Norsk Bibliotekforening

Commission of the European Communities
Brussels
Belgium
markt-d1@ec.europa.eu

Oslo, 27th November 2008

Re: COM (2008) 466/3

Green Paper on Copyright in the Knowledge Economy

Norwegian Library Association (NLA) has considered the Green Paper on Copyright in the Knowledge Economy and will support the position taken by EBLIDA (European Bureau of Library, Information and Documentation Associations) which is enclosed as an attachment to this letter.

Yours sincerely
Norwegian Library Association

Anne Hustad (sign.)
president

Tore Kr. Andersen (sign.)
secretary general

Frode Bakken (sign.)
chair Copyright Committee

Encl.

Postboks 6540 Etterstad
N-0606 Oslo
Telefon: 23 24 34 30
Telefax: 22 67 23 68
E-post: nbf@norskbibliotekforening.no

'Copyright in the Knowledge Economy'
Response from EBLIDA to the European Commission's Green Paper
[COM (2008) 466/3]

EBLIDA, the European Bureau of Library, Information and Documentation Associations, is an independent, non-profit umbrella organisation of national library, information, documentation and archive associations in Europe. Subjects on which EBLIDA concentrates are European information society issues, including copyright and licensing, culture and education and EU enlargement. We promote access to information in the digital age, and the role of archives and libraries in achieving this goal. We represent the interests of our members to the European institutions, such as the European Commission, European Parliament, and the Council of Europe.

Introduction

EBLIDA respects authors' rights as the basic pillar of the copyright régime. However, the exceptions to copyright are equally part of the fabric of the régime. Successive changes to copyright law have produced the current imbalance, by strengthening authors' rights without proportionate treatment of the exceptions. Authors' rights have lengthened in duration, and if they are supported by technical measures (as is often the case in the digital environment), they can operate without any effective exceptions at all. Not only can technical measures remove the availability of exceptions - they are themselves immune from practicable legal challenge.

At first sight the Information Society Directive[1] is reasonably accommodating to the exceptions to copyright. In quantity, the exceptions it provides are more generous than those implemented by most Member States. However, three major defects fundamentally weaken its carefully enumerated list.

First, its list of exceptions is exhaustive. It keeps the exceptions firmly in the twentieth century by limiting those available to provisions that have been found useful in the past. In a matter as important to Europe as the knowledge economy, the legislator has shown a failure of nerve, in this respect, that can only be damaging for the future.

Second, it struggles without success to allow the exceptions to survive when technical protection measures are imposed by right holders. No Member State has managed to prevent technical measures from abolishing the availability of exceptions. The complexity of article 6 (4) makes it unusable in practice. Thus, when the material is digital, mere technical devices can remove the exceptions; and with them, the much-needed balance in copyright law is likewise removed.

---

[1] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

Third, by default it allows contracts to eliminate the benefit of exceptions. Virtually all digital copyright material is supplied under contract. Unlike the Database Directive, the Information Society Directive does nothing to moderate contracts in order to protect the user. And it must be remembered that, since copyright is an exclusive right, the supplier has a strict monopoly. It follows that the supplier's contracts, if he so chooses, are non-negotiable. (This point is very important in any discussion of the Green Paper, which raises the possibility of various contractual or licensing innovations, apparently overlooking the right holder's unassailable position when proposing a contract.)

The Green Paper

The purpose of the Green Paper is to initiate a debate on how knowledge for research, science and education can best be disseminated in the online environment. It sets out a number of issues connected with the role of copyright.

The Green Paper consists of two parts:

- General issues regarding exceptions to exclusive rights introduced in the main piece of European copyright legislation – The Information Society Directive[2] and the Database Directive[3].

- Specific issues related to the exceptions and limitations which are most relevant for the dissemination of knowledge and whether these exceptions should evolve in the era of digital dissemination.

EBLIDA's approach in responding to the Green Paper has been guided by two principles:

The fundamental rights to expression and to receive information

The effective functioning of the Internal Market.

Both principles are essential in order to derive maximum advantage from the knowledge economy. A successful copyright régime must take due account of the rights of authors, but it must also properly accommodate other important participants in the knowledge economy - including secondary creators, educators, and researchers - who depend on the exceptions to copyright.

General issues

(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

No.

---

[2] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

[3] Directive 96/9/EC on the legal protection of databases

It is the responsibility of the legislator to provide a proper balance between authors' and other right holders' interests on the one side, and the societal interests in research, science and education on the other. If the balance is changed to the disadvantage of the societal interests the legislator should use the means available to him to introduce exceptions to authors' and other right holders' rights in order to restore the balance.

It cannot and should not be left to the interested parties, e.g. libraries, to negotiate licence agreements to compensate for legal exceptions. The strength of the parties involved is too unequal for this to be possible. The inequality of strength derives from the exclusive right conferred on the right holder by law. Only the right holder (never the user) may take legal action against other interested parties. By virtue of his exclusive right, the right holder's position, if he so wishes, is non-negotiable. On a matter as important as copyright exceptions, contractual arrangements between unequal parties have no place.

The publishing of scientific books and journals, be it in print or as databases, is an activity dominated by a handful of multinational publishers, who in reality can dictate to libraries the terms for using the material they publish. These terms frequently override exceptions and user privileges granted by law, e.g. reproductions for private or personal use.

The absolute monopoly power of the right holder is relatively new. In the world of print, right holders could not in practice prevent the making of legitimate copies, authorised by exceptions to copyright. This has changed. Right holders supply digital publications under contracts which give them the power to deny to the user the exceptions granted by statute.

In order to prevent right holders from unduly taking advantage of their monopoly there should be a general provision in all copyright legislation: any term of a licence agreement, which purports to contradict exceptions and limitations to copyright, should be null and void. For an example of such provision, see the Database Directive, Article 15.

This is probably the most helpful and uncontroversial reform available to the legislator in this context.

(2) Should there be encouragement, guidelines or model licences for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

It is primarily the responsibility of the legislator to provide the exceptions and limitations of authors and other right holder's rights in order to ensure that that the needs of society in respect to research, science and education are provided for. If the needs of society are not properly provided for the legislator has the necessary means to implement the corrections needed. The legislator should use these means. It is not to be expected that the parties involved can handle problems by private licence agreements, which it is the responsibility of the legislator to solve by implementing adequate legislation.

In addition to this, it should be mentioned that the "interested parties" are not always organised in a way that makes collective licence agreements possible. In

such circumstances, societal and user interests may only be taken care of by legislation.

This said, it should be added, that there might be special areas, where it may be easier to weigh the interests of the parties involved in the framework of an officially approved licence agreement rather than defining a legal exception to right holder's rights.

Any contractual arrangement between right holders and users, which can supplement copyright exceptions, will have to be a *collective* licence, and this leads to an issue pertaining to *orphan works*. A collecting society cannot indemnify users regarding works by rights holders who are not members of the society, and this means that such licences cannot provide libraries with the necessary legal certainty. *Extended collective licences* may be an option, as in the Nordic countries.

It has to be remembered that copyright governs the use of all recorded material. Its scope is universal. Guidelines and models are suitable only for carefully defined cases.

(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?

No.

The most serious flaw of the Information Society Directive is that only one of 21 exceptions is obligatory. This single obligatory exception is article 5(1) legalising cache copies. The Information Society Directive harmonises only certain aspects of copyright and related rights, namely the *rights* of authors and other rights holders: it does not harmonise the exceptions and limitations to these rights. The non-mandatory exceptions are not all implemented in Member States, and if implemented they are implemented differently. The Directive thus fails to open the Internal Market to copyright products, as was intended. The result is that trans-national licensing within the EU is difficult or impossible, leaving research and educational institutions with very different operating conditions. Yet research, and increasingly teaching, are often conducted across national boders.

It is also unfortunate that the list of non-mandatory exceptions is *exclusive*. No new exceptions may be added by Member States in national legislation. It is strange that the legislator could regard an exclusive list as adequate in the light of the evolving Internet technologies. The inadequacy of the Information Society Directive is illustrated by the fact that the Commission's *i2010 Digital Library Initiative* will probably falter for lack of proper exceptions to cope with the *Orphan Works* problem – unless new exceptions are introduced.

(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

Yes.

Within the European Union the terms for using copyright material are very different from one Member State to another, by reason of the fact that most exceptions are non-mandatory. They may not have been implemented in a particular Member State or they have been implemented differently in different Member States. This creates problems and legal uncertainty for everybody who works on a trans-national level.

Libraries have since 1979 adhered to the principle that the country of origin is responsible for the preservation of published literature. This principle, the so-called UAP principle (Universal Availability of Publications), was instituted by IFLA (International Federation of Library Associations) in 1979, and has since then been the guiding principle for the preservation and inter library lending policy of research libraries.[4]

This principle – and the present division of labour between research libraries – is endangered when Member States have very different regulations concerning the reproduction of copyright works. The difficulty arises largely through the different implementations of Article 5(2)(c).

(5) If so, which ones?

Article 5(5) of the Information Society Directive requires that the exceptions and limitations provided for shall comply with the three-step test, i.e. they shall be applied only

1 in certain special cases
2 which do not conflict with a normal exploitation of the work or other subject-matter and
3 do not unreasonably prejudice the legitimate interests of the right holder.

Under these circumstances it is difficult to see why all the exceptions should not be made obligatory.

It should be added, that Member States ought to be free to add exceptions, which comply with the three-step test. (This would make it possible to deal with the orphan works problem on national level.)

Specific issues: Exceptions

3.1. Exceptions for libraries and archives

(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

No.

[4] Report on the work of the Core Programme for Universal Availability of Publications and the Office for International Lending 1979 – 2002. http://www.ifla.org/VI/2/uapreport79-02.htm

In our answer here, the term ‘publishers’ will usually include other right holders, where appropriate.

Digitising library material is an expensive process, and libraries have no wish to digitise their collections themselves if publishers are providing digital versions. If digitisation can be done on a commercial basis this is much to be preferred. Libraries may then buy access via licence agreements. However, publishers only re-publish works if there is a commercial interest in doing so – if the anticipated revenue will cover the costs.

Publishers usually have no commercial interest in the mass digitisation of library holdings. For their mass digitisation plans, libraries choose collections the vast majority of which are either out of copyright, or are orphan works. In the digital age, such works can enjoy a wider circulation than merely being stored, and consulted on site, and libraries and archives see it as their duty to disseminate them.

It has to be remembered that libraries and archives often need to use their exceptions in respect of works where the availability of current publishers’ back-catalogues is irrelevant. Current publishers do not hold the key to all that libraries require. Many publishers have disappeared while copyright continues to subsist. Current publishers do not have the right to deal in such ‘orphan works’. And publishers, by definition, cannot provide access to unpublished works.

The fact that publishers will develop online access to their catalogues does not enable them to take over the obligations of libraries and archives when it comes to the preservation and management of the cultural heritage. Publishers are commercial production enterprises, and the production of books and journals – whether in digital or printed format - is a very different enterprise from preserving them for an indefinite posterity. It is difficult to see how such a task could be in their long term commercial interest. The preservation of a country’s cultural heritage as such is no profitable business. It requires institutions whose permanence is not questioned and which can work with a planning horizon that covers centuries. No private enterprise meets these criteria.

(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?

We give a qualified ‘yes’ in answer to this question, whose meaning is not entirely clear. As explained in answer to (6) licensing schemes involving publishers cannot meet all the needs of libraries and archives.

The Information Society Directive’s article 5(2)(c), if properly implemented, is sufficient to enable libraries and archives to make the reproductions necessary for the preservation of their collections, and combined with article 5(3)(n) they may also give patrons access to the preserved material within the premises of the institution, if this article is correctly implemented in national legislation.

But article 5(3)(n) enables publicly accessible libraries, educational establishments, museums and archives to give access to their digitised

collections only on their own site. This restriction is uncontroversial regarding commercially active works, if it is possible to get online access via normal commercial licence agreements with the publisher. However, many works are not commercially active during the whole term of the relevant rights – be it 70 years after the death of the author or 50 years after the recording of a performance. Most works are only commercially active for a few years, and only very few works are commercially active 50 years after publication.

If works are not available on commercial terms, one might imagine that libraries, educational establishments, museums and archives could enter into licensing schemes with the publishers and give online access to them. The problem here is that publishers often do not have the "digital" rights and are not able to enter into a licence agreement, and the authors may not be locatable, and even if they were, the transaction costs for individual rights clearance of mass digitisation projects would in most cases be prohibitive. In these cases collective licensing is a possible solution, though it will usually necessitate special provisions in domestic legislation. The Nordic countries use extended collective licensing schemes in these situations, and in Denmark, a new copyright provision, which will even facilitate these types of licences, has come into force in July of this year.

Archival materials, however, present difficulties for any licensing solution. The authors of private letters and diaries and business records never intended such works for publication, and authors' collecting societies cannot credibly purport to represent them.

(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;

If 'clarification' were to lead to further restriction, we answer 'no' to (a) and (b). It would help Member States if the following were made clear: institutions should be allowed to use those formats and make the number of reproductions necessary to serve the purpose in question. The decisive issue is not the number of formats or reproductions, but how many copies are made available to the public. Any limit on the number of shifts or copies would be counter-productive to the purpose of the exception, given that digital technology produces copies that need constant refreshment. But in respect of making 'preservation' copies available to the public, the institution should not be free to make more copies available than it had originals.

As to question c) it is not clear how it is to be understood. The Information Society Directive does not give the institutions *carte blance* for any kind of reproduction, but there is nothing in article 5(2)(c) to prevent a library from scanning (digitising) a collection, e.g. a collection of newspapers, for preservation purposes. The limitation is in making the digitised collections available to the public. There must be no restrictions in preserving the cultural heritage by whatever means are the most suitable for this purpose. As regards

communication to the public, it might be argued that it is not worthwhile for a library to digitise a collection of orphan works if the digital versions may be viewed only on-site.

(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?

It is much to be regretted that only a few publishing houses offer search facilities to search the contents of their publications. If the right holders are not doing it, libraries should be free to offer this service. The public would benefit immensely if it were possible for libraries to make the contents of books, journals and newspaper articles searchable. Google Book Search is a daily illustration of the value of such a function. It does not harm the right holders – on the contrary it is free advertising – and it increases the usefulness of the library materials.

(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?

The goal of the *Commission Recommendation 2006/585/EC of 24 August 2006* is to make the European cultural heritage online available to the public. The realisation of this goal requires mass digitisation. However, in the *"Final Report on Digital Preservation, Orphan Works and Out-of-Print Works"* and the *"Memorandum of Understanding on orphan works"* the question of mass digitisation is not addressed. Even within the limited scope of the Memorandum, the digitisation of individual works, it does *not* provide libraries with any legal certainty.

The Green Paper states, “Detailed solutions are to be developed at the national level. The majority of the Member States have not yet developed a regulatory approach with respect to the orphan works issue.”

It is difficult to see how this could be done, unless Member States have recourse to Recital 18 of the Information Society Directive and adopt extended collective licensing, like the Nordic countries. This in effect means statutory approval for a licence where the collecting society does not necessarily have the authority of the right holder. However many Member States reject this as a possible solution. If so, the only option left seems to be the introduction of a new exception to deal with the problem of orphan works. This may be necessary anyway in order to allow the copying and making available of works (notably unpublished works) for which no appropriate licensing body exits.

(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

The Information Society Directive has to be amended anyway, so it is natural to do it here.

(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?

A statutory instrument will probably be required, in order to make lawful the use in one Member State of a copy legitimately made in, and under the law of, another. This question is wider than the specific issue of orphan works, and is central to the effective development of the knowledge economy in the EU.

3.2. The exception for the benefit of people with a disability

(13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?

No.

The exception provided by Information Society Directive article 5(3)(b) ought to be obligatory. It would go some way to providing equality of access to information for people with disabilities. The European Commission, Council and Parliament must be in favour of such a change to help correct a discriminatory situation. Indeed Recital 43 of the Directive emphasises this.

(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?

No.

Choice of formats must be determined by the disabled person concerned in order to suit his or her disability. Cf. also Recital (43) of the Directive: "It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats."

(15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?

Yes.

The wording of Article 5(3)(b) does not limit the exception to visual and hearing disabilities.

(16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?

All disabilities which prevent the user from accessing the work.

(17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?

Yes.

Disabled people should not be required to pay remuneration to right holders for converting a work into an accessible format. Disabled people will have to bear the expense (equipment, etc.) of shifting formats. An additional payment to right holders would mean that right holders (who would suffer no detriment from a controlled format-shift for this specific purpose) would derive a financial benefit from the disability suffered by others. This would be unethical.

(18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?

Yes.

We propose that article 5(3)(b) of the Information Society Directive be made obligatory, with a corresponding exception in favour of people with a disability that would apply to both original and sui generis databases.

3.3. Dissemination of works for teaching and research purposes

(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

For most purposes, except the actual supply of digital materal, licences should be unnecessary: the Information Society Directive's article 5(3)(a) should be sufficient with its provision for exceptions "for the sole purpose of illustration for teaching or scientific research…".

A typical European university already signs a hundred or more licences governing the use of digital research material supplied by various publishers. The licences invariably have different provisions about what categories of people may have access to the material, whether, and how much, they may print off from the digital original, and whether, and how much, digital material the researchers may store on their own individual computers. It is complex, bureaucratic and time-consuming to examine these licences to see what is permitted in each case. Existing licensing schemes are in that sense unsuccessful.

It would be far more efficient for the law to provide that such licences may not interfere with the statutory exceptions in force in accordance with the Directive. This would give certainty to teachers and researchers regarding what they are permitted to do in every case.

Some existing licensing schemes allow copying by researchers and students of digitally-published original material. The Copyright Licensing Agency in the UK has such a licence for UK universities. Such (secondary) licences are, again, unsuccessful, because of the uncertainty about when they might be useful - the primary licence, governing the supply of the material, may often allow the use permitted by the secondary licence. Thus the university has no need, in many cases, to pay twice by buying two licences for the same purposes.

(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Yes.

There is a market for higher education within the EU and also in the USA, and research institutions cooperate on a trans-national level. If European educational and research institutions are to operate in this market, it is important that exceptions concerning teaching and research take this into account. These rules ought to be harmonised. For distance learning to function optimally it is necessary that learning material can be accessed across borders. The principle we have described in our answer to question 12 is important here.

In this connection it may be mentioned that inter library document delivery of journal articles in electronic formats should be allowed. Recital 40 of the Information Society Directive requires elaborate and inefficient working by libraries in order to assist researchers in this way.

(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Yes.

The modern office is digital. The office is not paperless, but the documents used have a digital origin. Documents come to the office via e-mail, via the electronic resources of the library, and from other resources accessed via the Internet. If – quite exceptionally – documents come as letters or printed texts, they are scanned and archived in the computer as electronic files. The digital office does not only exist in firms or institutions with substantial IT resources. It is a completely ordinary working place. Basically is consists only of a computer with an Internet connection.

In short: the office is where the computer is. You may work in the building where your firm or institution is located, in the aeroplane on your way to a meeting or conference, or at home. This holds for the administrator, for the researcher, for the student – and by and large it even holds true for children in primary schools.

This is the reality – within the EU and more or less all over the world – whether current legislation supports it or not. Legislators should face this fact, and adjust the legislation accordingly.

(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

No.

The length of the excerpts from works which can be reproduced or made available for teaching and research purposes should depend on the vulnerability of the material in question, and the limits in practice of the proposed use. Since the circumstances of use are so varied, it would be impossible to frame reasonable minimum limits.

(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Yes.

The teaching at higher education institutions is based on research. In the digital age it is already possible for students to make good use of material formerly regarded as research material. Therefore the exception must cover both teaching and research in order to make sense.

3.4. User-created content

(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

No.

The purpose of copyright legislation is to regulate copyright-relevant actions, in particular the act of copying works in which copyright subsists. Copyright subsists in user-created content just as it does in commercially-produced content; in a handwritten letter just as in a printed book or digital journal. A supposed division between 'real' content and 'user-created' content, each with separate copyright rules, would be unsustainable.

(25) Should an exception for user-created content be introduced into the Directive?

No.

An exception for user-created content would expose ordinary people to the appropriation of their creative work by others. At the same time the apparent increase in cases of academic plagiarism also seems to provide a good reason for not facilitating the re-use of another author's works. An exception for user-created content would blur existing academic standards.

While it is not entirely clear what such an exception might provide, we reaffirm the principle mentioned in our answer to question 24 - a supposed division between 'real' content and 'user-created' content, each with separate copyright rules, would be unsustainable.