepts of copyright law. This is a multi-faceted problem; while much of the public focus has been on the behaviour of consumers and peer-to-peer file sharing, at least as great a challenge lies in the systematic exploitation by some businesses of other businesses' copyrights – without permission or proper recompense. The only businesses which have been able to profit from content on the internet appear to be those which depend largely or wholly on others - not only to provide the investment of time and/or money for the creation of that content, but also to carry all other risks and liabilities of creation and publication.

For example, many businesses have been established that download and analyse other peoples' content, and then sell access to it via customised packages of links. Without paying anything for the content which drives their whole business, they generate revenues measured in tens of millions of Euros. Unsurprisingly they are able to undercut those of their rivals who properly take out licences; equally unsurprisingly they want this business model to continue indefinitely.

Perhaps a little more surprisingly, they have come to believe that their business is entirely legitimate and reasonable.

- ***The Changing Face of the Business of Media – in print and online and the role of copyright in its future***

In the short run, the creation of high quality media content will continue to be subsidised by print revenues. However, as the internet becomes the primary mechanism for distribution of content, these print-related revenues can only decline while the hidden subsidy that they provide for high-quality content on the network will steadily disappear. The end result can only be an impoverished world of internet content – whether in information, news reporting and investigative journalism, in education or in entertainment. This is not an issue of a new approach disrupting incumbent business and models: no alternative investment model for generating original, professional content has emerged at scale elsewhere online. There is simply a net destruction of value and therefore investment. This may seem counter-intuitive; however, the extrapolation of current trends leads inexorably in this direction.

However, this is not a tired call for a tightening of copyright regulation; although there may still be a need for some continued "tidying up" of UK legislation, we remain convinced that the fundamental tenets of copyright law have stood the test of three centuries, and have created the diverse and exciting media landscape on which society places such high value today. Copyright is not the problem; in those substantial areas of the internet where copyright effectively does not function, and where the possibilities offered by a scaled-back copyright regime are therefore undergoing a live pilot test, there is no evidence that it has given rise to new creativity, liberated from the restrictions of copyright. Copyright should continue to be the enabler of innovation and growth because it has proven its effectiveness over centuries and no better alternative has emerged.

Generating revenues from creative content – and the continued growth of this critical sector of the economy, ultimately depends on finding ways to make copyright function on the internet in the way that legislation intends that it should: by providing those who create and those who invest in creation with clear mechanisms to determine how that content should be exploited. The ability to decide how and on what terms your content is used gives rise to the incentive to create it in the first place. That is at the core of copyright law. However, when this becomes impractical or unworkable, when the need for permission is routinely ignored or assumed, value is destroyed and creativity slows down. The rational response is to make copyright more, not less effective so the introductions of new exceptions to copyright only serve to undermine its effectiveness and the ability of rightsholders to licence their content.

- ***From people-intensive to machine-to-machine processing of rights and permissions***

In the digital age this should be, for the most part, about the mechanisms, not the principles, of the law. It is clear that the *processes* by which we have managed copyright since the Statute of Anne are no longer appropriate in the internet age. As in every other part of our lives, we need to move away from the traditional people-intensive mechanisms that have characterised the management of copyright and embrace machine-to-machine management of rights and permissions. Management using written licences and screeds of legalese are simply inappropriate when it is machines rather than human beings that you need to address. But this is a technical problem which can be solved technically.

Past attempts to do so, through projects such as the **Automated Content Access Protocol** – a well-constructed industry-wide effort to make copyright work properly online – have hitherto been aggressively rejected by those who simultaneously claim to support the principles of copyright but reject attempts to make it functional. This makes it hard to avoid the conclusion that Government needs to provide some assistance. In the face of a new technological revolution which threatens to push us backwards, the legal framework should have the courage of its long-held convictions.

- ***Embracing and exploiting technology***

The media recognise better than anyone **that the internet is a catalyst of change on a scale unprecedented since the invention of the printing press**. The landscape is changing out of all recognition, new value chains are forming, new business models emerging. We see extraordinary opportunities for creativity and growth across the sector. If we get that right, then sustainable models for content online can emerge at scale. These will certainly include paid models, which are quickly becoming part of everyone's online experience. This can only be a good thing because in a world where advertising is presently the dominant (or only) revenue stream for content, without alternative streams of revenues we are limiting the size of the content market to the size of the advertising market. And advertising revenue is simply inadequate to fund professionally produced content – whether it be news reporting and investigative journalism, education, entertainment or sport.

Without copyright, there is no mechanism that will give the return on investment that is essential to encourage entrepreneurs to continue to innovate in content creation and distribution. And the survival of an effective copyright regime will depend entirely on finding ways of making copyright work with the network, not against it – exploiting technology, not fighting it.

3. What do we need from Government to create a copyright-aware internet?

Media companies, alongside a wide range of content companies, are already putting into place many of the individual technical elements that are essential to making copyright work on the internet. From the development of rights information registries to the implementation of standards for communication about permissions and usage, the infrastructure is beginning to come into place. But to fulfil our potential, in summary we need two things:

- Unwavering support for the basic values of copyright, in the face of the continuing assault on its most fundamental precepts from those in whose commercial interest it is to see copyright diminished

- Practical support for copyright industry initiatives in the development of approaches to the automated management of copyright and permissions, such as that proposed by the European Publishers Council's project ***The Answer to the Machine is in the Machine*** **(section 4).**

Our basic premise is that the law of copyright is fit for purpose and already applies to the internet. It is, therefore, more a matter of will: of the various stakeholders in the network of ***recognising and applying the law*** and of ***using practical solutions to facilitate the management of copyright online.***

❖ **The creative industries need the encouragement and support of Government to work together to create and implement the technical standards critical to a universal rights-aware network**. The many different standards initiatives that have developed in the media over the last decade or more need to converge on a common standards framework – we cannot expect rights users to work with different standards and different requirements when dealing with different media sectors. This does not imply an undifferentiated landscape – far from it; a properly designed standards infrastructure will encourage appropriate creative and competitive diversity of business models and business architectures. But these should not reflect an out-dated view of sectoral boundaries between the media.

- **The technology industries that dominate the internet – suppliers of both the technical and the business infrastructure of the network – are also essential collaborators in the development of this infrastructure**. **Government has a key role to play in facilitating discussions between the creative industries and the technology sector.** We have many interests in common. This is not a zero-sum game: the creation of a copyright-aware internet will improve the potential commercial environment for everyone. New works, which can be both protected through copyright and exploited commercially will expand the digital economy, e.g. user-generated-content can be encouraged through micro-licensing opportunities thereby expanding the entrepreneurial potential in partnership with new opportunities for rights management.

- Some parts of society have become accustomed to an internet which they effectively view as being without copyright. The introduction of a copyright-aware internet implies **the need for more widespread education on rights alongside the wider need for greater digital awareness. Government clearly has an important role to play in this**.

- **Regarding the introduction of a fair use exception, there has to be a more honest debate about the wishes of the various stakeholders that may benefit or lose as a result of introducing a major change to our copyright law.** During David Cameron's speech on 4th November on creating a future Tech-hub in East London to mirror Silicon Valley, he said when announcing this IP Review that *:*

  "The founders of Google have said they could never have started their company in Britain. The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the US".

  This raises several issues which we feel bound to address:

  a) Numerous search engines came before Google and the IP issues Google faced were nothing new. Their use of content was fundamentally no different from any of their predecessors. So it is hardly credible that IP considerations played any part at all in their launch, certainly when set against their key differentiator at launch (a better algorithm and a nice clean page design) and their subsequent drivers of success (ad words and huge server infrastructure).

b) It is also worth pointing out that in reality the laws in the USA and European Union were at that time of Google's launch in the process of adaptation and alignment in certain critical areas in order to facilitate the transmission, hosting and caching of digital content, by establishing an hierarchy of rights and responsibilities - with great clarity (see Annex 2). These legal changes not only provided legal certainty to start ups, the expanding internet service providers and telcos at the time, but facilitated the launch of new tech-based business models such as search. All of these required certain, limited exceptions from the law merely in order to function technologically. We would do well to recall that these exceptions were made to encourage innovation but also invoked responsibilities for those who benefited from these exceptions. These are duties which often now disregarded when it comes to dealing with illegal content especially in removing infringing material. This was the quid pro quo for not assuming full liability alongside that of the content providers.

c) It is also worth noting that while Google were not founded in the UK, they have managed to start their business here anyway and so far our IP laws have not stood in the way of their business growing to around £2bn in UK revenue annually.

d) This "taking a snapshot" though, in reality involves crawling, copying and indexing copyright protected content on an infinite scale without the permission of the rightsholders. Once Google had expanded exponentially this no longer remained a benign activity and started to threaten rightsholders' commercial interests. Google's response turned the permission-based rights trading of copyright law on its head so that, unless and until the rightsholders specify they do not wish to be indexed by Google, the copying continues leading to parallel publication of the original content.

e) Although, as mentioned above, Google's original model was no different to how other search engines operated, given Google's overwhelmingly dominant position in the search market and expansion into other products and services since to create a Google-branded platform, content owners have sought better ways to manage their content. Google requires content owners who do not wish to have their content crawled to block this process. However a decision to block Google's crawlers in order to protect one's content from re-purposing by unlicensed users, becomes a classic "Hobson's Choice" as Google Search has become the de facto gateway to the internet for the vast majority of internet searches.

f) The second part of David Cameron's statement is equally concerning**:** ***"Over there (US) they have what are called "fair-use" provisions which***

some people believe gives companies more breathing space to create new products and services". When matched against the first statement about possible barriers arising from our IP laws, it seems axiomatic that what Google and others may be looking for is something that would go far beyond what the US law regards as fair use; as their business models have evolved beyond indexing for search purposes, they are in effect asking for an exception to legitimise ***the repurposing*** of copyright protected material, free of restriction or conditions, and for free.

It is also hard to understand what "breathing space" the law could offer. The term "breathing space" implies something temporary, a helping hand while new products and services are in their vulnerable embryonic phase. In reality nothing in IP law anywhere exempts any activity on the grounds of the newness or small scale of the otherwise infringing activity and it is hard to know how this could ever be put into place, even if it were desirable. To the extent that small businesses in the US or elsewhere avoid litigation early in their development, it is good fortune, rather than the law, that creates the breathing space.

- However**, returning to the original proposition, that our IP laws in the UK were not as friendly to innovation as those in the US, we believe strongly that other, significant factors were likely to have been at play when Google, Apple and other US based start-ups launched** such as: the scale of the market in the United States (in terms of its size and common language) as well as other factors associated with risk-taking entrepreneurial cultures, flexible labour markets, competition policy and access to start-up finance rather than any differences in the copyright regime. Furthermore Google chose to headquarter their European Operations in Ireland where IP laws are harmonised with the rest of the European Union but where attractive tax regimes may have played a more compelling role in their decision than IP.

- **In sum, therefore, without any recourse to changing of the law, technically it must be possible - through a process of structured cooperation, to build the standards-based infrastructure necessary to support an expansion of many business models and user access**. This is our preferred route to incentivising creativity, creating competition, expanding the market and is set out in our Section 4 which follows.

4. **Our Big Idea to promote innovation and growth**

A Big Idea for the Digital Agenda submitted by the European Publishers Council and selected for promotion at the Digital Assembly, June 2011 in Brussels

"The answer to the machine is in the machine"[1]:

Our thesis is straightforward. Copyright *as law* is entirely fit for the new environment of networks and digital dissemination. But traditional *practice* for the management of copyright – individually lawyer-crafted licences, communication on paper, people-heavy processes –needs adapting to align with the internet age.

An electronic © symbol for the 21st Century

The copyright symbol © was developed at the beginning of the 20th Century as a visually arresting signal – with a clear message – a reminder that:

"this work is covered by copyright and its re-use requires permission"

Let us now adapt and innovate to create a similar device for the 21st Century – interpretable and transactional by both people and machines to forge an essential link from the past to the future. A universally available, non-proprietary e-copyright symbol with full functionality provides a first essential tool in signposting the routes through a pervasive communications infrastructure from finding the content, what you can do with it, through to transactions, making it easy to find content and to get permission.

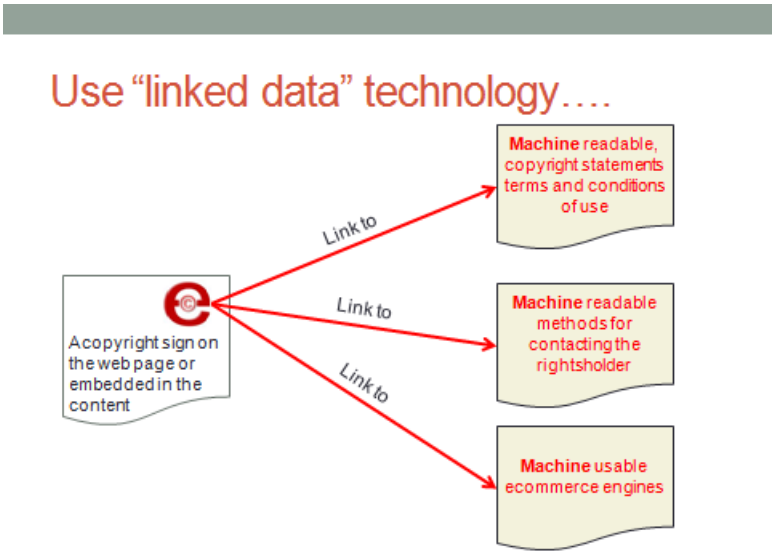
Our 21st century rights management practices require a forward-thinking approach to technological solutions and a rigorous implementation of interoperable data standards. This will allow for the maximum possible automation and flexibility of licensing and administration solutions. By embracing the technology of the internet, the solutions become as seamless as technically possible.

[1] **Charles Clark, publisher and copyright expert, 1933-2006/** Charles Clark's famous aphorism was used as the title of a chapter that he contributed *to The Future of Copyright in the Digital Environment* (ed:P. BerntHugenholtz) published in 1996, but almost certainly predates that use.

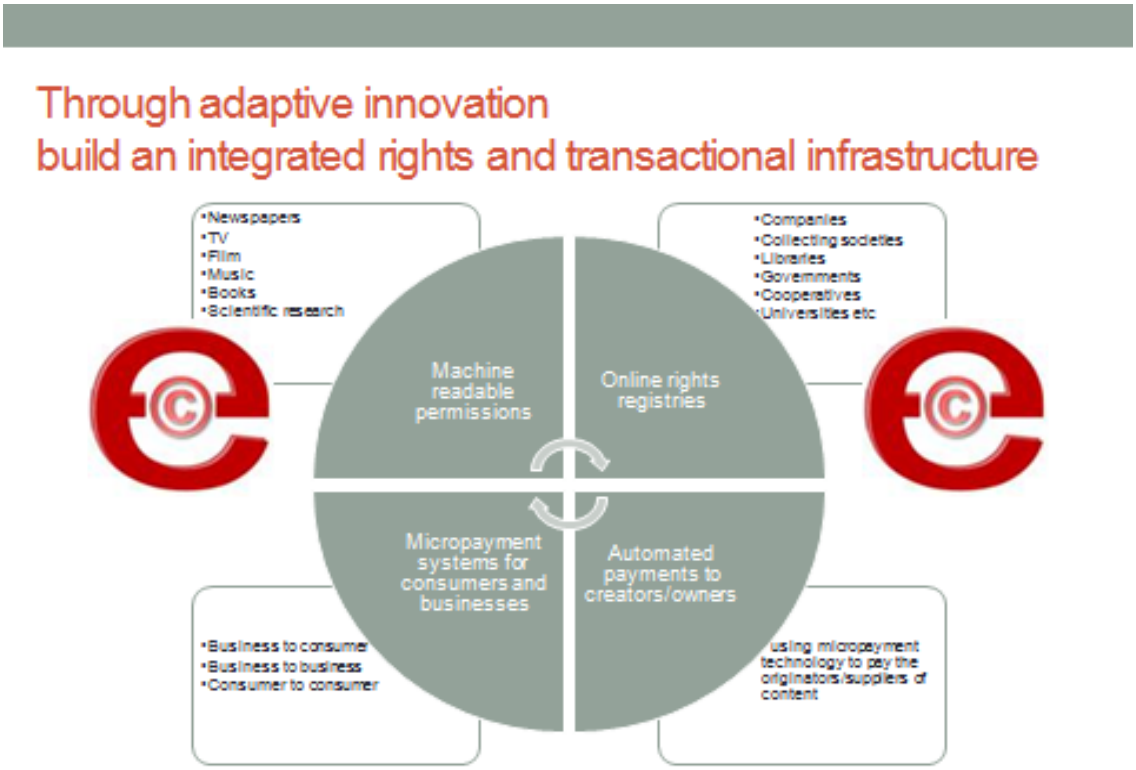
The media industries long ago embraced a digital and interactive future after a past dominated by analogue and linear products and services. This future promises the potential for a far greater availability of content to consumers, increased diversity and flexibility of offerings made by service providers and new revenue opportunities for rightsholders. Nevertheless the business models in the digital space are in a state of flux creating diverse licensing and administration challenges and new requirements.

The key ingredient for 21st Century rights management is to use the internet for what it is really good at – the management of myriad individual data transactions. Accurate data is critical for end to end processes in the digital environment - from machine readable permissions data through to clearly labelled and interactive databases. This is key to efficient licensing solutions. We need standard data exchange formats to enable the most effective and interoperable reporting, invoicing and administration processes. Machine readable rights and permissions data needs to move centre stage, particularly in the regulation of business-to-business transactions which often form the backbone of what consumers actually search and find.

- The "digital copyright" symbol can link the user – whether a person or a machine – to human and machine readable copyright statements, licences and (where appropriate) to e-commerce engines and payment distribution systems.



We need to build comprehensive, accurate, multi-territory databases or registers for each content sector using industry standard identifiers to identify content linked to details of the rightsholders with an interest in that content and, in relation to each form of exploitation, the entity or entities mandated to license the relevant rights.



There is a market for micro-licensing, especially for budding entrepreneurs who want to take a famous music track or a film clip to include in their video, or game. We need to make it really easy for users to get permission to use this content, and to offer very flexible licensing terms depending on how such content might be distributed. Then having created something "new", these entrepreneurs should be able to protect their creativity and get paid for it, thereby creating growth in the economy and eventually rewarding the original creators of the music track or film clip that contributed to this new work.

The potential power of the internet for linking data, particularly the semantic web or "Web 3.0", provides the engine for the development of the type of infrastructure which is essential for permissions' management and transactions, whether you are buying a TV series, newspaper content, the latest eBook or a single music track, for commercial or non-commercial use.

Action Plan: From the Big Idea to a Live Demonstration:

Following selection by the European Commission to take our Big Idea forward to the Digital Assembly in June, we have taken the following action:

1. We have appointed a Project Director, Mark Bide of Rightscom and a technical Partner, CNRI.

2. We are gathering the support and expertise of a wide range of stakeholders in the value network - content industries, technology companies, e-retailers, payment companies, standards organisations, collective management organisations and the technology community.

3. We are building a live demonstrator: to show-case the feasibility and potential of internet-scale automation of rights and permissions management both for professional and amateur use.

4. The common requirements of the use cases are:

    - Transparency
    - Applications that are protective of user and rightsholders rights
    - Open standards based – non-proprietary, globally interoperable
    - Cross media
    - Not predicated on a single business model or single work flow

5. The Demonstrator will show end-to-end processes developed from 20 demonstrator "Use Cases" submitted by companies and organisations representing different media sectors: Online Press, Trade (book) publishing and Professional STM publishing; Audiovisual; Music; User Generated Content and Software and Data.

    The Use Cases we have received so far fall into three distinct themes:

    i. B2B communication of rights and permissions information within the information supply chain

    ii. B2C Communicating rights and permissions to end users (although many of the "consumers" may be businesses)

    iii. Licensing of online content: automated (or partially automated) mechanisms for licensing – transactional (micro) licensing and collective "blanket" licensing

In this way we will be able to show how different requirements might be met (including, for example, embedding rights/permissions data into digital objects **as well as** embedding references to that data.

The will also show how the existing technical infrastructure would allow these to be delivered using structured approaches to expressing rights/permissions include some of the following: ACAP, Creative Commons, ODRL, Open Government Licence, ONIX-PL, PLUS and existing linking technologies: HTTP, Handle and existing repositories: ARROW, CMOs, GRD, Book Rights Registry.

This Review has given us the perfect opportunity to focus on the business and user requirements, but political and practical support is needed for building the essential links in the infrastructure, to put the UK and Europe at the forefront of the digital content economy. Using the technical framework of Linked Data and the semantic web, this infrastructure can be built a piece at a time, and can be as scalable as the internet itself.

European Publishers Council

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