



**“Towards a modern, more European Copyright Framework”:
Adapting Exceptions to Digital and Cross-border Environments –
Recommendations by European library and other cultural heritage organisations**

In response to the Commission’s Communication “Towards a modern, more European copyright framework” and in anticipation of upcoming proposals on copyright, this document presents recommendations on behalf of the library and cultural heritage community.

These recommendations aim to **update and strengthen justified exceptions and limitations** to copyright in this modern digital age, and propose measures to prevent further fragmentation of the single market caused by **contract terms and Technological Protection Measures** overriding legislative provisions for exceptions and limitations.

Libraries, museums and archives provide a cultural space for European **citizens**, a unique outlet for **creators** and essential hubs for **education and research**. European libraries spend approximately **€4.8billion on purchasing content every year**¹. Not only do they support authors through purchasing, they provide a much-needed platform for promotion to existing and new audiences and ensure lasting access to authors’ works. In addition, EU Member States ensure **on-going remuneration of authors** for book loans through national implementation of the Rental and Lending directive.

The library and broader cultural heritage community supports a balanced copyright framework that not only recognises citizens’ right to information, but also respects authors’ rights to fair remuneration for their work. However, libraries and audio-visual collections in particular are witnessing first-hand how **fragmented implementation** of exceptions under EU copyright legislation is an increasing **barrier to cross-border access to content**, preventing progress in particular for students and pan-European research projects. To compound this, in all but four European Member States (Belgium, Ireland, Portugal and the United Kingdom), **contract terms can override existing copyright exceptions**, which further undermines the goal of a coherent European copyright framework. *Examples of the resulting single market failures are provided in Annex.*

In this context, the library and cultural heritage communities agree with the Commission that copyright exceptions must be brought up to date and reflect technological developments in an increasingly digital society. We fully support the Commission’s general objective to make **relevant exceptions mandatory** and to **increase the level of harmonisation**, as outlined in the December Communication, to ensure that all EU citizens benefit from the same level of access to information. However, we would stress that this approach must go hand in hand with provisions to **close loopholes** that allow imposition of contract terms and technological protection measures (TPMs) that override exceptions and limitations.

In order to achieve this, the library and cultural heritage communities propose the following recommendations to update the current EU copyright legislative framework.

¹ \$5.5billion, from 2014 Outsell report, “Library Market Size, Share, Performance and Trends”.

1. Extend relevant exceptions in the InfoSoc Directive to reflect new technological realities

We very much welcome the Commission's stated intention to update certain exceptions benefitting libraries and cultural heritage organisations under Art. 5 of the InfoSoc Directive (2001/29/EC), as well as its intention to make it easier to digitise out-of-commerce works and make them available online. In particular, we would welcome the Commission's action on the following issues:

- Introducing a robust harmonised and mandatory exception that allows **Text and Data Mining (TDM)** both for non-commercial and commercial purposes. Any type of stakeholder should be allowed to carry out TDM where content has been legally obtained;
- Clarifying the preservation exception (5(2)c) to provide a clear space for **preservation** by cultural heritage and research institutions, reflecting the use of digital technologies for preservation and the needs of born-digital and digitised works, where current rules around rights add unnecessary complexity and uncertainty.
- Updating the scope of the existing exception for private study (5(3)n) and research to take into account current practices of accessing digitised collections, including:
 - on site consultation and **remote access via (closed) networks**,
 - **non-commercial cross-border document supply** for research and private study of works and other subject-matter contained in library collections,
 - making available online for non-commercial purposes works in the collections of cultural heritage institutions that are **not available via commercial channels**, or otherwise actively managed by their rights holders;
- Finally, we note that libraries are facing significant challenges when it comes to facilitating **e-lending** within the current copyright framework. However, we appreciate the impact of the ongoing CJEU case (Case C 174/15 on e-lending, between the Dutch Public Libraries Association and Public Lending Right Foundation) on the Commission's upcoming round of proposals.

2. Make the exceptions harmonised and mandatory to prevent single market failure

To ensure that libraries and cultural heritage organisations can cooperate across Europe and that all European citizens and researchers enjoy the same high standard of access to culture and knowledge, all of the above exceptions must be made **mandatory** and should be implemented in a **harmonised** way under the InfoSoc Directive.

3. Protect the exceptions from override by contract terms and technological protection measures

To achieve the objectives of stimulating pan-European collaboration on research, ensuring cross-border access to content at a local level and fostering European cultural diversity, it is crucial that rights to lawfully access content (including content made available to the public on agreed contractual terms which they may access where and when they choose) are not undermined by **contract terms** and **technological protection measures**. The European copyright framework must include a provision that protects exceptions and limitations in the InfoSoc Directive from being overridden in this way².

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² This could be done by replicating the provision on contract override already present in the Database Directive (Art. 15, 96/9/EC) (either overall or with regard to specific exceptions), and removing the wording in the InfoSoc Directive (Article 6.4 - 4th paragraph) which excludes on-demand content made available to the public on agreed contractual terms from the scope of Article 6.4.

ANNEXE

Examples of single market failures as a result of legislative gaps in existing Copyright Framework

Cross-border library services

In January 2012, to protect itself from potential claims of copyright infringement, the British Library, one of the world's greatest research libraries, a library of 'last resort' and the world's largest document supplier, ceased its international document supply service, the Overseas Library Privilege Service (OPLS) that was supported by a UK copyright exception. OPLS was replaced with a publisher-approved licence, known as the *International Non-Commercial Document Supply (INCD)* service. The British Library's response to a Freedom of Information request made in Spring 2015 by European NGO, Electronic Information for Libraries (EIFL), revealed that this licence has adversely impacted cross-border access to information for research for non-commercial purposes in Europe and elsewhere, with 97% fewer requests receiving a positive response in 2014 than in 2012. This is due both to the dramatic increase in copyright fees the library must charge under INCD which has put access to its collections beyond the reach of many countries' (including European) universities and research institutions, and due to publishers having withdrawn 93% of journal titles in the library's collection from availability for cross-border document supply.

EIFL (Electronic Information for Libraries) offers a further example: a PhD student in Estonia was undertaking comparative research in five Baltic and Nordic countries on historiographical narratives i.e. a critical analysis of authentic source materials used in the writing of history. The student needed to consult articles and book chapters from c. 1920 that are not available in Estonia. The university library sent electronic requests to libraries in Iceland and Norway that had the materials in their collections. But, due to copyright and licensing restrictions, the requests were refused.

Indeed, despite extensive schemes in Nordic countries, licensing did not facilitate this straightforward request. In addition, libraries in Denmark and Norway reported in the recent EU consultation on copyright that cross-border access is not permitted under their Extended Collective Licensing schemes. In its comments, the National Library of Norway that has an Extended Collective Licence to provide online access to Norwegian literature said, "the cross-border effect is halted as the cross-border effect is not compatible with EU-law".

Contract override

Libraries are faced with licence contract terms that prohibit them from carrying out various acts permitted by national copyright exceptions and limitations. Purely to illustrate, and not at all to single out its terms as being anything other than typical for digital information products, we compare the publicly available internationally offered *Wiley Online Library Licence* to UK copyright exceptions. This particular licence benefits from being short and clearly written, but its terms are typical of the variables in licence contracts that restrict or prohibit acts permitted by copyright exceptions in one or more EU Member States.

Clause 2(5) states "All rights not specifically licensed herein to the Licensee are expressly re-served by Wiley." This means that any act not expressly mentioned in the licence may not be carried out. Thus, by omission this licence does not permit:

- Preservation copying
- Copying into accessible formats for disabled people
- Copying for judicial or statutory purposes

Additionally, this licence expressly forbids:

- Document supply (*Clause 3(2)*)
- Text and data mining (*Clause 3(1)(3)*)

However, in 2014 the UK introduced provisions to protect its library, archive, research and education exceptions from override by contract terms by rendering “unenforceable” any “term of a contract” [that] “purports to prevent or restrict the doing of any act which [...] would not infringe copyright. All five activities listed above permitted by UK copyright exceptions but not permitted by this licence in most other jurisdictions, may now be carried out by UK licensees on *Wiley Online Library* content without affecting the remainder of the licence contract (*Clause 9(4)* also covers such eventualities).

Licensing removes by the back door the public policy space to determine how information may be accessed and used, with consequential unhealthy impacts on culture, scientific research, education, learning and a democratic society. This should be prevented by legally protecting copyright exceptions and limitations from override by making any contract terms that purport to do so null and void – as the UK, Ireland, Portugal and Belgium have done. There is precedence for this in the Database Directive 96/9/EC.

TPM workaround systems

In September 2015 the UK Libraries and Archives Copyright Alliance (LACA) made a complaint to the UK Intellectual Property Office (IPO) under the s.296ZE of the Copyright Designs and Patent Act 1998 (CDPA), which implements Information Society Directive Article 6.4 into UK law, seeking remedy on behalf of a bona fide researcher attached to an academic institution who was prevented by the CAPTCHA TPM from taking an electronic copy of a free to access online law database, for the purpose of text and data analysis for a non-commercial purpose as permitted under the UK’s text and data mining exception (CDPA s.29A).

The law database website states that it is a term of user access to the website that they will not “copy...publish or reproduce any information which is protected by copyright or any intellectual property rights, except if expressly permitted by the copyright owner”, a contract term that is in this case voided by the UK’s contract override provisions CDPA s.29A(5) protecting the text and data mining exception. The complaint arose because after a number of attempts over several months it had proven impossible to raise any response from the rightholder. Two months later, in November 2015, the IPO formally responded that the complaint could not proceed because it was out of scope under CDPA s.296ZE(9) (implementing paragraph 4 of Information Society Directive Article 6.4) stating:

“Copying for the purposes of text and data mining under s.29A CDPA is a “permitted act” for the purposes of s.296ZE CDPA as are acts which may be done under the exception in reg.20 CRDR (see s.296ZE (11) (b)).

The Complainant has stated that the CAPTCHA technology applied to the site prevents him from carrying out a permitted act in relation to the sentencing web page and seeks a remedy under s.296ZE CDPA. However, it appears that the complaint falls outside of the scope of s.296ZE since s.296ZE(9) provides the section does not apply to copyright works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. As users of the website are able to download the databases on-line, then the terms and conditions governing access to those works will prevail, and it will be necessary to approach the owner of the website to request permission to copy/extract the data.”

The researcher has been unable to carry out the text and data analysis of the database content. The content he required is not available from any other online source to which he has access.