

Brussels, 20 September 2011

Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works – Frequently Asked Questions

1. What are out-of-commerce works?

Out-of-commerce works are works that are still protected by copyright but are no longer commercially available because the authors and publishers have decided neither to publish new editions nor to sell copies through the customary channels of commerce. In the past works such as books were referred to as being either “in-print” or “out-of-print”. Today, with the advent of electronic channels of commerce, the term “out-of-commerce” is used (with electronic publishing a book will be “in commerce” even if only available in electronic form).

2. What is the problem with out-of-commerce books in the EU? What does this have to do with copyright?

While publishers may not have a financial interest in maintaining older and less commercially successful books in commerce, libraries – in particular when we talk about those books which they have in their archives and which are part of the cultural heritage of the country, region or city where they are situated – may want to digitise and make them available online. For many libraries this is part of their public interest mission, made possible thanks to digital technology and networks. For the European citizen, this is an unprecedented opportunity to have access to books that would have otherwise fallen into oblivion.

Libraries do not own the copyright to the works contained in their collections. Therefore, they must seek the permission of the right holders – authors and publishers – before they can digitise out-of-commerce works and put them online as part of their digital library projects.

3. What is the Memorandum of Understanding (MoU) about?

The MoU is a sector-specific stakeholder-driven agreement negotiated amongst organisations representing libraries on the one hand and publishers, authors and their collecting societies on the other. It contains the Key Principles that these parties will follow to license the digitisation and making available (including across borders in the EU) of books or learned journals that are out-of-commerce. It aims to encourage voluntary collective licences.

4. What are the main elements of the MoU?

- It is sector specific, providing solutions for books and learned journals.
- It is based on voluntary licensing agreements to be negotiated in the country of first publication of the works.
- The determination of the out-of-commerce status will be decided in the country of first publication according to criteria defined by the parties.

- The types of use of the works will be agreed by the parties in each licensing agreement.
- It foresees the need for solutions to situations of collective management when not all right holders are represented by a collecting society.

5. Why a MoU? Why is the Commission not proposing a legislative initiative?

Copyright holders, whether authors or publishers, are the ones who can decide whether or not to permit libraries or other cultural institutions to digitise out-of-commerce works contained in their collections and put them online as part of a digital library project. Through voluntary agreements interested parties can negotiate mutually acceptable terms and conditions for the online exploitation of out-of-commerce works. This is preferable to legislation that could be too prescriptive and lack the flexibility to provide solutions adapted to the needs of particular users and the specificities of particular sectors while fully respecting copyright.

The Key Principles contained in the MoU signed today contain the necessary elements to ensure sufficient flexibility enabling authors and publishers to mandate collective management organisations to grant national and multi-territorial licences to those libraries and other publicly accessible cultural institutions wanting to digitise and make available out-of-commerce books and learned journals in their collections. In turn, the MoU recognises that legislative backing for these licensing solutions voluntarily developed by stakeholders may be needed in some Member States in order to cover situations where licences include right holders that are not members of a collective management organization.

6. How do out-of-commerce works differ from orphan works?

There is one fundamental difference between them: orphan works are works where the copyright owners are not known or cannot be found so it is not possible to get the necessary authorisations to use their works. By contrast, the right holders of out-of-commerce works are generally known so a user such as a library will know whom to contact to get the necessary permissions to use the works. Whereas for the use of orphan works, the key element is the determination of the "orphan works" status, for the use of "out-of-commerce" works, the key element is how to facilitate their licensing (without having to determine whether within a collection of out-of-commerce works there are some that may, or may not, be orphans).

7. Is there a link with the recent Commission proposal for a Directive on so-called "orphan works"?

The MoU on out-of-commerce works and the orphan works proposal are part of a two-pronged approach in the field of copyright to further the development of digital libraries in Europe and provide the widest possible access to our cultural heritage. The Commission outlined this approach in the Digital Agenda for Europe (see [IP/10/581](#)) and in the Commission's Strategy on Intellectual Property Rights ([IP/11/630](#)).

The two initiatives are separate - they respond to different needs - but complementary.

The orphan works proposal aims to clarify the situation where the holder of rights in a work is not known or can no longer be located. This situation, while not new, has been brought to the fore by the advent of digital technologies and the possibilities they offer for relatively old or unknown works to be digitised and made available online. It was therefore essential to propose legislation in order to address this very specific situation and provide the necessary mechanisms for libraries and other

cultural institutions to determine the orphan status of works and be able to use them without the risk of infringing copyright.

In the case of out-of-commerce works, the needs are different. These are the needs of "mass digitisation", for instance of important parts of a library's collection. We are trying to provide a licensing solution for works which, while normally being under copyright, are no longer in commerce. The challenge that must be addressed is how to facilitate these licenses, taking into account that often they will need to cover a large number of works and different right holders. This is what the MoU sets out to do.

8. Could this memorandum be used for other works such as out-of-commerce films, games or music?

The MoU signed today is sector-specific. It covers books and learned journals. It is the result of negotiations which took account of the specific needs of certain users (libraries) and right holders (authors in books and learned journals) as well as the role that collective management could play to address these needs. It cannot be seen as a solution that can be automatically extended to other print material, other types of works or other uses. Nevertheless, this MoU is a positive example of how negotiations amongst interested parties can lead to viable results in the area of copyright and the broader debate on making copyright fit for purpose in the digital age. Dialogue between stakeholders is the way forward to facilitate agreements for the digitisation of European out-of-commerce cultural material in other sectors as well.

9. Who are the signatories to the MoU?

The MoU was signed by the European Writers' Council (EWC), the Federation of European Publishers (FEP), the European Publishers' Council (EPC), the International Association of Scientific, Technical and Medical Publishers (STM), the European Bureau of Library, Information and Documentation Associations (EBLIDA), the Conference of European National Librarians (CENL), the Association of European Research Libraries (LIBER), European Visual Artists (EVA), the European Federation of Journalists (EFJ) and the International Federation of Reprographic Rights Organisations (IFRRO).

10. What was the Commission's role in the MoU?

The Commission services (Directorate-General for Internal Market and Services) brought the interested parties around the table and facilitated the dialogue by providing guidance and input to the debate on copyright-related matters.

11. What are the next steps on the MoU?

It is now up to the parties to the MoU to put it into practice. Its full effect can only be determined once licensing agreements based on the Key Principles have been negotiated. The Commission will monitor the development of the MoU based on information received from stakeholders.

12. What is the size of the EU book market?

The total annual sales revenue of book publishers of the EU and the EEA in 2009 was approximately € 23 billion. The largest markets in terms of publishers' turnover in 2009 were Germany, followed by the UK, France, Spain and Italy. Publishers issued a total of about 515,000 new titles in 2009. European publishers held a total of close to 6.5 million different titles in stock – the UK (2.4 million), Germany

(1.2 million), Italy (700,000), France (600,000) and Spain (400,000). A total of approximately 135,000 people were employed full time in book publishing in 2009.¹

In the UK, the digital publishing market is now 6% of the combined physical and digital sales of UK publishers. The overall size of the digital market stands at £180m.

Consumer digital sales of e-books and downloads increased from 2% to 11% of all digital sales from 2009 to 2010.²

Digital Agenda website:

http://ec.europa.eu/information_society/digital-agenda/index_en.htm

¹ Source: the Federation of European Publishers - <http://www.fep-fee.be/documents/EUROPEANBOOKPUBLISHINGSTATISTICS2009websiteIEI.pdf>

² Source: UK Publishers Association - http://www.publishers.org.uk/index.php?option=com_content&view=article&id=1755:the-publishers-association-reveals-accelerated-growth-in-2010-digital-book-market&catid=503:pa-press-releases-and-comments&Itemid=1618