

GOWERS REVIEW OF INTELLECTUAL PROPERTY**COVER SHEET FOR RESPONSES**

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Please indicate below which issues are covered by your response. Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

General Questions covered:	
How IP is awarded	Y
How IP is used	Y
How IP is licensed and exchanged	Y
How IP is challenged and enforced	Y

Specific Issues covered:	
Current term of protection on sound recordings and performers' rights	Y
Copyright exceptions – fair use and fair dealing	Y
Copyright – digital rights management	Y
Copyright – orphan works	Y
Copyright – licensing of public performances	N
Copyright – designated archive status	
Patents – utility patents	N
Pharmaceutical Supplementary Protection Certificates (SPCs)	N
Trade Marks – international issues	Y
Designs – registered designs and unregistered design rights	N
Legal sanctions on IP infringement	Y
Parallel Imports / International Exhaustion	Y
Coherence between competition policy and IP policy	Y

Have you raised any other issues in your response?

Y

Details of accompanying documents

Appendix A: Copyright – Digital Rights Management

Appendix B: Parallel Imports

Appendix C: Creative Commons

Appendix D: Copyright Infringement and Enforcement

- Please TICK BOX if you DO NOT want your response posted on the Gowers Review website.**

GOWERS REVIEW OF INTELLECTUAL PROPERTY

Submission by the Publishers Association

The Publishers Association (PA) is the leading trade organisation serving book, journal and electronic publishers in the UK.

This area of British publishing has an estimated total turnover of £5.8 billion (contributing 0.5% of UK's GDP). It covers a broad sectoral constituency:

Scholarly Journals:

Primary research outputs and monographs mainly in the fields of Scientific, Technical, Medical, Biomedical, Agricultural, Environmental and Social Sciences aimed at an audience of scholars and researchers, and delivered mainly through institutions.

Academic and Professional:

Books, journals, specific reference books, including electronic publications to the academic, HE and professional markets.

Educational:

Text books and learning resources, including electronic materials for primary, secondary and further education. (English Language Teaching (ELT) materials – for export).

Trade Publishing:

Adult fiction and non fiction (specialist and general) Children's books, general reference, including e-books, audio-books and 'audible' downloads.

In addition to the domestic UK market, all four sectors are significant exporters with exports valued at approximately £2.6 billion.

All are making major investments in digital development and publishing is one of the foremost service industries in the UK knowledge economy.

The success and continuing development of all four sectors is underpinned by the economic principles of copyright which have remained valid over time, and as the applied rules of copyright have evolved to match their intended purpose. Today they are being progressively interpreted to adapt to the electronic infrastructure which reinforces the performance of the industry in delivering an increasing range of products to a widening market place.

Scholarly Journals

Scholarly journal publishing, a business in which the UK excels, represents the front line of digital publishing in the textual world and the most advanced case study in migration from print-based to electronic delivery. The global industry generating at least \$5bn in revenues, of which around 30% derive from UK-based publishers, now offers over 90% of its products in digital form.

Publishers acquire their IPR by encouraging submissions to their journals, which are then filtered and peer reviewed by editorial boards. Traditionally research authors have transferred copyright in their work to publishers, entrusting them with the task of communicating their outputs to their peer group. In the digital world however, it is becoming more common for authors to license the publication right to publishers, while retaining certain uses such as the right to self-archive their material on institutional or subject repositories after a time lag designed not to undermine the market for the primary journal. Continuing heavy investment in Internet technology in combination with business model innovation is making research outputs ever more widely available to global peer groups, and downloads in the billions are rising impressively year-on-year.

This has been achieved without imposing fresh costs onto the global research academy and with very little recourse to technical protection measures. The industry has achieved significant enhancements to its value-added proposition by effective exploitation of Internet technology within the security of the copyright system. Publishers have built the partnerships necessary to achieve this through their own initiatives. CrossRef for example operates a cross-publisher citation linking system that allows a researcher to click on a reference citation on one publisher's platform and link directly to the cited content on another publisher's platform, underpinned by a common system of identifiers – DOIs – also developed by publishers and librarians working in partnership.

As the number of the digital resources in library collections has grown, a system is needed to manage the widely differing licence terms applied to resources by their creators and publishers. The ability to express these terms in a standard XML format, link them to digital resources and communicate them to users has become a pressing need with benefits to both publishers and libraries. Another partnership organisation – EditEUR, set up to co-ordinate the development, promotion and implementation of electronic commerce in the book and serials sectors through management of digital rights - is developing just such a standard, ONIX for Licensing Terms, building on the work of the Digital Libraries Federation's [Electronic Resource Management Initiative \(ERMI\)](#) and earlier joint work by EditEUR and NISO on [ONIX for Serials](#). Formats have been or are being defined and piloted for matters such as communicating serials product catalogue information, details of subscriptions held by specified institutions, holdings details from publication access management systems to user libraries, and details of the content of a serials release, or indeed of any selected set of journal issues or articles. Each of these is supported by an outline specification, XML schema, and full HTML documentation.

Publishers have also collaborated with UN agencies to enable access to primary biomedical, agricultural, and environmental research outputs by key institutions in developing countries for little or no cost. Access at article level is being enhanced by licensing electronic document delivery services (such as The British Library). Other vital collaborations involving publishers include a secure and sustainable e-legal preservation system and community initiatives to preserve scholarly content such as CLOCKSS <http://www.lockss.org/clockss>. Many publishers of important journals have invested in digitising their entire catalogue back to the first issue and making this freely available or on advantageous terms. Accessibility issues are also starting to be addressed collaboratively.

Academic and Educational

Transition to electronic delivery in the market for academic and educational books is not so far advanced. Delivery platforms, business models and channels to market are not yet mature, and the market is characterized by numerous experimental offers based on non-exclusive arrangements via intermediaries (such as library suppliers) and aggregators (portals and e-libraries). Publishers acquire their IPR largely through author submissions. The market has not reached the tipping point achieved by scholarly journals, but incentives such as the need to find an economic model for publication of scholarly monographs, to extend access beyond library holdings, to reduce library infrastructure costs, and to achieve the searchability and linking functionality now accepted as the norm in the journals market will continue to drive collaborative work on standards and experiments by publishers to extend access. Exploitation of Print on Demand technology and the ability to manage access deriving from developments in search engine technology also offer a practical incentive to publishers to build their own digital warehouses.

The e-learning market is at an even earlier stage of experimentation. Government investment in infrastructure and connectivity has created the means for distributing and sharing digital teaching and learning material, but work on standards, channels, e-commerce mechanisms, and the digital management of rights is not so far advanced as in the scholarly world. Significant public sector interventions are also evident in this sector, from Becta, the JISC and the BBC. Textbook material for higher education is starting to be offered in digital form, but there remain significant barriers to progress through the lack of a viable business model capable of accessing institutional funding.

The schools market in the UK for learning materials is in the region of £300m, of which around 30% is invested in digital material. The market is not about digitisation of print originals, but effective use of ICT through innovation. It is thought that only around 20% of UK schools are using ICT effectively in an 'embedded' way. Teacher confidence and professional development will determine the rate of transition. Again, technical protection measures are not common in the schools market. Publishers acquire their IPR very largely through direct commissions.

The UK system for voluntary collective licensing of reprography is probably the most efficient and effective in Europe. The whole system of education and research has been licensed for onward use for non-commercial purposes of selections from copyright material for over fifteen years. 'RRO UK' (comprising CLA, PLS and ALCS) represents a powerful and flexible mechanism capable of extension into licensing digital material for uses beyond those covered by the publishers' primary licences, and discussions with rightsholders are well advanced to exploit this capability. RRO UK operates on the basis of a non-exclusive mandate from rightsholders to issue licences. Access to repertoire is extended by a network of bilateral agreements between RROs.

Trade Publishing

General trade publishing is also responding to the opportunities which the potential exploitation of a variety of new digital technologies progressively allows.

Digital change has been slower to affect conventional trade publishing because the basic product – the book – remains in high demand and 'works' best in the market place. The hardware which will allow e-books to compete has not yet been perfected, and the current cumbersome e-book readers available do not yet offer any significant improvements over the conventional book itself. However, the technology is coming, and the changes that it will bring to products, distribution and rights structures are being anticipated. Core investment in digital technology by publishers will enable an increasing range of products and methods of delivery to expand the scope of traditional publishing – whether e-books, e-books with enriched texts, browsing services extracts, pay per view downloads, audible materials and other products, capable of use and storage across a variety of interoperable platforms and electronic devices.

In the copyright field, this has prompted publishers to revise standard rights definitions to suit the products of the future and the changed business models they will serve. In the UK, publishers have chosen to effect these changes through consultation with authors and authors' agents. Electronic Rights will rely on shared language in publisher–author contracts, with new, agreed definitions relating to electronic/digital content, reflecting the changing publishing landscapes for use across the author and publisher communities. This will involve a significant simplification of the conventional identification of rights consistent with the pragmatic view that in relation to the treatment of digital exploitation, in terms of royalties and reward schemes applicable to an increasing range of products, this requires to be approached on an 'e-tail' basis, - that is in terms of route to market rather as hitherto, an issue of 'subsidiary rights'.

A voluntary Guideline, acceptable to authors and publishers is planned in June 2006.

A technology that is already having a big influence on academic publishing, and which will impact increasingly on trade publishers as the bulk of their content also becomes digitised, is Print on Demand. Effectively, no book will in future go 'out of print', changing what is at the moment a 'front-list' driven business, and radically increasing the value of 'back lists' (the long tail for which publishing has sometimes been criticised). Simultaneously, investment in electronic repositories, allowing electronic delivery to a paper-bound book or to an e-book download, will replace the need for physical warehouses and retention of stock.

In terms of contracts, this is raising the issue of the 'Reversion' of authors' rights, hitherto based on conventional definitions of what is deemed to be 'out of print', and this again will affect the contractual and commercial relationship between authors and publishers and the rights terms to be applied.

The technology which will have the greatest effect on how publishers market and sell to consumers, is the rapid development of 'Search Engines'. While some coverage has been given to copyright issues (in the US, not Europe) arising out of the operations of Google in relation to scanning publishers content, this has tended to be a distraction from the better exploitation of the technology and is not an integral problem or deterrent to investment (Google's competitors have avoided the issue).

In the UK, publishers are responding to the challenge by investing in digitisation and electronic warehouses, thus retaining control of their intellectual property, and negotiating licences with the major search engines to 'crawl' them and offer the widest repertoire to the market. This in turn is prompting a requirement for an interoperable standard to cover the licensing expression language that will be needed (probably also ONIX based – see Scholarly Journals above).

The combination of publisher-controlled electronic repositories together with search engine technology is expected to open further windows into the fast developing on-line 'community' and will offer new ways of marketing, customising the product, and interacting with consumers.

The Importance of Copyright

The centrality of Copyright and the principles upon which it is based has been critical to the growth of the book and information industries up until now, and will provide that important element of certainty which will underpin the essential investment in the digital development to guarantee their future growth and competitiveness.

Throughout the evolution of Copyright those economic principles have remained consistently valid. Copyright provides the most practical legal and market framework for trading in works of the mind. The system provides at the same time protection and fair reward to the author/creator (encouraging him/her to create/produce more), with safeguard and therefore incentive to the publisher

who accepts the risk and cost of publishing or exploiting the author's work, and invests in the production, market and distribution structures.

The copyright structure has always involved a balance or compromise between the legitimate interests of rightsholders and the social and economic need to give reasonable access to the works in question. Publishers manage content commercially in ways intended to provide access to the widest possible customer base, but are also required to make that material available in accordance with the 'fair dealing' criteria that apply in the UK as well as other exceptions proscribed by law. These requirements apply both to the copyright treatment of printed works and the management of digital/electronic content.

It is important therefore that copyright practice should itself adapt to an electronic infrastructure which can reinforce the economic and social balance between copyright owners and consumer access. The legal framework, (updated through recent European legislation) is reasonably sound and robust. The process of adjustment, whether to correct omissions, or where electronic business models do not precisely replicate the physical print procedures that preceded them, can be approached in a practical way through appropriate licences which cater for the circumstances encountered. These have the benefit of themselves being dependent upon negotiation, and for an industry which has been accustomed to serve a trusted customer base and is looking to continue with compliance models that have proved themselves to be efficient, consultation and transactional licences have been a pragmatic and logical way to proceed.

The rapid development of technology and electronic delivery platforms have had the unwanted effect of raising the level of damage from piracy, and publishers have a legitimate fear of 'massive leaks' of materials which would cannibalise what is a highly competitive market. However, the fear of piracy or illegal copying has not, to our knowledge, prohibited investment in the new technologies. Rather the direction has been to devise business models which provide practical control of copyrighted files (eg electronic repositories) and their licensed use, and then separately devise anti-piracy strategies and measures designed to keep pace with the parallel development of piracy techniques (see answers on Challenge and Enforcement, Question 11, Legal Sanctions below and Appendix D).

Similarly, when developing electronic content management systems (see response to Question on Digital Rights Management and Appendix A) the emphasis has been on creating an ontology that will support a transactional or enabling procedure, covering usage rights, payment terms and licence permissions. For the publishing sector DRM's as commonly described, are ultimately less useful as a copyright infringement tool as their primary function, than as what is ultimately a collaborative technology which can facilitate new business models – and hence publisher support for open architecture in terms of electronic rights expression standards and the interoperability of machine platforms.

E-Content, across the whole spectrum of publishing, offers fresh opportunities for delivery to a wider customer base, allowing consumers to access it wherever and whenever they want in a market place which provides for competition and payment. To be delivered effectively, electronic content requires electronic management of delivery, trade terms etc, and in parallel with this the copyright management also requires a technical infrastructure to accommodate the digital environment. The key, for publishing as a leading IP service industry is to ensure that the transactional business models and copyright process are mutually supportive.

The remainder of our submission will respond to the detailed questions raised, where appropriate. Certain topics are dealt with separately in Appendices, with cross-references as necessary.

GENERAL QUESTIONS

1. HOW IP IS AWARDED

General comments

Much of this section is not applicable to copyright, as opposed to other IP rights which may depend upon registration or other formalities. It is a fundamental principle of the international copyright system under the Berne Convention, to which the UK is a party, that copyright works should be protected from the moment of creation, and that no national formalities or costs (such as registration) should be imposed or required. This has remained a principle of UK copyright law since, although it has been suggested that in some allied areas, eg moral rights, the requirement for the right of paternity to be "asserted" is inconsistent with this.

In general, the PA feels that obtaining copyright is not a problem for its members, although most publishers do not 'own' copyright itself – with the exception of some journal or specialist publishers (eg of reference or multi-volume works) this usually remains the property of the author, who then grants a publishing licence (often a sole and exclusive licence) to the publisher on which an international publishing operation may be based. This can include a network of multiple sub-licences, covering different territories, languages, formats or media. None of this would happen without the original copyright, but the copyright itself as IP is not usually bought or sold unless whole companies or literary estates are being acquired.

The formalities and costs of obtaining Trade Marks are often underestimated, but patents are not usually an issue for publishers.

The comments which follow will therefore focus primarily on any copyright implications.

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

Most publishers understand the mechanics of obtaining the rights they need, via legally enforceable contracts with their authors. These may take the form of assignments of the entire copyright, or (more commonly) sole and exclusive publishing licences, usually for the full term of copyright. In both cases, the legal formalities are very simple – under the Copyright, Designs and Patents Act 1988 the only legal requirements are that such contracts should be in writing, and signed by the copyright owner.

However, the increasingly important distinctions between the UK and EU standards for ‘originality’ – an essential element of copyright protection – often confuse publishers and users alike. Traditionally, the UK standard was relatively straightforward, requiring little more than independent effort (previously called “sweat of the brow” in the engaging US phrase), but the current EU standard requires positive evidence of the creativity of an author. In some fields, such as Database Right, dealing with valuable but relatively mundane material, it is proving difficult to achieve the higher EU standard, so many valuable UK works – deemed not original enough for EU copyright protection – are reliant upon sui generis rights such as Database Right, which give lesser statutory protection (see 1(i) below). Following a recent, particularly unhelpful decision by the European Court of Justice in the William Hill case, even specialist lawyers are confused.

In general, there is a constant need to remind publishers, particularly SME members, of the value of IP and of the need to confirm such grants clearly. There is an equal challenge in maintaining education and awareness of IP generally amongst users.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

As said above, this is largely a matter of education and awareness. The PA and other publishing associations arrange regular seminars and briefing sessions on topical issues, including IP, partly to obtain guidance and feedback from members but primarily to provide education and awareness. The role of collecting societies is important as well eg, in UK publishing, the Copyright Licensing Agency, and internationally the various reprographic rights organizations (RROs) in different territories worldwide – in some countries where piracy is a major problem, an effective local RRO can be a major factor in educating the public about the importance of IP generally, and facilitating licences for those who need them.

International enforcement of IP is a major problem for UK publishers, especially given the broad reach, and popularity, of the English language for cultural/historical reasons and increasingly resulting from internet use. In many

countries where piracy is a problem, eg (currently) China, Turkey, India and Pakistan, the costs of effective enforcement of members' IP rights can only be found by substantial investment in local lawyers, investigators and long-running and time-consuming legal actions and prosecutions. Some major members can fund such actions individually but many PA members are dependent on industry initiatives funded by collective means. The PA is very active in such initiatives, eg in India where it has had a major anti-piracy campaign running for many years, but this sort of necessary defence of IP rights in major foreign markets is often a long haul. UK government departments such as DTI are helpful when they can be, and our relationship with them is positive and close, but generally we need as much active help from the UK government as possible to help with defence, education and awareness of IP internationally. It is often remarked on by visiting publishers in piracy hot-spots how relatively dynamic and commercially-minded US embassies and consulates abroad are in comparison with their UK counterparts. An increased focus from the centre could easily transform this.

In the UK, the Patent Office, DTI and DCMS all have initiatives to help improve education and understanding about IP, in which the PA is an active participant. Lord Sainsbury's Creative Industries Forum has also helped raise the profile of this issue, and inter-departmental involvement. We feel strongly that, although all this is admirable, we need much more of this kind of encouragement and awareness-raising.

(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?

Not as such in copyright, but the scale of costs in obtaining Trade Mark protection for suitable marks is not often fully appreciated by publishers, especially SMEs, and many titles, names, brands and logos in publishing are inadequately protected as a result

The copyright system is better understood here, but many of these marks are not original enough to be eligible for full copyright protection (where they may be eligible for registration as a Trade Mark – at a price).

(d) How do these costs compare internationally in your organisation's experience?

See 4(b) and (h), and General Introduction to 4

(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?

N/A to copyright.

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?

Lack of trust is often an issue internationally, where weak or inadequately enforced copyright laws in other countries threaten key export markets, or even in some cases condone piracy (eg where government agencies themselves copy without consent, contrary to Berne conditions). In Europe, the recent Enforcement Directive (and possible follow-up legislation on criminal remedies) is going some way to harmonizing legal provisions, and public understanding, and internationally the TRIPS treaty is proving effective in encouraging Berne member states to follow common principles, such as lack of unreasonable cost, delay or formality, and truly deterrent penalties.

However, in many countries, despite the above, it is often a matter of timing, in getting the legitimate edition first into the market, often at a loss-leading local price which will provide a disincentive to local pirates. Even so, a pirate with no author to pay or significant costs or overheads except the printer's bill is in a strong position to compete, and cheap books are popular.

(g) Are there specific barriers to obtaining IP rights in your sector?

Not as such. A wide range of collective licences are available at reasonable prices (adjudicated from time to time by the Copyright Tribunal) from the Copyright Licensing Agency, including for Visually Impaired People (under the Copyright (Visually Impaired Persons) Act 2002), while individual licences or permissions are obtainable at market rates directly from rightsholders (usually the publisher acting as agent for the author). Rightsholders do, of course, have the right to say "no", and there may be good reasons for denying permission to copy or use a copyright work (eg protection of the author's moral rights), but in general publishers are there to publish and exploit the work on behalf of authors, so granting copyright permissions and subsidiary rights is a regular feature of a publisher's business, and often a significant source of revenue.

Additionally, competition law rightly provides a counter-balance here if there is any suggestion of unfair refusal to license potential users, or abusing a dominant market position by demanding unreasonably high prices or imposing restrictive conditions. We feel this balance in the UK is broadly right. In the online music sphere, the European Commission has recently issued a Recommendation on cross-border licensing issues, recommending a liberalization of collective licensing for online music, and although general conclusions which may be applicable to the music industry may not be suitable for the publishing trade there is much in the Recommendation which makes good sense, including good governance, transparency and best practice.

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals?

The cost of obtaining permissions, or suitable licences, may be an issue for some publisher SMEs, particularly if they are embarking on a major collective work or anthology and have underestimated the scale of fees which may be payable. The PA and other associations regularly advise members to budget well in advance for such costs, and allow time – if some costs exceed budget limits – to omit or replace the extracts concerned. This may particularly be an issue in new media, where permissions may need to be negotiated well in advance, with less industry experience on which to rely.

One factor which occasionally emerges is the issue of orphan works - what to do if, despite the best efforts of the potential user or licensee, the rightsholder simply cannot be found, from whom to seek permission? Strictly speaking, the copyright position is that substantial parts of the work cannot be copied (unless fair dealing), but this means that many copyright works are left unused and potential revenue for the rightsowner (if he or she ever appears) is lost. A number of countries are exploring potential solutions here. There is recent legislation in Canada, and suggested legislation in the USA which would at least place a cap on any damages for copyright infringement which may be payable if and when a rightsowner appears, and providing both (a) for sufficient acknowledgment and (b) for a central fund for licence fee equivalents if necessary. This strikes many in the UK publishing trade as sensible (given that publishers are users here as well as rightsowners, and SME publishers often have to waste valuable administrative costs in unsuccessfully tracing rightsowners) and we are discussing whether similar rules, perhaps via collective licensing or a Code of Practice, may be workable in the UK. We are ultimately going to need some measure of international consistency in all this, but we regard it as essential that the potential user should be required to provide evidence of serious, real efforts to contact the rightsowner first. It is in no-one's interests to waive, or weaken, copyright for people who merely find it tiresome or inconvenient.

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work?

The Patent Office as a rule administers UK copyright efficiently and well, consulting stakeholders as required on proposed changes to the law, or other developments. Their recent move to Newport, Gwent, however has not helped stakeholder communication (given that most of the copyright industries are based in London), and publishers like others feel we see too little of some key officials. We hope they will continue to do everything they can to overcome this unhelpful barrier. Many of us think that even the historic name 'The Patent Office' sends an outmoded message in a digital age, particularly to those whose primary concern is not patents but copyright.

In recent meetings relating to education and enforcement matters, the Patent Office have made it clear that lack of funding means that some priorities are not being dealt with at all at present, in particular the maintenance of an adequate enforcement database for the UK, similar to the US's 301 Priority Watch list under the aegis of the US Trade Representative. While the US wields a big stick when it comes to trade preferences, the UK is not without influence internationally, particularly given its role within the EU, and we think the UK could do better.

The World Intellectual Property Organisation (WIPO), which administers Berne internationally, is accessible and regularly consults publishers and other stakeholders, as is the EU Commission on any proposed EU changes. A day trip to Brussels is not expensive and EU officials are remarkably willing to discuss IP issues, although the relentless harmonization agenda sometimes seems over-hasty and ill thought-through (as in the lamentable recent threat to repeal the Database Directive, which came close to abolishing the hard-won and essential Database Right in the process)

2. HOW IP IS USED

(a) What types of IP does your organisation use and why?

Speaking for member publishers rather than the PA itself (which rarely owns or uses IP commercially itself), the most commonly used types of IP are:

1. Copyright in both literary and artistic works, since text and illustrations are the most commonly needed content for modern-day publications. Copyright in software programs is also increasingly important, and also in musical or dramatic works used in multimedia compilations.
2. Typographical copyright in published editions – this is the only form of legal protection available for publishers of public domain material eg Milton and Shakespeare
3. Neighbouring rights such as Moral Rights, allied to copyright but usually owned as personal rights by authors – these are important to protect the authors' integrity and right to be credited
4. Trade Marks – often important to protect brands, names, titles, logos or other distinctive signs used in publishing (which copyright may not protect itself)
5. Database Right – vital to protect substantial investment in valuable commercial databases which the new EU copyright standard (requiring evidence of the author's "originality") is unlikely to protect
6. Publication Right in unpublished works in which copyright has already expired (unlikely to be a major factor until common law copyright expires in 2039, but will be important thereafter)

Publishers may make licensed use of any or all of the above IP rights on behalf of their authors, usually via sole and exclusive publishing licences contained in

author contracts, in return not only for publication itself but also for remuneration such as fees, advances or royalties on sales.

(b) To what extent do you seek multiple overlapping forms of IP protection?

A publisher who is to publish successfully – and safely – the works of authors and contributors, including works of others for which outside permission is needed, requires an enforceable licence from all relevant rightsowners. This may involve not only copyright but also any of the IP rights listed in (a) above, including any relevant Trade Marks. Trade Mark protection is a particular priority at present, given the favourable enforcement provisions which have applied to Trade Marks until s. 107A of the Copyright, Designs and Patents Act 1988 is fully implemented. Trading Standards Officers currently have a responsibility to act in cases of Trade Mark infringement, but not in copyright cases (where they have a power, but not a duty). It is hoped that this illogical and discriminatory distinction will be removed under recent proposals to apply funding via the Proceeds of Crime Act, but effective copyright remedies at this level are still difficult to obtain.

(c) To what extent are these decisions influenced by sector-specific considerations?

See (b) above.

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

There are general education and awareness issues here. The real value of most publishing company purchases or transfers lies in the relevant IP, but accurate valuation of this involves accountancy conventions on which we are not qualified to comment. Most accountants seem to have formulae for IP valuation. Our members do not report any problems in raising finance against IP-based assets, and publishing is an investment business. However, the publishing business is increasingly global, so it seems likely that the current accounting conventions will need international standards before long.

(e) To what extent does the term of IP rights at the margin affect investment decisions?

Although some publications may earn back their investment relatively quickly, the majority require many years to cover their costs and come into profit. Publishers therefore may often need to control copyright (or an exclusive licence under it) for the full current legal term of 70 years from the author's death. This is particularly the case where future exploitation in some media – eg film or TV – may develop only years, or even decades, after publication, such as the films of Lord of The Rings or Room With a View.

The possibility of such future revenues may therefore be a powerful factor in whether or not to invest in a work.

(f) How well does the UK IP system promote innovation?

Well, we think, in the sense that all publications are innovations, and in the absence of any comparable system of incentives for authors to write or publishers to invest substantially in the results. A limited form of statutory monopoly, balanced by exceptions in the public interest, is far from perfect but it does provide the incentive for investment in works of the mind, and the means to protect them against unfair exploitation by others, at least for a limited term.

The recent DTI re-structuring to emphasise innovation was a welcome reflection of our sector's drive – the UK has become a world leader in creative investment, and we believe that it is our strong and stable IP regime which gives this important part of UK plc its competitive edge worldwide.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

The publishing sector makes good use of the support given, for example the DTI funding for our recent US mission to investigate copyright enforcement and Notice and Takedown methods. Our UK publishing Code of Practice for Notice and Takedown (currently being trialled) directly benefited from this seed funding. More, of course, would be very welcome. Publishing partnerships such as EEditEUR (see General Introduction) provide essential funding for developing standards, eg ONIX for Licensing Terms, but active government funding could help significantly with such standards.

Some areas by their nature need more funding than others – a UK pilot scheme for facilitating the use of digital files by Visually Impaired People languished for over a year for lack of government funding, despite appeals by RNIB and the best efforts of the DTI, and is only now getting off the ground on a more modest, self-funding basis, a year later than we all hoped. Visually impaired people feel this kind of delay discriminates actively against them, and is an example of the kind of area where government funding might usefully be targeted.

(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?

Not really applicable to copyright.

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

Not that we have seen. If copyright does impose measurable costs on the economy, these must surely be far outweighed by the very considerable benefits

(eg to the UK's GDP) which copyright, and the copyright industries based on it, confers in return. It is also important to bear in mind that copyright is not an absolute monopoly, and was never intended to be. The significant exceptions for cultural, research, education and other purposes built into UK copyright law provide a significant counter-balance to any monopolistic behaviour, supported by UK competition law. There is no reason why recent digital technology should change or upset this balance.

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?

We do not know of any defensive use of copyrights, but there have occasionally been attempts to register Trade Marks pre-emptively, eg recently some of the Sherlock Holmes characters and titles. The PA and Society of Authors both protested strongly against this at the time, and the threatened legal actions for Trade Mark infringement did not appear.

Similar problems occurred with cybersquatting, or pre-emptive registration of domain names, although the issue there was not so much the use of IP rights defensively as the improper acquisition of such rights. This is vigorously resisted, for obvious reasons, and has led to several high-profile court cases. Dispute resolution is also available via NOMINET and ICANN.

3. HOW IP IS LICENSED AND EXCHANGED

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

See generally answers to 1 (g) and (h) above. In copyright, it is usually very easy (both individually and collectively), provided (a) there is no commercial or moral rights conflict, or threat to normal exploitation, and (b) reasonable market rate remuneration for author and publisher. Note specifically, however, the comments on orphan works at 1 (h), and also that many non-profit users are routinely granted licences at well below market rates, and in the case of some – such as Visually Impaired People – were usually granted permissions free, until they obtained a full copyright exemption altogether, under 2002 legislation. In addition, it should not be forgotten that many non-profit uses may count as 'fair dealing', or be otherwise exempt under UK copyright law, and so may not require licences at all.

(b) What mechanisms do you use for finding potential licensing partners?

There are many in the publishing world. Apart from the usual editorial or commissioning deals, travel, and visits to potential or existing publishing partners, there are an increasing number of Book Fairs worldwide where rights are bought and sold, eg Frankfurt, London (increasingly important), Paris, Beijing,

Moscow and others. Contracts may be licences, sub-licences or co-edition deals, along lines well established in the trade. Agents may often do some of these deals directly, where the author retains the rights.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

See 1(h) above on Orphan Works. Publishers do not have any difficulty with existing research exemptions, or 'fair dealing' generally, which we believe are clear and well understood in the UK. However, since most publishers are publishing for commercial purposes, their own uses of others' IP would not qualify, so permission is needed and obtained.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, Trade Marks, and designs?

Not in copyright, we believe – see generally (a) above. Both individual and collective licences are fully available on reasonable commercial terms and subject to competition law rules. For more on Digital Rights Management, see Appendix A, and for increasing availability of Creative Commons licences, see Appendix C.

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

On cost of permissions generally, see 1(g) and (h). We have no evidence that current permissions fees are excessive or unreasonable, although some may be beyond some budgets. Any publisher charging a licence or permissions fee is acting as the author's agent, and so is primarily motivated by the need to licence at a level that the potential licensee can afford, and in the process generate legitimate revenue. Publishers have no interest in denying access if licence revenue is available, and indeed would be failing in their duty as agents if they did.

(f) Are there specific barriers to licensing IP in your sector?

Not known to us. See (e) above.

(g) Does your organisation use methods to facilitate exchange of IP - such as crosslicensing or pooling IP rights with other firms or organisations?

Publishers regularly use co-publishing deals and joint ventures, particularly to improve the economies of scale for high-investment projects. Clear agreement is normally needed not only on who owns which IP, so that profits (and losses) may be shared, but also on ownership of any IP newly created in the process of creating the joint work, especially relevant software.

(h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools?

Not in copyright.

(i) Are there barriers to trade and exchange of IP internationally?

Piracy remains a major problem – on this, see 1(b) generally. Despite the TRIPS treaty, the EU Trade Barrier Regulations, and repeated PA anti-piracy campaigns, the main barrier to trade and exchange of legitimate IP internationally remains local piracy. Local RROs can be effective in helping to offset this, but this still requires much local commitment, energy and funding

(j) Does your organisation consider renewing patents using “licence of right” provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?

N/a to publishing

(k) What could be done to improve “licence of right” provisions and business awareness of them?

N/a to publishing

(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

N/a to publishing

4. HOW IP IS CHALLENGED AND ENFORCED

For our general views on IP enforcement, particularly online, see Appendix D.

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, Trade Marks, and designs?

Yes. The main problem with enforcing copyright in the UK and internationally is cost – on this generally, see (b) below. Increasingly, there is also a problem of public perception and awareness, in that many people – particularly younger people - in the internet age believe that with rapid connectivity everything that can be viewed on-screen or downloaded is free – or should be. This presents a major education challenge both to rightsholders and the government, if valuable IP rights, important to UK creativity and GDP, are not to be devalued and evaded.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Cost of enforcement is a major barrier. Both in the UK and internationally, the costs of enforcing copyright can be very high – perhaps for SMEs prohibitively so. Bringing a fairly routine copyright enforcement case in the UK can easily cost £50k -£60k, and more if it is contested or substantially defended. Injunctions are not easy to obtain without overwhelmingly strong evidence, and often require a cross-undertaking in damages, which may be well into six figures if the defendant is a large company. The PA is developing a pilot scheme for Notice and Takedown of infringing copies offered via pirate websites in the UK, which it is hoped will go some way to providing an effective, affordable and speedy alternative for online infringement, but if the dispute finally requires litigation substantial costs may still be incurred. For more detail on this kind of electronic infringement, see Appendix D.

Internationally, to the cost of collecting evidence and paying for lawyers must be added the necessary costs of investigators, and arranging for documentary proof of exclusive rights, eg via affidavits or Powers of Attorney, often for every title being pirated. In countries where separate documentary evidence is required this can be a powerful disincentive where a warehouse raid may disclose evidence of thousands of different pirated books. Some of these costs may be shared between larger companies operating in the same territories, but for SMEs the disincentives, both in terms of cost and management time, can be very serious.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?

The PA has a confidential informal arbitration procedure which can be relatively quick and inexpensive, except in very complex cases, but there is as yet no industry-wide arbitration scheme. Arbitration can be more flexible, eg in choice of procedure as well as arbitrator, and mediation often provides a way out of intransigent disputes, in enabling an escape from a polarised and confrontational approach, so where they are available and viable publishers normally welcome such services.

Where damages are not sought, Internet technologies bring access to other alternatives to litigation, such as Notice and Takedown and interdiction (see Appendix D).

The PA has not been directly involved in Copyright Tribunal cases, apart from observer status in the most recent dispute between the Copyright Licensing Agency and universities over reprographic copying fees. In general, the Tribunal is felt to be expensive and slow – the CLA case cost over £1 million on each side.

(d) To what extent do you use IP litigation insurance? How effective is it?

Litigation insurance is rarely used in publishing, largely on grounds of cost, and the standardized approach to settlements and agreements required and expected, which publishers have previously said leads to a loss of flexibility and control by the parties.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

Not as such, but see above generally on cost and flexibility. Where feasible, and where the necessary common experience is available, the PA regards industry codes of practice and mediation as infinitely preferable to costly and time-consuming litigation. A recent example is the PA's trial publishing Code of Practice for Notice and Takedown. See Appendix D for more detail on this.

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

All of the factors set out above are particularly relevant to SMEs and individuals, with limited funding, experience and management time. Many publishers and PA members are SMEs. See 2(b) and 4(b) above, for examples of particular issues for SMEs.

(g) To what extent is the risk of litigation a factor in your organisation's investment in innovation?

Risk of IP litigation is not often a factor, since there are well-developed systems for obtaining copyright permissions in the publishing trade, and any genuine errors are usually settled (so that the standard author's contract warranty against IP infringement is not often called in), but a libel action is a much more significant risk, especially in trade publishing. The frequency of 'forum shopping' by some well-known litigants, and the risk of having to defend an action under a foreign legal system, can – and does – have a serious 'chilling effect' on some publishing programmes. We hope that final agreement on the current draft Rome II Regulation in Brussels will enable either a country of origin rule, or exclusion of all defamation, privacy and personality rights actions from the scope of the Regulation altogether.

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

See 1(b) and 4(b) above, generally. Established piracy in some key markets, usually via unauthorized reprints or translations, is rapidly being added to by online infringement, which has led the PA to issue practice guidance to its members recently, eg on Notice and Takedown.

Generally, the principal enforcement barriers publishers face internationally are non-compliance by other states with their Berne and TRIPS obligations, or by local lack of enforcement which may give grounds for a complaint under the EU Trade Barrier Regulations. Common examples are slow and expensive civil procedures, often requiring prohibitive documentation, lack of police, prosecution and customs interest or support, regular delays and adjournments, and a lack of deterrent (or any) penalties for what are often perceived locally as victimless crimes, or comparatively unimportant offences in terms of police or prosecution time and resources. The PA has recently produced dossiers on Turkey, India and Pakistan, all of which clearly highlight the current international piracy problems publishers experience on the ground, and which we would be glad to forward.

SPECIFIC ISSUES

- **Current term of protection on sound recordings and performers' rights**

Background: The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

Questions (a) to (e) inclusive.

This is not an issue immediately relevant for publishers, so we are not expressing a view at this time. However, we can see the inconvenience and confusion which may be caused by different international terms.

- **Copyright exceptions - fair use / fair dealing**

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

(a) What are your views on the current exceptions in copyright law?

Publishers have always understood that copyright is not an absolute monopoly, and was never intended to be. The various exceptions to copyright are perhaps as important to UK culture and society as a whole, and particularly for the research, education and library worlds, as the limited exclusive rights granted to authors and publishers to encourage their creativity and investment in the first place. The limited term ensures that all copyright works will fall ultimately back into the public domain, for use and access by all, and that even while the

copyright term is still running, certain specified exceptions will benefit scholars and other key users in the public interest. However, they need to be as carefully defined as copyright is itself. This quid pro quo is wholly fair, and publishers believe that over the last 300 years copyright law in the UK as well as internationally has arrived at a reasonable balance between the legitimate needs of rightsowners and users, including society itself. This has not come about without considerable debate, and much compromise on both sides, a debate which – quite rightly – continues in the digital world of today. This is not worrying evidence of breakdown, but the continuing working out of healthy compromise and a vital balance in the system. Publishers are not in the business of attempting to weaken or remove existing exceptions, but the fair and reasonable balance we have all achieved remains crucial for us, and for our authors.

One of the challenges of digital developments is that “digital is different” - well-worn wording currently used to define copyright exceptions in the analogue world may become inappropriate or even dangerous when applied to digital uses, where an almost limitless cascade of copying is now possible at the click of a mouse. This was particularly an issue during the passage of the WIPO Copyright Treaty of 1995 and the EU Copyright Directive of 2001 where, for example, Article 5.1 finally encapsulated a carefully-worded exception for temporary and transient copies “within the machine”, which was necessary to enable the internet to work and which the UK like many other member states incorporated verbatim into its own domestic law. An equally vital proviso for all exceptions was adopted verbatim from the Berne Convention’s 3-step test in Article 5.5, which provided that copyright exceptions:

- (1) may only apply to certain special cases;
- (2) may not conflict with normal exploitation of the work, and
- (3) may not unreasonably prejudice the legitimate interests of the rightsholder.

Publishers believe very strongly that criteria like these provide essential checks and balances which will maintain the flexibility within the system which we all need. They also now provide a harmonized framework within the EU as a whole, which gives much-needed clarity and transparency to the entire European copyright system.

There is no reason why these checks and balances should not continue to work in everyone’s best interests in the digital society and there is no reason why technical protection measures or digital rights management technology, for example, should not operate perfectly well on the same basis, if allowed to evolve and develop naturally. If technical problems with the operation of copyright exceptions do appear, publishers as much as users have a direct interest in sorting them out. Publishers are users too, when seeking a licence or permission to use extracts from other published works (eg in an anthology or collective work) and publishers use fair dealing exceptions as much as scholars. So we are all in this together.

(b) Could more be done to clarify the various exceptions?

The 3-step test cited above will be increasingly important as a yardstick for copyright exceptions, and it is likely that judicial decisions, e.g. of the European Court of Justice, will be needed in due course to flesh out exactly what is permissible and what is not. The fact that the 25 EU member states, and the many other countries who are acceding to the WIPO Copyright Treaty, will all be adhering to the same harmonized regime will be more and more helpful in a digital world.

Local legislation, or codes of practice if more appropriate, will be needed to clarify areas not yet settled. This complies with the principle of subsidiarity and provides necessary local flexibility. In the UK, the requirements of the 3-step test were broadly incorporated into 'non-commercial' wording, but this in itself is capable of misunderstanding and may require clarification when applied to specific cases. Similarly, Article 6.4 of the Copyright Directive provides that a route through, or around, technical protection measures should be provided for beneficiaries of exceptions to the extent necessary for enjoying those exceptions, but neither rightsholders nor users in the UK have experience yet of exactly how this is to be done, in a way which gives reasonable access when needed but which still protects the integrity of the copyright works involved (without the obvious risks of a 'right to hack'). Local agreement is the best route here. A good example is the current UK pilot scheme for visually impaired people to have access to publishers' digital files at or near publication date, which has been developed by RNIB and rightsowners together, under the auspices of the DTI.

(c) Are there other areas where copyright exceptions should apply?

When the UK implemented the 2001 Copyright Directive, the government took the view – rightly, in our opinion – that we had broadly the balance of rights and exceptions we needed and that it should implement 'narrowly', without fundamentally changing the balance or making new law. So the new Making Available right was balanced by the new exception for temporary copies (see (a) above), and existing fair dealing exceptions were brought in line with the 'non-commercial' limits of the 3-step test. So far, this has served to clarify how exceptions should operate in the online world. We may find that further copyright exceptions are needed, provided all stakeholders are fully consulted, but publishers believe the 3-step test will remain crucial in interpreting their limits.

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private "fair use" exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for "fair use"?

The current exceptions were recently harmonised at EU level in the 2001 Copyright Directive (implemented in the UK in 2003), expressly to bring them into

line with digital developments such as Technical Protection Measures and Digital Rights Management, and to enable the EU to ratify the WIPO Copyright Treaty. They included a new exception for temporary or transient use, closely argued and negotiated between rightsholders, ISPs and users after considerable compromise on all sides, and a possible list of 20 exceptions set out in the Directive, all subject to the condition that all exceptions must comply with the crucial Berne 3-step test (set out at (a) above). We believe that this hard-won harmonisation, and the balance achieved, offers the best basis for future development of copyright exceptions in the UK and EU.

We do not believe that the UK should introduce a general private copying exception at this time, and we certainly do not believe it would be helpful to describe any such exception as 'fair use', which is an American concept considerably wider than private copying, and frequently confused with the UK's own 'fair dealing', which covers one group of UK exceptions alone (eg fair dealing for research and private study). There has never been a private copy exception in UK law (apart from time shifting), but there is considerable industry tolerance in the publishing trade of truly personal, private copying on the basis (a) that it has little or no commercial effect and rarely conflicts with normal exploitation of the works concerned (as opposed to illegal downloads or file sharing), and (b) it would be impractical and wasteful of resources to try to stop. This does not mean, however, that there is any justification for an ex post facto private copying exception across all sectors. In our very strong view, this would be undesirable, and highly dangerous, for the reasons given below.

In the first place, a private copy exception would undermine individual rights management, and thus be as destructive of individual rights as a compulsory licence. UK publishers spend considerable resources battling unjustified compulsory licensing worldwide (in some countries such as Pakistan where piracy is strong and governments fail to comply with their Berne and TRIPS obligations). There are some carefully crafted compulsory licensing provisions for developing countries in the Berne Convention, but these are narrowly defined and depend on an inability to license, sufficient credit to the author, and payment of fair remuneration, none of which would be satisfied by a private copy exception. The UK, in any event, is hardly a developing country.

There is a serious risk that, without very careful wording, commercial pirates would move in to make illicit use of any private copy exception, under the guise of merely offering backup or conversion services to facilitate users' private copy exceptions, when in fact they would be running a fully commercial piracy operation. This has already been seen in the USA, and elsewhere in connection with existing research and private study exceptions (copy-shop owners, and even lecturers, often claim to be merely facilitating students' research and private study, when they are in fact running full scale photocopying businesses).

Given the fact that publishers do not generally enforce copyright against genuine private, personal copiers (see above), and the increasing development of

consumer-friendly DRM licensing technologies, we query why a private copy exception is needed, certainly in the publishing world. There are serious dangers in using a perceived need in one industry sector, eg music downloads, to justify hasty and premature changes in another sector altogether. In the publishing world, contractual and licensing alternatives exist to authorise any private uses, if required. The 'one size fits all' approach of a general private copy exception does not account for the myriad different values underlying UK publications, which need and deserve individual management, and licensing.

Publishers, on behalf of their authors, should be able to choose freely between individual and collective management of their rights. They should not have their rights taken away by unjustified blanket licences and exceptions, with – at best - approximate and inflexible remuneration (see (e) below).

(e) How would you see content owners being compensated for such use?

Under a private copy exception system, the only effective remuneration for rightsholders would be some kind of levy, either on relevant hardware or perhaps software, or a tax on the transmission itself. This is a crude, obsolete apparatus which ignores the possible flexibilities of DRM technology. It not only reduces copyright to a form of taxation (in itself undesirable), but would tax those who never copy as much as those who do. It also risks double taxation, in that those who still wish to license directly on more favourable terms and conditions will still have to pay the levy.

The reality of DRM technology is that it enables publishers to micro-manage copyright works and removes the need for blanket, national, taxation. It provides flexible remuneration for all kinds of uses, tailor-made to account for consumer needs and preferences, and based on increasingly direct experience of what the market wants. For more detail on DRM technology, see Appendix A.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

Publishers invest to produce a very wide variety of copyrighted teaching and learning material across all media and all technological platforms, designed specifically to meet the needs of students and their teachers and lecturers in all fields of education, which is priced, packaged and structured to meet the specific pedagogical requirements of each sector. In addition, the RRO UK infrastructure (CLA, PLS, ALCS) offers cost effective reprographic and digital copying licences designed to provide access to significant extracts from virtually the entire UK published repertoire for educational purposes. Site licences for scholarly journals also provide for educational use within institutions, and publishers' agreements with their authors increasingly allow for 'self archiving' of scholarly material in publicly accessible repositories after an appropriate delay so as not to undermine the primary market for such material. Research funders (such as the UK Research Councils and the Wellcome Trust) are adopting policy positions on 'self

archiving', alongside business model experiments by publishers designed to extend access to primary research outputs. Experiments are being conducted with various permutations on 'open access' or 'author pays' business models, with considerable interest in their sustainability. Publication under these models is often underpinned by Creative Commons licences (see Appendix C). We would also point to a range of evolving business model experiments aiming to deliver both scholarly and teaching and learning material in e-book format. It remains to be seen which of these experiments will prove sustainable and cost effective as the market matures.

There have also been significant public sector initiatives, particularly through BECTA and the JISC, to extend the quantity of material accessible through electronic means and fully to exploit the potential of the Internet for education. The BBC has also invested heavily in its BBC Jam (digital curriculum) initiative. While we applaud such initiatives as potentially ground-breaking and enabling, we would argue that they should be designed to complement rather than to compete with a healthy and innovative private sector investing in copyrighted material, and we believe that any state-aided initiatives should be proven to be sustainable and geared to needs which would be uneconomic or inappropriate for the private sector to provide. We do not see any justification for a 'right to hack' (see section 7(b) above) when experience has shown that licensed solutions arrived at through collaboration and negotiation can provide managed access which meets users' needs, protects copyright and sustains the principles of the copyright system (including the need to respect authors' moral rights of integrity and paternity).

(g) Are there issues concerning the archiving of material covered by copyright?

Librarians have expressed fears to us of a 'dark archive' of important material which becomes effectively inaccessible when and if technology expires or is replaced. In the meetings we have regularly been having with European deposit librarians under the auspices of the Federation of European Publishers (FEP) we are finding solutions to such risks, and we have recently revised a joint Statement on legal deposit of electronic works to account for online deposit. The reality, of course, is that no publisher has an interest in making his author's work inaccessible, so dark archives are a risk which all of us wish to avoid. They are not a necessary result of DRM, or of Technical Protection Measures – the technology can manage round these risks.

One development which seriously concerns publishers is the suggestion that deposit libraries should start digitizing their collections (often of several million volumes), usually by scanning, without consulting authors or publishers, even though the works concerned may still be in copyright. This sounds superficially attractive and modern, but would seriously weaken copyright (and the agreed basis of legal deposit) if permitted. Some US libraries, and one UK library (the Bodleian), have recently joined in a digitization programme with Google, but this raises significant copyright (and legal deposit) issues and is the subject of two

separate legal actions in the USA. A similarly centralized digitization programme is under discussion in Europe, under the i2010 heading, but it is unclear at present whether, and to what extent, it would include copyright works. Needless to say, mass digitization of this kind without proper consultation would be strongly resisted by authors and publishers, particularly if commercial use is to be made of the digitized results. .

Legal deposit of electronic publications is a key issue not provided for until now by the UK's somewhat antique Legal Deposit laws, but it is currently being addressed by the Legal Deposit Advisory Panel, set up under the Legal Deposit Libraries Act 2003 with an independent chair and with equal membership from the six UK legal deposit libraries and the publishers most involved. It is so far proving a good example of balanced consultation and debate, backed up by research projects and pilot schemes where necessary. A pilot scheme for e-journals is under way, debates relating to web archiving (and web harvesting), and discussions on key 'territorial' definitions for digital deposit, e.g. the meaning of 'publisher' and 'publication', and even 'in the UK'. This strikes us as a model way forward, and there is every expectation that appropriate Regulations will be produced in due course, following Regulatory Impact Assessment and full consultation of all stakeholders.

- **Copyright – digital rights management**

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means.

However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology.

They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

We refer the Enquiry to Appendix A for our views on DRM, and also to our previous submission to the All-Party Internet Group on the same subject.

- **Copyright – orphan works**

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

See comments on orphan works at 1(h) above. UK publishers are often in the position of users when seeking permission to reproduce other copyright works. Although ownership data is increasingly available in collecting society databases, the UK, like many other countries, still lacks a comprehensive, reliable database of all copyright owners (or owners of publishing rights, which may not be the same thing). This means that publishers themselves often find difficulty in locating copyright owners and obtaining the necessary permissions, so must either (a) not reproduce the extract concerned at all, which may leave unfortunate gaps, or require second-best, last-minute replacements, or (b) take a calculated commercial risk that the owner will never appear, or - if he or she does – that a reasonable commercial licence fee will be acceptable. We always advise our members that the latter option involves a measurable legal and commercial risk, but if that risk could be limited in some way on reasonable terms we would all feel progress was being made (see comments at (b) below).

(b) Do you have any suggestions on how this problem could be overcome?

As we explained above, and at 1(h), the first practical step which may be taken is the limitation of damages for copyright infringement where serious and determined steps have been taken, but unsuccessfully, to find the copyright owner, and publication has gone ahead nevertheless. The latest (January 2006) proposals from the US Copyright Office in this direction strike us as sensible and workable, although we are not persuaded legislation would be required in the UK (as opposed, say, to an industry code of practice, and/or a collective solution building on existing collecting society databases).

There would need to be a number of conditions. In our view, the first and perhaps most important would be evidence of real, determined attempts to trace the rightsowner. This may vary according to types of work, but would obviously have to consist of much more than a few token telephone calls – some serious research is required, reinforcing the fact that it is the user's responsibility to seek permission, rather than the owner's duty to give it.

Secondly, there should always be fair acknowledgment of the work's copyright status, and therefore due credits to the author and publisher (a requirement already well known in fair dealing for criticism and review under the name of 'sufficient acknowledgment').

Finally, there should be provision for reasonable remuneration in the event the rightsowner ever appears. This could simply take the form of a cap on damages, as in the US proposals, but, while welcome, this has the limitation of requiring

litigation before producing any remuneration and the net proceeds may be minimal. Perhaps a more positive solution would be a kind of escrow account into which users may be asked to pay, perhaps managed collectively on an industry basis, and which would provide any owners who appeared with the equivalent of reasonable licence fees in due course. We would be very happy to discuss any such proposals further.

- **Copyright - licensing of public performances**

(a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings?

N/a to publishing

(b) Could the system be clarified or simplified, and if so how do you see this working?

N/a to publishing

- **Patents – utility models**

This whole section is not applicable to publishing

- **Pharmaceutical Supplementary Protection Certificates (SPCs)**

This whole section is not applicable to publishing

- **Trade Marks – international issues**

Trade Marks may be important for publishers, particularly where the works concerned have valuable titles, names, logos or other distinguishing signs which may require separate legal protection. In general, only the major publishers, responsible for major titles such as Wisden, Roget, Encyclopedia Britannica, or Grove's music dictionaries, regularly register Trade Marks. For most publishers, a common complaint is the time and cost necessary to register a Trade Mark (even in the UK, and certainly internationally). Although for appropriate titles it can give better and quicker legal protection (where copyright requires originality and proof of ownership), cost is a factor, especially for SMEs.

(a) To what extent does your organisation register its Trade Marks at the European rather than national level?.

We believe publishers do not often register at European level, largely on grounds of cost, but will do for major works, usually via a Trade Mark agent or suitably experienced lawyer.

(b) Could the UK Trade Mark system be improved to work better alongside the European system?

We have no proposals to make at this time.

- **Designs – registered designs and unregistered design rights**

This section is not applicable to publishing

- **Legal sanctions on IP infringement**

The existence and availability of effective and deterrent sanctions for copyright infringement is extremely important to publishers, since a right which cannot be enforced is no right at all. Publishers fully support the UK's international obligations under the TRIPS treaty and, increasingly, within the EU under the recent Enforcement Directive (for civil remedies) and – still under discussion – possibly to be extended to criminal sanctions as well. UK law itself provides a range of powerful remedies in theory, although many of these depend on considerable litigation costs (see 4(b) above), or prosecution time and resources. IP is not often a high priority for enforcement agencies (see Appendix D on the Level 2 Gap).

Although publishers are most often exclusive licensees rather than copyright owners, UK law gives them significant rights on their own account to enforce the author's copyright, as do most author contracts (indeed, publishers are usually required to do this, on the author's behalf). This is the only way to protect what may be substantial investments, not only of money but also of time, skill and expertise, but publishers do not take the very considerable risk of enforcement litigation lightly. Cost is a very real deterrent in the UK.

The PA has recently launched a pilot scheme for Notice and Takedown in the publishing sector, to cope with the increasing flow of online infringements in a way which will be effective without requiring litigation, except for the most serious cases.

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?

See our comments at 2(b) above on the illogical and discriminatory position regarding implementation of s.107A of the Copyright, Designs and Patents Act 1988. There is some hope that this position may be eased using powers and revenue under the Proceeds of Crime Act, but this is long overdue.

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

See our detailed comments on criminal sanctions at Appendix D.

- **Coherence between competition policy and IP policy**

The exercise of IP in the UK is already fully subject to UK and EU competition law, and rightly so. This ensures that IP cannot be used or exploited in a way which would be anti-competitive, or amount to abuse of a dominant position. This is in the interests not only of users and consumers, but of other publishers who may be seeking entry to the same market. We feel that the rules here are well grounded and well understood in the industry. On this generally, see our earlier comments at 1(g) above.

Parallel Imports / International Exhaustion

See our detailed comments on Parallel Imports at Appendix B

Background: European law does not allow firms to use Trade Mark or copyright law to prevent their goods sold in one EEA Member State from being imported and resold in another Member State – i.e. they are not able to segment the EU market. However European law does allow the use of Trade Mark and copyright law to restrict the imports to EU Member States of goods sold outside the EEA. It also specifically inhibits EU Member States from legislating to remove such import restrictions at the national level – so called “international exhaustion” of Trade Marks or copyright. There has been a good deal of debate, both here in the UK and at EU level, about the costs and benefits of removing restrictions on parallel imports. There is a further issue of firms taking advantage of variations in prices on pharmaceutical products across the EU and repackaging drugs bought cheaply elsewhere within the EEA to resell within the UK.

(a) Has your company been affected by parallel trade?

Yes – See Appendix B

(b) What would be the impact on your organisation of a change in the current rules?

(c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules?

Appendix A

Copyright – digital rights management

The acronym DRM (Digital Rights Management – or The Management of Digital Rights) is used relatively sparingly by the publishing industry largely because the confusion surrounding the term and the loose interpretations given to it tend to distort what publishers managing electronic content particularly require of this technology – which is more properly an end to end trading solution.

In the publishing industry, the progressive delivery of electronic content over on-line networks in the increasingly customised or personalised formats which new markets demand, has created the need for a digital management system which enables such content to be 'prefixed' by appropriate 'authentication' together with information covering the usage rights and licence terms conditional on its use and delivery – offering content owners and their customers a convenient 'one-stop-shop' solution. While in the print environment these delivery and usage conditions are normally expressed in formal contracts, in the digital context the ability to communicate contractual terms integral to the content and the transaction on-line offers major efficiency benefits in managing digital resources and facilitating compliance.

During the early stages of DRM promotion and development, fears of copyright piracy and aggressive marketing by technology companies pushing proprietary DRM systems caused DRMs to be primarily associated with security technologies and Technical Protection Measures (TPM). While control and protection is clearly one aspect of any electronic management system, the journal publishers (who were first in this field), wanted a system which would replicate the 'trust compliance' models which operated successfully in the print environment. For the publishing sector, the TPM aspect of the technology was less useful as a copyright management tool (all DRM solutions are ultimately hackable anyway) than a wider end – to – end digital rights trading solution as part of a 'collaborative' technology which could facilitate the development of new consumer models aimed at customer preference.

The sector therefore remained shy of proprietary systems focussing on security solutions, and was not supportive of trusted computer platforms which embedded TPM technology, not only because of a dislike of 'monopoly gateways' but also because the remote control of this kind of DRM technology could remove the rightsholder from the contractual compliance relationship with the customer upon which the journals business is based. Instead the sector preferred an 'open architecture' approach, based on open international standards to be achieved through ISO (MPEG 21) and based on the principle of interoperability – both of electronic language and machine delivery platforms. This contributed to the development of a Rights Data Dictionary as an MPEG 21 International Standard, and from that to the development of a Rights Expression

Language (in a standard XML format) which is the basis of **ONIX for Licensing Terms** currently being developed in cooperation with the US Digital Libraries Foundation and supported by the British Library.

In the publishing sector, the term DRM is used less as a generic description, and more specific reference is made to 'Digital Management of Rights', 'Electronic Content Management Systems', 'Rights Expression Language' or 'Electronic Supply Chain Technology' according to the context.

In general terms, the UK industry also equated DRM technology with the 'licensing route', as preferable to the machine levy systems operated in some EU Member States.

A major information service industry within the knowledge economy, the publishing sector requires a broad 'engagement' technology sufficiently flexible and comprehensive to fulfil simultaneously the following range of functions within a single transaction:-

- a) The authorisation and **authentication** of the content offered (or part thereof).
- b) **Information** about usage rights, payment terms or licence provisions.
- c) delivery of an 'interoperable' package enabling the combination and exchange of different kinds of content (including 'enhanced' text) and its distribution via a variety of electronic delivery systems and platforms. (This requires a standards component to meet the demand across the whole spectrum for content to move seamlessly and interchangeably across networks and technical platforms.
- d) Electronic **controls** allowing access and use management in accordance with compliance terms – inclusive of payment terms and technical measures within an electronic copyright management infrastructure.

This technology allows publishers to create a mix of potential business models, derived from traditional practice, but combining directions regarding members and types of users, specific time frame, republication conditions and delivery at specific locations – allowing a fine discrimination according to the institution or private individual wanting that content, and how they want to use it.

This 'enabling' technology, while largely progressed through Journals and STM sector will be increasingly applicable – depending on the level of compliance or usage required – across the wide spectrum of the publishing industry – whether when licensing the search of electronic repositories, or the downloading of individual products.

TPM as part of DRM

The association of DRM technology, and thereafter its confusion with Technical Protection Measures (TPMs), - together with legitimate legal safeguards against their circumvention have raised concerns that the use of DRM may prevent consumers from accessing and using copyright works for 'fair dealing' or other lawful purposes. It is the consistent position of the publishing industry that this technology may only be operated and deployed as prescribed by existing law. Indeed its ability to manage content down to individual or micro levels means that it has the facility to ensure also the delivery of legal exemptions or copyright exceptions to a very precise degree.

This sensitivity allows the use of such measures within the 'fair dealing' and other service environments. Libraries and intermediaries routinely use measures to manage digital content in line with their licences and permissions (e.g. regulating the number of copies that can be taken etc). The library sector which has to manage a plethora of contracts – and manually apply both legal exceptions and conditions of usage into their systems have a strong interest in adopting integrated electronic rights management systems (which is why **ONIX for Licensing Terms** has proved such a fruitful area of collaboration).

In the context of commercial intermediaries, e-book distributors may use TPMs to support specific business models and while these protection measures may not be applied directly by publishers, their sensitive deployment by intermediaries can underpin the confidence of rightsholders who are more ready to allow the use of their works within untested service environments – and this can contribute to the development of new, innovative digital markets in their own right.

TPM's as an element of the (DRM) transactional technology therefore need to be seen in the practical context which they are intended to serve. Because problems of widespread pirating of electronic works derive from the illegal application of some new technology and from the nature of the Internet itself, and given that legal remedies, while available, tend to be cumbersome and costly (x ref Questions on IP Infringements), technical protection measures within the transaction are a prophylactic mechanism applying the premise that "the answer to the machine lies in the machine". It is also reasonable to argue that deliberate 'hacking' through legitimate protection measures with the specific object of stealing copyright material is the digital equivalent of 'breaking and entering' and should be an offence under law.

There is a clear distinction between legitimate and unlawful access. Technical Protection Measures are there to ensure and also to facilitate legal access. However, it is also the clear view of the industry that such measures may **not** be deployed to prevent the exercise of those copyright exceptions permitted under copyright law – and persons who are prevented from enjoying their personal and public rights under these exceptions (fair dealing etc) must have access to effective remedies. While we are not aware of any specific complaints against UK publishers for **illegally** preventing the enjoyment of permitted exceptions, we

think that the present system which provides an appeal to the Secretary of State as the only legal recourse open to an individual, is perceived to be altogether too cumbersome, and we would recommend that a faster and more accessible remedy should be explored which would be more consumer friendly, and perceived to be 'fair'.

Appendix B

Parallel Imports

Introduction: Exhaustion Doctrine and Territorial Rights

COPYRIGHT, throughout its evolution, has always been construed as operating under national jurisdictions existing separately and independently in each country, but conforming to a network of international treaties (e.g. Berne Convention).

TERRITORIAL RIGHTS are exclusive (and non-exclusive) rights to exploit a copyright 'property' within designated countries granted by authors to publishers with the aim of achieving the most efficient and cost effective exploitation of their works, through a series of publishing agreements/contracts in different countries.

Under this system, if an author decides to disaggregate his or her rights on a geographical basis, it is possible for rights to a single work to be acquired by several publishers each within its own contractually defined exclusive territory. Countries where the rights have not been granted to a single publisher constitute 'Open Markets' where no one holds 'exclusive' rights to the work in question.

The granting and acquisition of territorial rights encourages both author and publisher to commit to the success of the work in that territory as it has been contractually defined. The publishing house will obviously want exclusive rights in its home country, while, in competing for exclusive rights in other territories, it is encouraged to invest in local distribution and infrastructure, regional marketing and stock availability while the consumer also looks to benefit from a steady supply of a range of books calculated to appeal to local taste and pricing norms. Territorial exclusivity has therefore been demonstrated to be more generally efficient than open markets, and to benefit all the interests from author to consumer who are engaged in the supply chain.

The management of territorial copyright is underpinned by '**Exhaustion Doctrine**' – the laws which establish the limits of territorial distribution rights of copyright owners after the first sale of their protected works. Where the rightsholder has acquired exclusive territorial rights in a particular country, **National Exhaustion** enables that rightsholder to prevent the parallel importation from another country of a foreign, alternative edition of the contracted work. In an 'Open Market' situation, under the application of **International Exhaustion**, after first sale or distribution of any edition of the work legally put on the market anywhere in the world, parallel imports of editions of that title into any market are then allowed.

The Importance of Territorial Markets

In the UK, the economic contribution of the content industries and their ability to deliver the domestic and also significant export objectives of the Information Age Programme depends upon our sustaining investment in our information industries, and in our own literary and cultural traditions. The protection awarded by territorial rights gives a necessary degree of certainty, both when investing in UK authors and then promoting them both nationally and throughout the world, and when buying rights from foreign authors and developing those works for the UK market. However, internationally, in the highly competitive English language markets world-wide, sheer economy of scale (as enjoyed by the US) can threaten a cultural hegemony which, without adequate protection in our home and traditional markets would debase the value of our domestic cultural genius and result in a reduction of the core investment in British 'home grown' authors.

Europe

Traditionally, the English language book market was divided up into two exclusive geographic/linguistic blocks – the UK and old commonwealth territories representing the principal market for UK publishers on the one hand, and the USA with its territories and geographical area of influence for US publishers on the other. The rest of the world was customarily 'non-exclusive' where both UK and US publishers competed on an 'open market' basis.

This 'non-exclusive' market originally included continental Europe.

With the establishment of the European Union, the developing framework of harmonised copyright laws established a new 'hybrid' '**Community Exhaustion**' which effectively treated the collective member states as a single geographical and jurisdictional entity for the purpose of allowing the free movement of IP protected goods among and between the EU member states.

At the same time, under the Treaty of Rome (now Treaty of Amsterdam) articles 28 and 30 were introduced as competition law provisions designed to outlaw quantitative restrictions (including the use of Intellectual Property Rights) on the free movement of goods between member states. The UK Copyright Law (1988, section 27 (5)) was drafted to conform with the EU legislation, stating that nothing in the UK Act can prevent the importation of any article "which may lawfully be imported into the UK by virtue of any enforceable community right".

This means that once goods, (including Open Market editions of books) have been legally imported into (any country within) the EU, copyright cannot be used to restrain their distribution into other EU States – even where the rightsholders may hold exclusive national territorial rights.

Exclusive UK territorial rights can therefore no longer offer protection in the UK rightsholders' home market against the parallel importation of foreign 'open market' editions so long as these have been lawfully brought within the frontiers of the European Union.

A number of things are therefore happening which affect the UK home market:

- Increasing parallel importation of US 'open market' editions entering the UK via Europe.
- Value of UK English language rights are diminished by parallel importation of US editions via other European countries.
- The growth of Internet bookselling is facilitating parallel importation. Market place 'jobbers' are setting up networks geared to parallel importation of foreign editions.
- Parallel importation of Open Market editions is facilitating the trade in illegal (infringing) editions which have not entered the EU lawfully, and stopping the entry of illegal (and counterfeit) editions is becoming increasingly difficult.

This primarily affects trade publishers who, because they can no longer defend Exclusive UK Rights, are progressively seeking from authors and authors agents, Exclusive English Language Rights to Europe, as a practical method of protecting their home market where they have previously held exclusive UK territorial rights.

The acquisition of European Rights not only secures the UK home market, but allows UK publishers to compete effectively in Europe, particularly against the 'dumping' of cheap foreign editions, while encouraging investment in the European market infrastructure – a process which, in addition to the fact that UK editions sold in Europe pay higher royalties than US open market editions, offers greater benefits to authors. The tendency to infiltrate the market through 'early' editions has also been checked by a move towards simultaneous publication dates. Because the UK publishing model is different, and because of discounting practice in the UK, the existence of territorial exclusivity has not resulted in UK books being more expensive to the consumer in the home-market. Thus territorial rights protect investment but do not affect competitive pricing.

As Europe continues to expand with more countries joining the EU, the incentive for UK publishers, authors and authors' agents to acquire and sell Exclusive European Rights, which can be operated effectively within the Community Exhaustion Regime, is likely to increase, and collective European Exclusivity will rapidly replace single UK Territorial Rights as the preferred contractual package for English Language Editions.

International – The developing world

In the developing world, territorial licensing enables publishers to produce local cheap editions, often in collaboration with local publishers at a price appropriate

to local economic conditions, while retaining an effective protection from these cheap editions being imported into their own home market. This process of territorial dispersal of production and licensed rights also has the effect of building up the publishing infrastructure within the developing countries which are encouraged to pursue effective copyright regimes both to provide the assurance needed to attract this investment and also to protect their own nascent publishing industries.

British publishers have a long tradition of operating such systems of territorial licensing, and taken with the spread of English as an internationally used language, and the long relationship with the Commonwealth, this has given UK publishing a strong global orientation.

Continuing strength in these areas depends on our being able to protect the very considerable investments that we have made and this requires strong IP regimes both in the UK and in the countries which are our main overseas markets.

Conversely, in countries which have weak IP regimes, increased opportunities for 'grey' or pirate goods tend to be an immediate consequence and this is an increasingly serious problem.

The publishing industry therefore puts a strong case for strong IP regimes and territorial rights among our trading partners – the dynamic contribution of IPR to the knowledge economy, the importance of territorial rights as an integral part of that system because of the investment needed over a long term to support emergent national authors and to promote established authors in new markets, the national investment in those markets themselves, the economic benefits that came from outsourcing in licensed territories, and the ability to price books for third world markets.

Electronic Content

While concern has been expressed that territorial copyright will be difficult to operate in the on-line electronic context, experience has shown that "the answer to the machine is in the machine". Large distributors operate comprehensive electronic bibliographic data-bases on which all territorial rights are listed, and exclusive rights to an edition within a country can be protected by electronic reference to the address recorded on the purchaser's credit card, (so that the purchaser is limited to the edition which enjoys the exclusive rights in his or her country of residence).

The UK publishing industry consults directly with international players such as Amazon, who are showing a willingness to build territorial protection into many of their new products. Electronic Licensing and appropriate DRM's may also be usefully deployed.

Appendix C

Creative Commons

Copyright protection and commercial exploitation need not be mutually exclusive. A creator may seek commercial reward or return from publication of their works while also seeking to ensure that they are not plagiarised, misappropriated or adopted for unauthorised commercial publication elsewhere. The two are both equally important to creators, but in some cases creators (e.g. some academics, or other employed authors) are able to adopt the position of being less interested in reward than in protection and authentication of their works, so that they may be willing to license their use for little or nothing, provided the integrity of the works is respected and their authorship is credited properly. The new generation of 'Creative Commons' licences seek to address this need, for example as a legal framework for self-archiving of research outputs or for protecting public archives of creative material from abuse.

The great strength of creative commons licences, and indeed other licences such as the GPL (General Public Licence) is that they are built on existing copyright law, with all the protection and authority arising from that law, both nationally and internationally.

These licences are already fully available, and no new legislation is required to enable them to be effective. The commercial publishing sector does not yet have any great experience of their use. They are still very much in their infancy and therefore at a trial stage. Dispassionate advice would be that users should perhaps look at 'Reversion' clauses (or lack of them) and consider their implications over time.

Appendix D

Copyright Infringement and Enforcement.

General Introduction

It would be misleading to characterise all challenges to copyright in the UK as 'piracy'. Rather there is a broad range of types of copyright infringement, requiring a similarly broad spectrum of responses. As an industry, publishing has always sought to pursue the appropriate remedy for a given infringement, rather than adopt a 'one size fits all' approach. Here we set out an overview of electronic infringement in the UK, followed by a detailed analysis of key areas: Commercial Piracy, Interdiction and Enforcement (Section 107A.)

Electronic Copyright Infringement – Spectrum of Infringers.

Types of infringement may be ranked on a scale from that which has historically been regarded as relatively benign, such as copying music (records, tapes, CDs) to cassette for playing in the car or at parties, to serious organised crime.

In today's electronic environment these types of infringement may be tabulated as follows.

- Copying purchased content for personal private use – e.g. copying a cassette to make up a car or party tape or copying a purchased audio book CD to an iPod.
- Downloading for private use:
 - Downloading copies of works already purchased in another format
 - Downloading copies of works not purchased.
- Uploading / Making Available:
 - Unwitting uploading - e.g. while downloading with BitTorrent.
 - Knowingly uploading in quantity – e.g. by P2P.
 - Making available in quantity with no revenue – e.g. via a free website.
 - Making available in quantity with revenue – e.g. via a free website with advertising.
- Cottage Industry commercial piracy:
 - Pay-to-enter websites offering infringing copies
 - Sale of infringing copies in electronic/CD/DVD format via websites, eBay, car boot sales etc.
- Large scale commercial piracy.

Electronic Copyright Infringement – Spectrum of Responses.

Methods of combating copyright infringement lie along a similarly broad range, although often more than one response may be appropriate. Following the analysis above we may tabulate the responses as follows.

- Private copying: Although there is no exception in English law for private copying we see no benefit in taking action against customers who themselves copy legally purchased content solely for their own private use, eg. format shifting.
- Downloading: While not a criminal act, this form of infringement is nevertheless very serious. For example, in a recent test we were able to download approximately 6000 infringing e-book and audio-book files in 24 hours from just 10 USENET news groups.

Despite the massive scale we have never suggested that enforcement action against individual downloaders is appropriate (and indeed we are unaware of any industry body having taken such action). In such cases the appropriate remedies lie in education and interdiction: spoofing, disruption, Notice and Take-Down.

NB: It is crucial to stress that downloading can never be a legitimate method of exercising any private copying exception.

- Uploading / Making available: This category of infringing behaviour covers the widest range, both of offences and responses. While 'soft' responses, as for downloading, are appropriate for low-volume unwitting uploaders, infringements in this category increase in seriousness to the point where the perpetrators are verging on commercial piracy, by being active in profiting from the exploitation of infringing copies of copyright works.

In the more serious cases appropriate responses range from interdiction, particularly Notice and Take-Down, to evidence gathering and prosecution, in cases where there is either a commercial motive or significant commercial damage.

- Commercial piracy: This is the main growth area for publishing related infringement and as such merits the most serious action. For small scale or first time offenders the usual first response is interdiction, usually via Notice and Take-Down or a proprietary NTD system such as eBay's VeRO programme.

In more serious cases prosecution is warranted. Such investigations usually begin with an evidence gathering exercise, including a test purchase. Ultimately, however, the cost of private criminal prosecutions is prohibitive and some form of state action, ideally prosecution by a local authority Trading Standards department is required.

DETAILED ANALYSIS: COMMERCIAL PIRACY.

The market.

2005 saw a significant increase in the volume of counterfeit works being offered for sale in the UK. A burgeoning trade in pirated audio books, targeting the more

traditional consumer, supplemented the existing underground market in pirated e-books, typically sold to enthusiasts and students.

Home market manufacture and sale of pirated e-books has traditionally been concentrated in the Scientific, Technical and Medical (STM), Information Technology and Science Fiction and Fantasy markets. SF&F also accounts for most of the volume of pirated audio books.

The pirate market in the UK is still primarily electronic in nature, though we are seeing a shift to 'real world fulfilment' with the use of CDs and DVDs to distribute content.

Offenders and methods.

In the UK offenders are mainly 'cottage industry' pirates: networks of individuals and small groups operating across force boundaries and primarily trading electronically. Currently the domestic market for pirated e-books and audio books is too small to attract serious organised criminals, although we anticipate that this will change with future developments in consumer technology.

Domestically, production occurs on a just-in-time model, with CDs and DVDs being burned to order. There has been a shift away from pirates manufacturing their own master files (by scanning printed books or ripping CD audio books to MP3) to recycling files obtained from other sources, both publicly available and closed networks. This is evidenced by the increasing number of pirated US editions being offered for sale in the UK.

Sales methods range from pay-to-enter websites offering infringing copies to the sale of infringing copies in electronic/CD/DVD format via websites, eBay etc. Often the offender will use auctions for popular items, such as the latest Harry Potter book, to generate an e-mail list of customers. He will then market directly to those customers, bypassing the auction sites fees and enabling him to offer a 'copied to order' service.

Large-scale distribution also occurs via Internet channels such as web and FTP sites, IRC, Peer to Peer networks and USENET news groups. While much of this distribution is open and 'free', restricted channels also exist, where participants are required to upload a certain quantity of new pirated material in order to gain access to the existing stock.

The damage.

In the realm of electronic piracy, it is notoriously difficult to quantify the potential harm, especially once we move beyond sales to include free mass distribution. Problems include estimating the number of downloads and arriving at a conversion ratio for pirated copies to lost sales.

However, a recent set of four test purchases netted £569 retail value of product for a price of £31. Another pirate sold over £22,000 worth of pirated audio books

via eBay in 42 hours. When the PA put a stop to this he moved into music, offering the entire Beatles catalogue on CD for £6. A brief search on that auction site alone showed 60 sales of these titles alone over a two-week period. Assuming uniform sales that would scale to £0.5m worth of product per annum – for one series by one author on one website.

Systematic monitoring of individual pirates reveals that they are now using online auction sites to determine the price the market will bear, by gradually increasing the price of their offerings until sales drop off.

DETAILED ANALYSIS: INTERDICTION.

Our primary tool for interdiction is Notice and Take-Down (NTD). This is a system where, upon becoming aware of the presence of infringing copies on a website or other site, the rights owner or his representative contacts the Internet Service Provider (ISP) hosting the site (the Notice), requesting that he remove or block access to the infringing material (the Take-Down).

Rational.

The Internet plays host to an incredibly high volume of infringing web sites, FTP sites, auctions and so forth. Given the cost in both money and time, of gaining an injunction any attempt to seek a remedy through the courts for each infringer is clearly not practicable. Instead there is a clear need for a system for removing such infringements which is cheap, fast and effective.

In 2002 the PA led a DTI sponsored mission to the USA to learn from their experience of operating such a Notice and Take-Down system under the aegis of the Digital Millennium Copyright Act. Our report concluded that the NTD system operated in the US had been proven to work well and that there were significant benefits to be gained from the implementation of a similar system in the UK which addressed specific UK issues, such as privacy and the right to freedom of expression, while remaining interoperable with the US model. Following negotiation with ISPs and civil liberties groups, the PA developed model notices and launched its own pilot NTD scheme.

Barriers to effective operation.

1. Safe Harbour: Under the UK e-Commerce Regulations an ISP becomes 'liable' from the point at which it acquires or is put on knowledge of an alleged infringement (i.e. its 'safe harbour' for storage of information provided by the recipient of the service, ceases to apply).

The legislation requires an 'expeditious' response from ISPs after they have been put on knowledge, and the ISP must assess its exposure for any action (or inaction). However ISPs see their role (correctly) as intermediaries, and reasonably wish to avoid a situation in which, lacking 'safe harbour' they are obliged to judge and act between disputing parties, either or both of whom may seek to hold them liable.

This has led to cases in which either infringing material is not removed by the ISP or non-infringing material is removed without any right of appeal, as the ISP seeks to minimise its exposure.

In the USA the DMCA squared this circle by extending the safe harbour to protect ISPs who took down (or put back) allegedly infringing material as long as they abided by the established process as set down. While the PA favours a voluntary scheme for NTD, along the lines of the code of practice developed with ISPs, we believe that some form of statutory underpinning, which provides this type of safe harbour, would address many of the concerns about the efficiency of such a scheme.

2. The proposed extension on limitation of liability for hyperlinkers etc: NTD based interdiction is, at root, a fast-track alternative to litigation. It can work only due to the recipients desire to avoid any legal action arising out of his liability for the infringement. The current DTI consultation, on extending the limitations of liability in the e-Commerce Directive, risks making NTD unworkable, effectively legitimising online piracy.

Currently an infringer who has built awareness of his site is liable regardless of whether he hosts the infringing files himself or simply links to them. We may therefore use NTD to remove the site, necessitating that he start from scratch if he wishes to continue.

Were any limitation of liability extended to hyperlinkers he would effectively become untouchable by NTD, and be able to maintain his site, simply altering his hyperlinks as rights owners attacked, one at a time, the individual files linked to. Ultimately, the infringer operates as a scofflaw, providing a one-stop-shop for pirated content.

DETAILED ANALYSIS: ENFORCEMENT.

Our UK enforcement activity is primarily directed at cottage industry pirates selling illegally copied audio books and e-books. The damage done by these operators is significant and increasing. For example, over the past year we have observed infringers making ever more significant inroads into the increasing revenue stream from sales of audio books.

One key goal is to address the problem of the 'level 2 gap'. Domestic commercial piracy mainly operates at level 2 criminality, falling between the remits of local police forces and the SOCA. The lack of ownership of this area of criminal activity creates problems at both stages of the enforcement process: Evidence gathering and prosecution.

Evidence gathering: Much good work has been done over the past year on access to information. In particular we would like to praise the work of the Patent Office in establishing the IP Crime Group and TellPAT, the National IP Crime

Database. We also welcome the recent DTI response to consultation on Part 9 of the Enterprise Act 2002, which promises to allow Trading Standards Departments and other enforcement agencies to share information for the purposes of civil as well as criminal action.

Nevertheless, private sector enforcement action can only go so far, due to data protection and privacy laws, and more state support is needed (see below).

Prosecution: Sadly the position here is much less satisfactory. The high cost of private criminal prosecutions, coupled with the large numbers of cottage industry commercial pirates makes it impracticable for the industry to prosecute offenders without state support. It is currently very difficult to secure a state prosecution of a cottage industry pirate, even though he may be causing significant damage and committing offences which are triable either way. This is largely due to the failure to implement Section 107a of the Copyright Designs and Patents Act, which would give local authority trading standards officers a power and a duty to take enforcement action against copyright infringers.

Implementation has been delayed due to issues around the cost of such enforcement. The Patent Office has been working on a deal whereby local authority TSOs will be able to recover 'Proceeds of Crime' money when convictions are obtained. Furthermore, the Patent Office has agreed to guarantee to make up any shortfall between the money obtained and the cost of enforcement over a three year trial period. Patent Office had announced hopes to implement in April 2006 but this has yet to happen.

Other threats to enforcement:

There are two other threats which risk making it impossible to enforce against certain types of commercial pirate.

1. The extension of limitations of liability for hyperlinks: The problems presented by this proposal are discussed in detail above. Suffice it to say that should such a loophole be created, it would be inevitable that commercial pirates would begin selling hyperlinks to infringing content hosted outside the UK in order to benefit from the immunity offered.
2. The 'private copying service defence'. First observed in the USA in the mp3.com case, this is when the commercial pirate claims that, rather than selling infringing copies, they are offering a backup or conversion service, enabling people who already own a legitimate copy of the work to exercise their private copying exception.

Despite being thrown out by the courts, we currently see commercial pirates in the UK attempt to use this 'defence' every day. The threat is that, without careful wording, any private copying exception might risk legitimising such actions, thereby giving commercial pirates carte blanche to operate without fear of prosecution.