

SCA Response to the EU Creative Content Online Consultation

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21 December 2009

Context

1. The Joint Information Systems Committee (JISC)¹ supports UK higher and further education by providing strategic guidance, advice and opportunities to use information and communication technologies to support teaching, learning, research and administration. The JISC is funded by the UK Higher and Further Education funding bodies.
2. JISC is committed to ensuring that access to JISC-funded resources and projects is free to the community and in accordance with internationally recognised open standards. To this end, it encourages the use of Open Access models and, where appropriate, Open Source solutions.
3. JISC is ultimately responsible for funding projects across the UK, which themselves make massive contributions to the UK's, EU's and International Knowledge Economy, as well as others which provide the systems, software and services to enable others to contribute extensively to the Knowledge Economy.
4. As well as working collaboratively with international funding bodies, such as the Surf Foundation² across the range of its activities, JISC also currently leads two international, corporate initiatives in support of JISC's strategic priorities:
 - i. The e-Framework³ is a joint initiative across JISC, Department for Education Science and Training (DEST) Australia, Ministry of Education, New Zealand and SURF Foundation, Netherlands. Focussing on service oriented approaches the initiative seeks to facilitate technical interoperability across education and research, through improved strategic planning and implementation processes.
 - ii. The Knowledge Exchange⁴ is a European initiative seeking to promote an 'open layer of scholarly and scientific content, to be freely available on the Internet'. Current membership of the Knowledge Exchange is Danish Electronic Research Library (DEFF), German Research Foundation (DFG) and SURF Foundation, Netherlands.
5. Currently, HEFCE (the UK's Higher Education Funding Council), through JISC and the HE Academy, is proposing to invest over 5 Million Pounds Sterling over the next 5 years in its open educational agenda to ensure that the UK can generate and make available high quality modern learning and teaching resources.
6. Future success for the EU will depend on the ready accessibility of scientific data, scholarly research results, accurate and up to date business information, sound recordings, multimedia files and literature. The full benefits of the digital society have not yet been realised in Europe. However, the full potential of developments in ICT to support teaching, learning, research and administration resulting from core Government and European investment is severely hindered by an archaic and out-of-step copyright system which lacks harmonization across Europe. It fails to address the dramatic change in ICT over the last twenty-five years and presents an unequal balance between users' interests and those of rights holders. Community copyright law has been drafted to protect the Union's traditional commercial copyright interests from the perceived threats of the digital format. This

¹ Further information about the JISC can be found at <http://www.jisc.ac.uk>

² <http://www.surf.nl/en/Pages/home.aspx>

³ <http://www.jisc.ac.uk/whatwedo/programmes/eframework.aspx>

⁴ <http://www.jisc.ac.uk/aboutus/partnerships/knowledgeexchange.aspx>

concern, whilst reasonable, has, however, restricted the ability of teachers, students and researchers to make effective use of the wealth of information that is potentially available to them. The inconsistency of the law, together with the highly protective tenor of the law, restricts bona fide research and teaching in the higher and further education sectors, and ultimately stems the flow of knowledge across the Single Market.

7. The real impact on colleges, universities and their funding bodies of the current legislative framework includes:
 - i. Substantially increasing the administrative burden in certain situations of rights administration and clearance as the impact and speed of ICT use and adoption in providing access increases
 - ii. Exposing the HE and FE sectors and their funding bodies to increased levels of risk and legal uncertainty
 - iii. Presenting unnecessary barriers in long term core funding investments, such as proposed open educational content activities, and investment in elearning, escience and research.
8. Indeed, the UK's public sector bodies make a substantial contribution to research and innovation. For example, the contribution of copyright, and in particular scholarly publications by UK researchers, is estimated in a recent report by the Research Information Network, to be 3.3% to the global research base⁵.
9. The JISC welcomes the opportunity to respond to the "*Creative content in a European digital single market: challenges for the future*" consultation, and in particular, to comment on possible EU actions for a single market for Creative Content Online. Our comments are summarised below.

Consumer Access: Extended Collective Licensing and Harmonised Exceptions

Orphan works (works for which the author is unknown or cannot be traced) present massive impediments to the use and reuse of content by public sector-funded bodies and users across the EU. In some case they can constitute up to 70% of cultural collections. In a recent survey of public sector bodies across the UK, carried out by the Strategic Content Alliance⁶ and the Collections Trust, 89% of the respondents indicated that these works affected their public service delivery. The quantity of orphan works, estimated to be on average 5-10% of all works (peaking at up to 50% of all works held by certain archives) across the UK's public sector represents a massive disruption to the flow of content⁷. These figures have been corroborated by comparative figures in the survey from across the EU, and will shortly be tested against an EU version of the survey which will be launched in the New Year.

These types of works, largely comprising of documentary photographs of low commercial value but extremely high academic and cultural value, were unlikely to have been created initially with any commercial intent. Orphan works not only place our public sector in a position of facing unacceptable levels of risks and/or using significant amounts of public money and publicly funded resources to try to trace rights holders, but also lock up access to this important silo of knowledge and memories. We believe that it is crucial that adequate solutions are sought to deal with these types of works, prevent further orphan works being created in the future and provide public sector bodies with limited liability in the event that rights holders come forward.

Due the types of works most likely to be orphans, the administrative burden in tracing rights holders and the likelihood of non legal remedies being sought by rights holders, should they come forward, we would support EBLIDA's position in our preference for an exception permitting the use of orphan works in certain circumstances.

⁵ See [http://www.rin.ac.uk/files/Income-&-cost-flows-report-\(summary\)-final.pdf](http://www.rin.ac.uk/files/Income-&-cost-flows-report-(summary)-final.pdf)

⁶ <http://www.jisc.ac.uk/whatwedo/themes/content/contentalliance.aspx>

⁷ <http://www.jisc.ac.uk/publications/documents/infromthecold.aspx>

We also broadly support any provisions regarding the governance and transparency of collective rights organisations to avoid the emergence of monopolies, and ensure that any rights holders are suitably reimbursed for the use of their works. Alternative forms of re-numeration are particularly welcome, as are considerations to the fact that many orphan works, by their nature, will never be claimed by their rights holders. In these instances, it is important that considerations are made about what happens to any unclaimed monies collected?

We are also broadly supportive of consultation's discussions regarding the possible harmonisation of the exceptions. Whilst the Info Soc Directive has clearly harmonised the rights of owners, it has failed to harmonise exceptions. As a result, this creates an unfair in-balance in contravention of the WIPO Copyright Treaty, whereby rights holders benefit from harmonised enforcement measures whilst transnational licensing and the ability to benefit from the exceptions is complex and unequal. This creates immense difficulties for research and teaching institutions operating under different conditions in different Member States, particularly those in which staff are working collaboratively. A single unified framework harmonising the exceptions to copyright, will inevitably support the creation and use of online content across EU in support of public interest activities, such as education, research and cultural activities.

Copyright law versus contract law

Copyright exceptions are designed to assist users make *bona fide* use of materials in a way that is helpful to society at large. Any attempt to impose by contract limits (e.g., numbers of copies, extent of copying) on this freedom should be resisted. The exceptions are designed to be flexible within the Berne three-step test to allow for the many ways people might make use of them, and to cater for unforeseen technical or social developments. JISC is very concerned that at present, UK law does not prevent a contract over-riding an exception to copyright. The Irish Copyright Act 2000 has a Clause 2(10) which ensures that no contract can over-ride an exception to copyright. Unless all Member States adopt a similar piece of legislation, there is a real risk that any substantive benefits resulting from the adoption of any measures to try and harmonise the copyright exceptions across the European member states will be negligible. This is particularly pertinent especially in view of the fact that frequently the organisation requesting a licence from a rights owner is in a weak position compared to the rights owner, who can adopt a "take it or leave it" approach to the licence it offers. Indeed, a recent survey⁸ carried out by the UK's British Library of 100 contracts comprising a randomly selected collection of agreements offered to the British Library revealed that over 90% undermined copyright law. This means that the British Library is not alone in paying more for rights it entitled to under the law, as well as resulting in unnecessary restrictions on researchers, students, lifelong learners and the public at large.

It should not be left to the interested parties, e.g., higher education libraries, to negotiate the ambit of exceptions to copyright, as the strength of the two parties is too unequal. In order to prevent rights owners from taking undue advantage of their monopoly, there should be a general provision in all Member States' legislation that any term in a licence agreement that purports to reduce or remove exceptions to copyright shall be null and void.

In summary

- i. Copyright exceptions must support the EC agenda to "*promote free movement of knowledge and innovation as a "fifth freedom" in the Single Market.*"⁹ Therefore they need to be harmonized to the very minimum that the EC states have already implemented; media and technology neutral
- ii. Contract law and technical protection measures (TPMs) must never over-ride the exceptions. Without this, the power in contractual relationships that vests with the

⁸ <http://www.bl.uk/ip/pdf/ipmatrix.pdf>

⁹ EC Commissioner Charlie McCreevy: Speech at Internal Market – Achievements and Challenges International Scientific Conference co-organised by the Commission Representation and the Faculty of International Affairs of the University of Economics, Bratislava, 29 November 2007

Licensor (i.e. the rights holders, such as Publishers) will ALWAYS mean that they retain the upper hand and can negate any exceptions

- iii. Copyright exceptions must support the WIPO Copyright Treaty copyright in *“Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”*¹⁰. This balance can more easily be achieved if the exceptions are relevant for the 21st Century, fit for purpose and easy to understand.

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¹⁰ http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P45_2379