STAKEHOLDER CONSULTATION ON EUROPEAN COMMISSION GREEN PAPER ON COPYRIGHT IN THE KNOWLEDGE ECONOMY

This submission is made by the International Federation of Reproduction Rights Organisations (IFRRO). IFRRO represents and links Reproduction Rights Organisations (RROs) world-wide. RROs administer reproduction and other relevant rights, including certain forms of digital uses, in copyright text- and image-based works on behalf of publishers and authors, including visual artists. These rights are normally referred to as reprographic rights. Members of IFRRO include national RROs, and national and international associations of creators and publishers, such as the Federation of European Publishers (FEP), the European Writers Congress (EWC), European Visual Artists (EVA), the European Newspaper Publishers Association (ENPA), the European Federation of Magazine Publishers (FAEP), the International Association of Scientific, Technical and Medical Publishers (STM), and the International/European Federation of Journalists (EFJ) at European level.

GENERAL REMARKS
The creation of new copyright works is indispensible to any aspect of the knowledge economy, including education and research. So is access to text- and image-based copyright works. We fully agree with the Green Paper on page 4 when it states that “A high level of copyright protection is critical for intellectual creation. Copyright ensures the maintenance and development of creativity in the interest of authors, producers, consumers and the public at large.”

The current legislation on Community level offers sufficient flexibility and a workable equilibrium between the right of rightholders and the interest of users to address challenges posed by changing technological environments. Rather than assessing further normative initiatives on a European Commission (EC) level, focus needs to be on the application of the current ones and the deployment of solutions available. The EC should also develop communication campaigns to make users better aware of the value of copyright. Also, it
would be appropriate to consider ways to encourage national solutions concerning orphan works which could be mutually recognised, albeit not in the form of legislative measures.

The national legislative and political framework determines whether creative industries can develop. Within legislation, copyright is at the heart of and plays a vital role when it comes to authorship and publishing and the dissemination of knowledge. The equilibrium between the right of rightholders\(^1\) and user requirements is addressed both on a Community and the national level\(^2\) through a set of exclusive rights as set out in Articles 2-4 in the EC Directive 2001/29, combined with exceptions and limitations\(^3\) to these rights set out in Article 5 of the same Directive, some of the main ones against remuneration to rightholders. The three-step test, specified in Article 5.5 of Directive 2001/29, Article 9.2 of the Berne Convention and Article 13 of the TRIPS Agreement, is a common international standard and an established high-level principle, reflected also in national legislation, which provides a basis for exceptions and limitations. Its application by national legislatures and courts has shown, time and again, that its inherent flexibility allows for appropriate national solutions.

Copyright legislation remains, nonetheless, but one of several elements in the package that makes up the framework for the creative industries on a national basis. The mix of elements is carefully chosen to address national requirements and traditions. Flexibility can only be built on general international (including Community-wide), principles, which leaves implementation to the Member States and the parties concerned. More detailed norms on a Community level would not serve the purpose of improved access to copyright works in a changing technological and media environment. There are examples which clearly demonstrate that solutions are best found on a voluntary basis through addressing the specific needs of those concerned, on the basis of existing copyright legislative frameworks. One example is the set of tools developed jointly by rightholders and cultural institutions for the EC i2010 digital libraries initiatives\(^4\).

Legal access to copyright works and copyright clearance is offered by rightholders through combined individual and collective measures. Collective administration is the preferred solution when the rightholder cannot or does not want to operate directly in the market place him/herself. RROs complement authors’ and publishers’ own sales and licensing activities to offer comprehensive solutions to the user communities, including education, research, libraries, archives and visually impaired people. Solutions to enable and authorise appropriate access and use of copyright works already exist or have the basis to be created on a national level for the sectors and user groups addressed in the Green Paper. It is for the user community to make use of the opportunities available to them.

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\(^1\) On page 3, paragraph 4, the Green Paper does not mention the perspective of authors among those to be considered. We ask that this be rectified in further Community documents on Copyright in the Knowledge Economy.

\(^2\) We distance ourselves from the way the Green Paper sets out the equilibrium on page 4, paragraph 4. The focus should not be on rewards, but on rights, and suggest that the Commission sticks to the traditional way of describing it.

\(^3\) The title and Recitals 1, 4 and 31 set clearly out that the purpose of Directive 2001/29/EC was harmonisation of exceptions and limitations. We find the Green Paper’s statement of its purpose slightly biased and imprecise.

\(^4\) i2010 High Level Expert Group - Copyright Subgroup’s Final Report on Digital Preservation, Orphan Works and Out-of-Print Works, see http://ec.europa.eu/information_society/activities/digitallibraries/experts/hleg/meetings/index_en.htm. See also our comments to Questions 6-12, pages 3-5 of this submission.
GENERAL ISSUES (QUESTIONS 1-5)
The current Community legislation offers an adequate basis for parties concerned to work out contractual arrangements and, when appropriate, accompanying guidelines. Stakeholders have also shown that they can develop appropriate instruments themselves, when required. We request that the Commission finds means to encourage the use of these well crafted – and already existing – instruments, which clearly demonstrate that trust and understanding between stakeholders can bring partners to flexible solutions, with the ability to change over time. Focus should be on developing solutions at the national level. Member States can fully adapt framework conditions, including those embedded in intellectual property law, to the level of economic and cultural development in their countries. Mandatory exceptions risk, de facto, being counter-productive and reducing flexibility. The risk of this leading to some divergences between national solutions is by far counterbalanced by the considerable advantage that each country is able to take into account its own particular needs. An exhaustive list of limitations would, over time, prove to be inadequate.

EXCEPTION FOR LIBRARIES AND ARCHIVES (QUESTIONS 6-12)
Library uses may be agreed under current Community regulations (Questions 6 and 7)
The EC Directive 2001/29 offers to Member States the option of including some exceptions and limitations in favour of libraries and archives in their national legislation, which enables digitisation or other forms of reproduction of copyright works for preservation purposes and the making available of them on dedicated terminals on the premises. IFRRO recognises that libraries and archives would want to offer services beyond what they are allowed to do by law. This needs to be based on agreements with the rightholders and/or their representatives to ensure that such uses do not conflict with the normal exploitation of the work and the rightholders’ interest in exploiting the work commercially.

Publishers, other rightholders and RROs have developed, and continue developing, online business models to provide access to copyright works. To the extent that access is available in this way, there is no need or justification for extending existing permitted exceptions so as to make works accessible to the public online via libraries without the rightsholders’ prior authorisation, as it would discourage especially publishers from developing this market further. Libraries should therefore be referred to take up licences with rightholders and their representatives when they wish to exploit works in copyright beyond existing exceptions.

There are successful models for online accessibility to copyright works already offered by rightholders. In France, the National Library, and Syndicat National de l’Edition, the French publishers association, have jointly developed Gallica², a business model based on public-private partnership, which involves virtually all players in the market. It offers access to copyright works both in and out of print. In Denmark, the Danish Library Centre and the major Danish book publishing houses have jointly set up ebog.dk, an aggregator of e-books. Libreka⁶ offers another model, a platform for online access to books organised by the

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² http://gallica2.bnf.fr/
⁶ http://www.libreka.de/
German publishers through the Börsenverein des Deutschen Buchhandels, which has the technical potential to develop into an access portal to the broader public, including libraries. To these examples is to be added online access offered by the many rightholders directly themselves. Most of these business models are still being tested and it is precisely the current copyright regime that enables rightholders to take the financial risk to launch such new products. It is thus fundamental to emphasise that copyright is not an obstacle to the creation of digital libraries or to the free circulation of knowledge: it is the precondition for the expression of creativity online in a sustainable way. In this context we refer to and commend the submissions made by FEP and STM.

With the view to assisting in the facilitation of online accessibility to copyright works which are orphan or out of print, a set of tools, including two model licensing agreements for the digitisation and making available of out-of-print works, has been developed by the copyright subgroup of the i2010 High Level Expert Group (HLEG) of the EC i2010 digital libraries initiative. The model licensing agreements have been worked out by teams made up of representatives from the library, author, publisher and RRO communities, and have been endorsed by the archives and museums representatives in the copyright subgroup and the HLEG. They address the offering of access to out-of-print books in libraries over open networks and to copyright works by cultural institutions to authorised users in secure networks. Having been developed and agreed by the relevant stakeholders, these licensing schemes are in themselves successful schemes yet to be deployed.

Moreover, the parties concerned have agreed on a test-base with the view to start the deployment of contractual and other solutions developed for the digital libraries. The EC-sponsored project ARROW\(^7\) comprises national and university/research libraries, authors, publishers and RROs as well as technology developers, and aims, _inter alia_, at examining business models for accessibility to works in libraries and the deployment of solutions that have been developed. Although the contract has not yet been signed, the EC has, nonetheless, accepted 1 September 2008 as the project start-up date, with the launch of the two and a half years project scheduled this year. The Commission should encourage and recommend the use of these instruments already available, and is further requested to sustain this and other test-bases by, on the one hand, maintaining a stable and predictable legal framework, and, on the other hand, giving financial support to the digitisation process itself.

The collaborative efforts involving relevant stakeholders to develop solutions to fit the needs of stakeholders concerned, exemplified by the i2010 digital libraries solution and the ARROW project, show that voluntary solutions work. Individual, complemented by collective licences provide the best solutions to adjust to various legal traditions and regimes and to consumer needs. The Commission should facilitate the use of available tools, including contractual arrangements, and only use exceptions as a last resort. After all, the multiplier-effect is a key factor for implementation. New initiatives within the Seventh Framework Programme (FP7), like ARROW under _eContentplus_, are good examples of a

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\(^7\) Accessible Registries on Rights Information to Orphan Works, shortlisted under the European Commission’s _eContentplus_ Programme.
concrete beginning of deployment, aimed, *inter alia*, at enhancing rights management to facilitate accessibility to copyright works in libraries and other cultural institutions through voluntary collaborative stakeholder efforts.

**Format shifting, number of copies and mass digitisation (Questions 8-9)**
The Directive 2001/29 provides an acceptable framework for stakeholders to work out solutions on a voluntary basis to the questions of format shifting, the number of copies allowed and the scanning of the library’s collection. In this field, it is essential to distinguish between uses of legal deposit libraries and other libraries, as the former officially undertake preservation missions, which specifically need to be accommodated.

We refer in this context to the final report of the copyright subgroup of the HLEG\(^8\), which, *inter alia*, states that, subject to specific criteria being met, “rightholders should authorise certain institutions (namely: publicly accessible libraries, educational establishments, museums and archives) to make more than one copy (an open-ended number of copies), if this is necessary in order to ensure the preservation of the work. Successive copying should be allowed to take place if and when technological developments are seen to require such a measure, for preservation purposes only, subject to the safeguarding of the individual publication’s identity and integrity; preservation should be justified only for works that are no longer commercially available in any format. If the work is available on the market, there is no need to preserve it except within national libraries’ deposit schemes”.

Article 5.2(c) allows Member States to introduce an exception in their laws to enable defined cultural and educational establishments to digitise copyright works for preservation purposes. This does not allow the digitised works to be made accessible to users online. Member States may make use of the exception under Article 5.3(n) to allow the institutions to display the work in their premises. However, a broader and further access to the works is subject to authorisation by the rightholders and those who represent them. Libraries, rightholders and RROs need to devise comprehensive schemes, which address *inter alia* the issue of orphan works, so that online availability is achieved. A good example of such a scheme is the collaboration of the German Research Library, DFG, the German Literature Conference, DLK, the Börsenverein des Deutschen Buchhandels and the RROs VG WORT and VG Bild-Kunst in laying the foundations for a German digital library of the twentieth century.

**Enabling a European-wide solution for orphan works (Questions 10-12)**
The HLEG and its copyright subgroup for the i2010 digital libraries initiative developed a comprehensive set of tools to tackle the orphan works issue on a national basis: sector-specific guidelines on diligent search for rightholders to orphan works, combined with a Memorandum of Understanding signed by the main 27 stakeholder organisations committing themselves to observe them; criteria for orphan works databases; criteria for rights clearance centres to clear the right to digitise and to make available orphan works by cultural

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institutions. One of the key conditions is that the due diligent search must be conducted in the country of publication, when known or ascertainable.

Outside Europe, we wish to emphasize the solution for orphan works developed by Copyright Clearance Center (the private, non-profit RRO for the United States in membership of IFRRO). www.discoverworks.org is an online, Wikipedia-like platform that allows individuals and research institutions to search for and identify copyrighted materials by addressing challenges that arise from missing content metadata. “DiscoverWorks” is a global hub – unmediated by government or anyone else beyond minor administrative tasks – that allows people to freely exchange information on all kinds of copyrighted works, in any language, as part of a worldwide, online community. Users can post questions about copyrighted works and their provenance; rightholders can assert their copyright rights or their moral rights through simple announcements; and any interested person can post information about the copyright status (or any other matter of interest) of any work.

The HLEG did not deal comprehensively with the challenge of enabling a cross-border and European-wide solution. The copyright subgroup’s final report merely states that, in addition to common diligent search guidelines and criteria, it recommends that “Member States recognise the solutions that fulfil “diligent search” criteria in order to achieve the cross-border effect”\(^9\). This may prove not to be sufficient, as there are other elements in an orphan works solution, such as rights administration, how a digitised work may be used, how to tackle the issue of reappearing rightholders and how the national solution has come about. It may therefore be appropriate to examine whether to establish, at Community level, a set of criteria that national solutions shall comply with, in addition to observing the due diligent search criteria, in order to be recognisable in other Member States, and this needs to take into account the requirement that the diligent search is conducted, \textit{inter alia}, in the country of publication of the work.

**EXCEPTION FOR PEOPLE WITH A DISABILITY (QUESTIONS 13-18)**

While access to information and knowledge is clearly justified, as recognised by recital 43 of the 2001 Directive, the exceptions need to be supplemented by voluntary licensing schemes, including schemes administered by RROs. Collaboration between stakeholders, representatives of users and rightholders, can bring clear advantages in ensuring accessibility in constantly evolving usage scenarios. This is also the conclusion of a WIPO commissioned study published in February 2007\(^{10}\). Also, some agreements between publishers and organisations offering services to visually impaired persons (VIPs) already exist in a number of countries, for instance Denmark, the Netherlands and the UK. These agreements are concluded, in general, under the form of a licence between the publishers on behalf of their authors and the agencies.


The study, commissioned by WIPO, also points out the possible involvement of RROs and their networks in providing protected works to VIPs. Because they act as a one stop shop on their territories and because of their expertise and their privileged relationship with authors and publishers, RROs could play an important role in assisting rightholders in providing VIP accessibility to protected works. They can complement publishers’ and authors’ activities and act as intermediaries to facilitate the negotiations with users. Some RROs, like The Copyright Licensing Agency Ltd. (CLA) in the UK, already offer licensing solutions to VIP, complementing the exceptions existing in national copyright legislation. Hence, RROs could act on a national level, by providing licences to users for the benefit of VIPs. When exceptions for VIPs already exist in the national copyright legislation, licences will complement them, subject to appropriate mandates from rightholders. IFRRO has developed a standard mandate for alternative format licensing, granted to RROs from both authors and publishers, in order to administer advice.

DISSEMINATION FOR TEACHING AND RESEARCH (QUESTIONS 19-23)

Intellectual Property (IP) is indispensable to knowledge, education and research. Access to it is best provided through direct licensing by rightholders (publishers and authors) in combination with collective licensing, for instance through RROs. In addition, and not in substitution for the purchase of whole works in print and electronic form designed for education, collective management is generally the preferred solution when multiple users need to do multiple copying of excerpts from multiple works by multiple rightholders, especially requested by education, for instance as supplementary teaching material in various formats, as such a use would undermine the normal exploitation of these works.

RROs were therefore first set up by authors and publishers to assist them in responding to the needs of education and research, which remain their prime markets. The tariffs, the portion of the work that may be copied under the licence and other conditions, as well as which groups of users (for instance teachers, researchers, students, librarians, etc. at the institution); whether to exclude certain types of work, for instance some specific books especially created for teaching purposes or sheet music; which departments and, when applicable, which sub-sites or other institution, etc. to be covered by the licence, are negotiated with the user and set out in the agreement.

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11 As stated in the WIPO Report of February 2007: “Licensing, including collective licensing, may offer other benefits too, as such as secure access to publishers’ e-files, and legislative changes may be better if they support and encourage a trusted environment where licensing can be developed”, supra, page 11.

12 The UK’s Copyright (Visually Impaired Persons) Act of 2002 provides that where a licensing scheme exists, exceptions are inapplicable. The (collective) exception for the benefit of organisations acting collectively for the benefit of their members, i.e. for multiple copies, does not come into effect if, and to the extent that, any agreed licensing scheme exists. For literary works (operated by the Copyright Licensing Agency) such a scheme is in effect.

13 Where rightholders make excerpts commercially available, such as, for instance, individual articles or chapters of books, an article or chapter is to be regarded as the “work” and an excerpt would be limited to a non-essential part of an article or chapter.
Scientific and research communities already make extensive use of individual licensing schemes offered by publishers and collective schemes offered by RROs. (Question 19)

Educational establishments seeking to provide their students with material need seamless solutions. Rightholders, complemented by services offered by RROs, can tackle these requirements. There are licensing schemes in most Member States where RROs are established, adapted and especially suited for dealing with access to works for teaching and research purposes. There are Member States in which textbooks and academic books have been excluded from the scope of the exception, as they have been designed exclusively for educational purposes.

Successful examples of licensing schemes with publishers, enabling online use of works for teaching or research purposes, already exist. In respect of individual direct licensing schemes we refer to and commend the submissions made by EFJ, EVA, EWC, FEP, ENPA, FAEP and STM.

Collective licensing schemes offered by RROs generally include scanning of books, journals, magazines, etc. for the printing out of a hard copy or for the posting on password protected internal networks, accessible to authorised users specified in the licence. For instance, the Centre Français d’exploitation du droit de Copie (CFC) signed in 2006 an agreement with the Ministry of Education, which included digital uses of copyright material in the French schools, colleges, universities, etc., which also covers distance education, but excludes textbooks. Educational establishments are allowed to digitise portions of material for the posting on closed password protected internal networks and the printing out of a hard-copy. This licence follows largely the photocopy licence which it complements.

Moreover, CEDRO provides digital licensing to all those who want to make digital use of CEDRO’s repertoire. The licence permits scanning, temporal storage, viewing on the screen and e-mailing to persons authorised under the licence.

CLA provides full licensing coverage to the UK education sector, permitting also scanning and copying from material in electronic format. The Higher Education Institutions (HEI) are licenced for the use of copyright material on their Virtual Learning Environments (VLE), and the sources of the material may be either analogue or digital. Rightholders opt into the licensing scheme. Permission to store materials on the VLE is granted to authorised persons under the licence. Access to VLEs is by password, and is available to registered students of the HEI inside and outside the UK. The form of licence is a repertoire (blanket) licence, such that HEIs do not need to seek permission for individual acts of copying, but must report in full on their usage at specific intervals.

In summary, the main access channels to text- and image-based copyright works, which include book stores, subscriptions, and direct sales of books/journals/access/downloads from publishers and other rightholders or their representatives, are available in all EU Member States. RROs exist in virtually all Member States to offer licensing schemes to complement these channels, subject to the mandates granted to them by authors and publishers. Entering into individual and collective licensing schemes offered to them by
rightholders and by RROs is what provides the broadest and most adequate legal access to intellectual property to the teaching and research communities. Exceptions and limitations will always represent a partial solution only.

**Copying for “illustration for teaching” does normally not include teaching material**

IFRRO sees the exception in Article 5.3(a) as a narrow limitation to the exclusive rights, aimed at enabling exactly what it reads: to illustrate, which is far from being the same as producing teaching material. Teaching material in whatever format, including multiple copying for classroom use, cannot and is not destined to be made under this exception, as it would definitely undermine the normal exploitation of these works.

The Green Paper makes a reference to the Nordic Extended Collective Licence, which is specifically addressed in Recital 18 of the EC Directive 2001/29. The use of works for the purposes of illustration for teaching may, to a certain extent, be considered as covered by a licence under an extended collective licence system, thus reducing substantially the need for such an exception in the law. This is also reflected in the legislation of the Nordic countries which have not implemented any exception or only minor ones with reference to Article 5.3(a) of the EC Directive 2001/29, and such use is then not covered by the extended collective licence.

The Green Paper expresses the worry that extended collective licences represent a risk that “no agreement or a rather restrictive agreement will be reached”. Experience has proved otherwise. Agreements offered by Nordic RROs have successfully adapted to new technology to meet consumer requirements. Contrary to what is stated in the Green Paper, Copydan Writing has since long offered agreements that include scan and storage of works to Danish educational institutions on all levels.

**Focus should be on application under existing EC legislation (Questions 20-23)**

It follows from this that IFRRO sees no need for further specifications on an EC level on any of the issues reflected in questions 20 - 23 in the Green Paper. Various collaborative rightholder efforts offer access to copyright works through individual and collective administration. Individual licensing schemes, with collective licensing mechanisms to complement them, offer comprehensive solutions to consumers, invaluable also to teaching and research, and address, or have the potential to address, on a national level the issues discussed. The main concern is how to develop solutions applying the current EC legislation, to be worked out by stakeholders supported, when appropriate, by national legislation, rather than more or modified legislation on a Community level.

**USER-CREATED CONTENT (QUESTIONS 24-25)**

Copyright applies to a wide range of creative, intellectual, or artistic forms. User-created content (UCC) is also covered by the current copyright legislation, and does not require specific rules. For instance, Wikipedia, on a contractual basis, has developed a system for

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14 Page 17, paragraph 2.
the expression of ideas in an online encyclopedia, as the text and most of the images and other content in it is covered by the GNU Free Documentation Licence (GFDL). Contributions remain the property of their creators, whereas the GFDL licence ensures the content is freely distributable and reproducible. UCC needs to respect intellectual property rights.

We thank the European Commission for the opportunity to comment on the Green Paper on Copyright in the Knowledge Economy and appreciate your consideration of our views. If required, we will be pleased to provide further information or answer any questions about this submission.

Respectfully submitted,

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