

Submission from CEPIC e.e.i.g.

Co-ordination of European Picture Agencies Press Stock Heritage

Response to EC Green Paper on Copyright in the Knowledge Economy

CEPIC is an international federation of picture agencies and libraries, founded in 1993 and registered in Paris in 1999 as a European Economic Group. It obtained observer status at the World Intellectual Property Organisation in 1997 and is a member of IPTC since 2005. It has participated in many EU conferences and follows EU legislation. CEPIC's membership includes not only over 1,000 large and smaller stock photo libraries and major news agencies but also art galleries and museums in 19 European countries. We estimate that CEPIC represents approximately 80% of the turnover in image publishing in Europe and that a large part of the European visual heritage is contained in its members' archives.

The aim of CEPIC is to be a trans-border united voice for the press, stock and heritage organisations of Europe in all matters pertaining to the image industry, including the consolidation of copyright protection. CEPIC wants to ensure copyright is not weakened by the process of harmonisation of copyright laws in European countries and to advise on copyright protection as new technology develops.

The role of picture agencies as preserving the past and the present for the future

Most members of CEPIC are commercial companies. However a not insignificant part of CEPIC's membership consists of museums and galleries, who are not for profit. Staff range from 1 person to over 150 people. Picture agency and library members of CEPIC produce their own content or distribute copyright protected material such as photographs, flash, videos or news drawings, either as copyright owners or on behalf of other rights holders such as photographers or museums. This is done on the basis of worldwide licences.

Picture libraries play a key role in :

- providing image content
- creating image content
- marketing image content
- collecting and distributing rights
- preserving image content by archiving, filing, indexing, digitizing, keywording and maintaining availability

The advent of digital technology over the last 15 years has probably revolutionised the picture market more than any other creative field. Most picture libraries are highly experienced users of on-line facilities, having digitized and put on-line many millions of copyrighted and non-copyrighted images. Picture agencies manage databases composed of digitized image material and the daily work of photographers deals with digital material, particularly in news.

This image material, photographs for news or illustration purposes, flash, videos or drawings is distributed through global and easily accessible networks, either with a local, a regional or a global licence. Picture agencies work with different business models ranging from the traditional Rights Managed model to the more recent Web Generated Content model.

Response to EC Green Paper on Copyright in the Knowledge Economy

General Remarks on the Green Paper

The Green Paper raises issues on how to best disseminate knowledge for research, science and education. Although the Green Paper wishes to address all issues in a “*balanced manner*”, we think that the views from the artist and copyright holders are largely absent.

Our impression is that the Green Paper reflects the opinions of publishing houses, schools, archives, scientists, academics and the public (“consumers”). The views of the individual artists, especially of image copyright material, are not represented.

We feel it is important to stress again that all the “works” “disseminated” for science and knowledge or for “recycling” in user-generated products, as mentioned in the Green Paper, are the product of an intellectual effort of an individual author, an intellectual creation protected by copyright and authors’ rights. Creativity is the product of individual creators.

About Creation on the Internet

As the Green Paper rightly states, copyright owners get little revenue from the internet. This confirms what we believe, that today, more than ever, copyright owners are the “weak” part in the revenue stream. We also believe that legislation in this area is not sufficient.

More than ever it is easy to steal other people’s work on the internet and damages awarded in court are very low. Bloggers may easily use images which belong to someone else because their identity is protected by the server owner, unless a police injunction is granted which rarely happens due to the police being overloaded with other work. Meanwhile, the server owners are making big money on advertising because the blog is more interesting because of the stolen image material.

What we need here is not a further weakening of copyright with additional limitations to accommodate internet users and “consumers” but on the contrary additional legal assurances that the author gets rewarded for his / her work.

About Exceptions to Copyright

In order to accommodate the dissemination of “Knowledge” on the internet, the Commission proposes either the introduction of further exceptions to copyright or the widening of existing exceptions. We think that exceptions to copyright should remain exceptional. Restrictions should not be introduced to benefit economic interests, regardless of whether these are public or private. When for practical reasons exceptions appear necessary, we think that the legislator is better commanded to let stakeholders find practical solutions with negotiated agreements rather than by interfering in copyright law. Copyright exceptions which benefit one single user are to be avoided at all costs. Any legislation should be clearly phrased in order to avoid different interpretations.

The legislator must bear in mind that once exceptions are introduced in copyright law:

- 1) They are irreversible
- 2) They will hurt different copyright owners differently according to the type of works

The “Three Step Test” established by the Berne Convention and referred to in the 2001 Directive on Copyright in the Information Society should prevail.

The response of the Coordination of European Picture Agencies Press Stock Heritage will focus on three areas :

- 1) The exception for the benefit of libraries and archives**
- 2) Most notably the issue of Orphan Works**
- 3) A possible exception for user-created content**

General Issues

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?***
- (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?***

The wording of the questions (1) to (3), calling for “encouragements” or “guidelines” to implement “copyright exceptions” point to the preference of the Commission for copyright exceptions “in the light of evolving Internet technologies”. While it is true that internet technologies have drastically changed the way we exchange information and do business, and that “the prevalent economic and social expectations” have changed too, it is also true that the creator or the companies representing or working on behalf of the creators should not lose out in the process.

Any exception to copyright weakens copyright as a whole and exceptions should be kept to a minimum. In this sense, there should be no “encouragement” or “guidelines” from the Commission to implement copyright exceptions.

In the case it appears necessary to do so, any guideline for contractual arrangements between right holders and users should be worked out between trade associations, such as CEPIC, as they best know their markets.

With regards to questions (4) and (5), we appreciate the advantages and security of harmonised legislation in a globalized economy. The picture industry has welcomed the harmonisation of the terms of copyright, which was achieved with the 1993 Directive on the Terms of Copyright and Neighbouring Rights. What the Directive has not achieved, and the issue is still pending, is the harmonisation of the definition of what constitutes a “Work of Art”, so that the level of protection for photography still varies greatly from State to State within the European Union. We welcome the harmonisation efforts of the European Commission but that should not be at the expense of the copyright owner, and this is precisely what an additional exception to copyright would do. So far, our industry has dealt well with the implementation of the 2001 Information Society Directive. One reason could be that picture agencies work through a network of agents and are well in control of their national territory and copyright legislation.

The fields in which we would welcome an harmonisation effort are not dealt with by the Green Paper : definition of a “Work”, neighbouring rights attached to the image, privacy rights.

Exceptions for libraries and archives

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?

The 2001 Directive on the Information Society already includes an exception for libraries and archives in its article 5.2. (c) The Commission is not proposing any new exception but rather to widen the existing exceptions.

With regard to question (8) we understand the need if not the urge for libraries to make their content available on-line and appreciate the issues of format shifting and scanning issues. However, in general we think that the exceptions provided for in the Directive are sufficient to cover most cases or that agreements with copyright owners are possible in other cases.

Besides it is important to point out that book publishers do not own the rights to the content they wish to put on-line. There is a need for an agreement with the copyright owner in this area. This use is eventually a secondary use which needs to be negotiated when the agreement is made with the copyright owner, or at a later stage.

The library may also negotiate directly with a copyright owner organization. The fact that the library has access to books, newspapers and magazines does not necessarily mean the library has the right to copy and reuse the content on line.

From the point of view of pictures agencies, a further key issue is that public libraries while making their works available to the public do not disrupt market rules.

Picture libraries digitize and make works available, licensing their material to publishers. Licensing fees are calculated so that both the author, who created the work, and the library, which managed and marketed the work are compensated for their work and can continue to live from producing and marketing the creation.

On the other hand, public institutes enjoy public funding. By entering licensing schemes with publishers, they may distort market prices. While it is the task of public libraries to make works available to the public, off-line and on-line, the commercialisation of digital works by cultural institutions may constitute unfair competition.

CEPIC would like to stress again here that the legitimate interests of the creator should be paid due attention and that the copyright owner should get full revenue of his / her work and that this revenue should be settled according to real market prices.

ORPHAN WORKS

- (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?**

Orphan Works are defined as “Copyrighted works whose rights holders can not be identified or can be identified but can not be found.”

The first problem with this definition is that it does not make a distinction between categories of works. Millions of pictures are created every day so that hundreds are bound to become orphaned. This is not the case for films or for printed works or for that matter for any kind of other works.

A distinction should also be made for categories of authors. In practice there is a great difference in the treatment of authors who cannot be identified at all and those who can be identified but cannot be found. The first case is rare or covered by the legislation on “anonymous works”. The second case is more widespread. The author may be found with a minimum of research. If the author cannot be found, acceptable solutions exist in practice, at least as far as picture agencies are concerned. For example, based on an article of the German Civil Code, our member BVPA, German Association of Picture Agencies and Libraries with 100 members, advises members to keep the money on a special account for 30 years, leaving 30 years for the photographer to ask for refund. The material may be used without the user having to fear the payment of huge damages and the user being compensated if he/she shows up.

The introduction of an additional optional exception to copyright, an exception for orphan works, in the 2001 Directive on Copyright in the Information Society, as proposed by the Gowers Review published in the UK, would weaken copyright further, as argued before, but would also lead to a blanket solution which would not do justice to the differences outlined above.

A stand-alone instrument will meet the complexity of the orphan works issue better than a blanket exception. Based on the Commission Recommendation 2006/585/EC of 24 August 2006, this piece of legislation should:

- Include a definition of orphan works
- Differentiate between categories of works and authors
- Include harmonised and precise criteria of “Diligent Search”
- Include recommendations to avoid the creation of future orphan works (databases on authors, development of metadata)

In the digital world, keeping track of an image with the appropriate copyright information requires effort and resources. This is a field where CEPIC and its member associations may help. CEPIC is member of IPTC and as such has participated on work on metadata, which is the information attached to the work. The annual CEPIC Congress, which brings together once a year the entire spectrum of the image industry from more than 50 countries on five continents, has hosted the two first metadata conferences bringing all stakeholders together : picture agencies, photographers, the largest camera producers. CEPIC has also hosted MILE, a EU E-Content funded project, which has set up a database providing information on orphan works.

User-created content

Questions:

- (13) **Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?**
- (14) **Should an exception for user-created content be introduced into the Directive?**

In its Green Paper on Copyright in the Knowledge Economy the Commission refers to a study made by the OECD and defines “User Generated Content” 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.*” It also refers to a proposition of the Gowers Review recommending that an exception be created for “*creative, transformative or derivative works*”.

It should be noted that from a copyright and compensation point of view, it does matter whether the work is user-generated or generated by a professional user. Existing business models within the picture business will license both without making differences in the fees between professional and private photographers. Augenzeuge, a service provided by STERN in Germany for example, looks for an amateur or a semi-professional who identifies a good shot with a journalistic eye, a news photograph, before a professional photographer arrives. However, the photographers get a 50% share, and they licence the pictures for the normal price on the German market. The guideline is the “MFM” pricelist, published every year by the BVPA, the German association of picture agencies.

The issue of User-Generated Content is fairly new and the introduction of further exceptions to copyright, again weakening copyright protection, premature.

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