



Limitations and Exceptions
in EU Copyright Law
for Libraries, Educational
and Research Establishments:
A Basic Guide



About LIBER

LIBER (Ligue des Bibliothèques Européennes de Recherche – Association of European Research Libraries) is the main network for research libraries in Europe. Founded in 1971, LIBER has grown steadily to include more than 400 national, university and other libraries from over 40 countries.

Together we work to represent the interests of European research libraries, their universities and their researchers by advocating on issues such as Copyright and Open Access, by collaborating on European-funded projects, and by meeting and learning at events such as our Annual Conference.

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I Introduction

This is an introductory guide to copyright law as it relates to schools, universities, their libraries, national libraries, and public libraries. Limitations and exceptions are crucial for these organisations because they are the primary legal mechanism by which information can be accessed and reused. Education, research, and learning itself is — in part — reliant on the ability to copy and share information.

Copyright law creates a monopoly. The monopoly rights (or 'exclusive rights' as they are called in copyright law) granted to rightsholders would prevent any copying or sharing of the works, if it were not for the flexibilities provided by limitations and exceptions to copyright law. Flexibilities in copyright law are called 'limitations and exceptions' because they are a limit (or an exception) to the exclusive rights granted to rightsholders.

In the electronic world — where information and electronic resources are often not bought outright but rented or licensed — schools, universities and libraries need copyright laws that ensure they can continue to function.

On this point, the Encyclopaedia Britannica says: *"When libraries do not own these resources, they have less control over whether older information is saved for future use—another important cultural function of libraries. In the electronic age, questions of copyright, intellectual property rights, and the economics of information have become increasingly important to the future of library services."*

2 Types of Libraries

There are many different types of libraries. Their specific function determines how they interact with copyright law, and which limitations and exceptions are most important for them.

Public Libraries

When the word 'library' is used, most people think of a public library. A public library allows members of the public to borrow books, CDs, films and other digital resources, or to use the library's collections for reference purposes. In addition, public libraries teach and give training, offer meeting spaces, and are used as a place to launch and support governmental programmes. Generally speaking, the collections of public libraries include, at a minimum, commercially produced books, magazines, sound recordings and film.

Academic / Educational Institutions

These include libraries in schools, major universities and research institutions. They focus on research, teaching and learning. The library's role is to provide access to the sources of information from which teaching, learning and research can develop. University libraries' collections include a mixture of commercially produced published materials and unique unpublished content such as private papers, photographs, videos, letters, personal or company archives. Academic libraries also increasingly host and preserve databases and datasets.

National Libraries

National libraries collect and give access to national publishing outputs. Depending on the country, they can hold sound and film outputs, in addition to text-based materials. Their collections are often backed up with legal deposit laws, dating back as far as the 17th century. More recently, electronic legal deposit legislation requires the deposit of electronic materials with national libraries, and allows the harvesting of a country's websites. The audience of national libraries is generally researchers: academic as well as creators and businesses.

National library collections include a mixture of commercially published materials and unique unpublished content such as private papers, photographs, videos, letters, governmental and non-governmental archives and datasets.

Special Libraries

Special libraries can be found in a broad range of organisations: from governments, the European Commission, European Parliament and learned societies through to charities and businesses. The collections are as diverse as the institutions themselves. They include published materials as well as unique unpublished content such as private papers, photographs, videos, letters, governmental and non-governmental archives and datasets.

Archives

An archive predominantly holds unpublished unique materials that range in scope from private papers, photographs, videos and letters through to governmental and non-governmental archives, and datasets.

3 Libraries, Research, Education: the EU Copyright Framework

There are a number of EU directives (laws which originate centrally in the EU and must be implemented by Member States) which are important for libraries and educational establishments.

Information Society Directive (Copyright Directive) 2001

The Information Society Directive did not harmonise exceptions to copyright across Europe very well. Rather, it perpetuated differences in Member States' copyright laws because (other than one exception for computer caching) each country can decide which exception to implement, and how to implement it. The directive did, however, create a static and inflexible list of permitted exceptions, with which any new or digital exception has to comply.

For researchers, libraries and educational establishments the most relevant exceptions from the Copyright Directive are very wide in scope but, as mentioned above, they create no requirement for Member States to introduce them:

Article 5

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 (i.e. reproduction right) in the following cases:

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 (i.e. reproduction) and 3 (i.e. communicating works to the public) in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;



(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

Database Directive (1996)

This right is unique to the EU. It gives protection to an entire, or large part of, a database — distinct from the actual contents of the database itself. This directive is important for researchers as it may need to be modernised. For example, the Database Directive will potentially have to be amended (along with the Information Society and Copyright Directives) to allow data analysis by computers of Big Data through techniques such as Text and Data Mining (TDM).

Rental and Lending Directive (2006)

This Directive is of particular importance to public libraries who lend their collections to members of the public. It allows libraries to lend their in-copyright collections, subject to remuneration being paid to authors (Public Lending Right). Whether the Directive needs to be updated, or already allows lending of eBooks, is a topic of much debate.

Term Directive (1993)

This Directive's aim was to harmonise the term of copyright and related rights (such as performances and sound recordings) in the EU. In reality, it has not achieved harmonisation of the duration of copyright. The length of copyright still varies quite considerably between Member States on certain types of works, and distorts markets and creates uncertainty for libraries wishing to digitise public domain items.

Digital Single Market Reform and a new Copyright Directive (2016+)

In 2015, the European Commission presented its intention to further harmonise EU copyright legislation, in order to create a Digital Single Market (DSM). Apart from regulation on cross-border access to content services, and the accession of the EU to the Marrakech Treaty (an international treaty on access to materials for the visually impaired), the Commission put forward a proposal in September 2016 for a new and updated Copyright Directive.

The proposed new Directive takes some of the optional copyright exceptions and makes them mandatory. There is a focus on research and education, and on access to knowledge, in the proposal. The Directive includes copyright exceptions for:

- TDM, limited to public research institutions;
- Using copyright protected works for teaching;
- Library and archive preservation of works in their collections.

The proposal also includes a licensing solution for digitising Out-of-Commerce works, a new copyright protection term of 20 years for news publications, and legislation to address the balance between copyright holders and content providers. However, the proposal from the Commission **does not** include important library requirements such as allowing:

- People to use their own computers or hand-held devices to access digitised materials on the premises of a library, rather than being required to use a library supplied ‘dedicated terminal’ as is currently the case;
- Researchers in one country to ask for a personal copy of a book chapter or article from the library of another Member State.

The new Directive will be processed in the European Parliament beginning in 2016. It must be approved by the European Parliament and the European Council, before being applied in the form of national legislation in Member States.

4 FAQs

How much do European libraries spend each year?

Including public libraries, all European libraries spent €5.08 billion on purchasing in-copyright works in 2013¹ — largely on digital content.

Are authors compensated for copying under an exception?

Many countries remunerate authors and creators specifically for copying by libraries, universities and schools through collecting societies. Many countries also have levies on copying media (e.g. photocopiers). Some exceptions require financial remuneration of authors in all Member States (e.g. Lending, Orphan Works).

Are education, research and library copyright exceptions common?

Yes. All Member States have exceptions for education, research, libraries, archives etc.

What is Knowledge Transfer (KT)?

Knowledge Transfer in the case of universities involves the transfer of knowledge and know-how from universities to the private sector. It is one of the focuses of Horizon 2020². According to a European Commission study on Knowledge Transfer 2010–2012, ‘*comprehensive KT policies appear to be correlated with national wealth. Eight of the ten countries with the most intense KT policy activity have a GDP per capita above the EU average*³. Copyright can support or detract from Knowledge Transfer depending on how flexible it is, as scientific research is often based on materials that are covered by copyright or database rights.

How does investing in research help the economy?

Research undertaken in universities is used by the private sector to develop new products and services for the market. One German study concluded that circa 5% of all products in their survey would not have been possible without publicly-funded research⁴. A Danish government study of research intensive companies found that ‘*27% of the products and 19% of the processes developed or introduced during the last three years would have been delayed or abandoned without access to academic research. These new products contribute an average 46% of annual sales.*⁵

1. Outsell. 2014 Library Market Size, Share, Forecast, and Trends.

2. <http://ec.europa.eu/research/era/docs/en/knowledge-sharing-european-commission-182-2007-en-pub.pdf>

3. http://ec.europa.eu/research/innovation-union/pdf/knowledge_transfer_2010-2012_report.pdf

4. Public Research and Industrial Innovations in Germany by Marian Beise and Harald Stahl.

5. Access to Research and Technical Information in Denmark. 2011. Report to The Danish Agency for Science, Technology and Innovation (FI) and Denmark’s Electronic Research Library (DEFF)



How do universities contribute to national economies?

Universities are major direct and indirect contributors to wealth in society. In Germany it is estimated that universities contribute €190 billion to the German economy per annum. In the UK, universities contribute €100 billion to the economy per annum.

5 Changes to EU Copyright Law that would Benefit Libraries, Research and Education

In the following section, we describe 15 current copyright limitations and exceptions and how they should be changed, to enable libraries to work effectively and efficiently.

1. Accessing Copyright Works for Citizens with Disabilities

Libraries and archives in many Member States have laws which allow them to adapt and make accessible copies of in-copyright works for individuals with a disability. Examples of this might include making a braille copy of a book for a blind person, or making a copy of a sound recording for someone who is not physically able to visit a library.

Problem: Laws vary across Europe. Some countries allow copying for some disabilities and disallow it for others. Czech Republic and Bulgaria, for example, effectively only allow copying for the visually impaired, while Finland and Poland do not allow copying of unpublished materials for the disabled.

Required Copyright Modernisations: Libraries and archives should be able to make a copy of an in-copyright work for individuals with all types of disabilities — not just visual impairments. This would ensure that all people, regardless of individual handicaps, can enjoy in-copyright works to the extent that able bodied people can. A disabled EU citizen should also be able to ask someone to make an accessible copy for them anywhere within the EU. This is important if the item they want is not available in their home country.

Addressed in the DSM Proposal? No.

2. Archiving and Preservation

Libraries and archives preserve their collections for cultural, political and research purposes. National libraries, backed up by legal deposit legislation, focus on all types of preservation. Universities tend to preserve academic books and journals. Archives, which often hold unique unpublished materials, are particularly interesting as they tend to hold valuable materials relating to the running of government.

Problem: Traditionally, making preservation copies has entailed making copies of materials onto microfiche and microfilm. Digital preservation is increasingly taking place, so laws must be format neutral (i.e. not distinguish between text, sound and film). Given the cost and complexity of digital preservation, we see the rise of specialist preservation centres that offer preservation services to libraries and archives not just in their own country, but across a range of countries. We also see discussion around a shared single digital preservation infrastructures between Member States (e.g. Latvia, Lithuania and Estonia). This all requires preservation laws to be cross-border and digital.

Required Copyright Modernisations: Digital preservation requires a number of mandatory provisions in copyright law. Laws should allow:

1. All forms of in copyright works to be preserved, and in digital format;
2. Format shifting as digital preservation requires the ability to change digital format (LIBER estimates that a specific digital format will change at least every five years);

3. Multiple copies to be made, since format shifting and using multiple back-up servers is standard digital preservation practice;
4. Digital preservation of collections held in one country to be preserved in another country, or in another place in the same country as part of a digital network.

Addressed in the DSM Proposal? The Commission proposal contains a mandatory exception for preservation. However, to be fully useful such an exception would also have to allow preservation networks between libraries. It is unclear whether the proposed article intends to do this, and this requires clarification.

3. Big Data / Data Analytics / Content Mining / TDM

Copyright does not regulate the ability of people to read, make notes and derive ideas from what they see or hear. The ability to analyse information, and to reuse facts and data freely such as place names or animal names, chemical compounds and book titles, is fundamental to knowledge sharing and everyday life.

Problem: Since the early 2000s, computers have been used to read and analyse digital information on the open web, as well as within specialist databases. The analysis of Big Data with the aid of computers, using TDM, has sped up the innovation cycle because computers can read and analyse vast amounts of information far more quickly than humans. Content mining is being used by European governments, start-ups, technology companies, scientists, and individuals to analyse information, establish facts, and come up with results and hypotheses.

Copyright (and database rights) were not designed to prevent people from reading, analysing or extracting and using facts. The only reason that copyright and database rights are relevant to Big Data and TDM is because — in order to analyse digital information — a computer usually has to make a copy before it undertakes computational analysis.

Some academic publishers assert to universities that TDM cannot be performed on subscriptions already purchased by the university, as a new and separate licence is required if computers, and not human beings are analysing the publications.

The UK government introduced an exception for computational analysis of Big Data in 2014, and Japan in 2009.

Required Copyright Modernisations: Japan⁶, the US, and a number of other Asian countries have copyright laws that allow Big Data to be mined. The EU needs to support existing and new innovation by facilitating computational analysis. Given that a human can, however slowly, freely analyse and extract facts using a pen and paper, we believe copyright has failed its purpose when this same activity is not permissible using a computer. Copyright was designed to protect original artistic expression, not to prevent society from analysing, hypothesising and using facts.

The Copyright and Database Directive must, as a matter of urgency, be updated to permit reading and analysis by computers for commercial and non-commercial purposes. This requires amendments to the Copyright and Database Directives to ensure that:

6. In 2009 a report by the Japanese Copyright Subcommittee of the Department of Culture states “In an advanced information society amidst vast volumes of information, data analytics technology, which allows the extraction of information as well as the advanced processing of such knowledge, is a necessity for users, as well as a fundamental of a digitally networked society. It can also be argued that the development of research involving data analytics has many societal benefits. In addition, another side to the argument is that research developments using data analytics do not use the (artistic) expression contained in a copyright work itself, as it is no more than the extraction of information. And that while in the process of data analytics a copyright work is used, its actual essence is not.” http://www.bunka.go.jp/chosakuken/pdf/21_houkaisei_houkokusho.pdf [Accessed 18/09/2011]

1. Where a person has lawful access to information, they can use a computer to analyse that information;
2. Facts, data and findings can be extracted, reutilised and shared anywhere;
3. Contracts do not override the ability for people to use computers to 'read quickly', hypothesise and analyse;
4. A Technical Protection Measure (TPM) can be circumvented if it is blocking legal access to an in-copyright work.

Addressed in the DSM Proposal? The proposal does not allow citizens or businesses to analyse the internet or other data sources.

4. eLending

Public libraries in Europe have the right to lend any book they own to a member of the public, subject to remuneration being paid to authors. This remuneration, often called the Public Lending Right (PLR), is provided in European Law through the 1992/2006 Rental and Lending Directive. The tradition of libraries lending books to the public goes as far back as the early 1700s, if not before. It is an important way of ensuring that all members of society have access to all types and ages of published content, irrespective of where they live or their financial situation.

Problem: Article 11 and Article 14 of the European Charter of Fundamental Rights of the EU give European citizens the right to receive information regardless of frontiers, and the right to education and continued training. Lending and eLending by public libraries support both these rights. With eBooks, however, the right of libraries to buy any book and lend it is currently being severely challenged.

Public libraries are not able to support education and learning in the way they used to because they are no longer free to buy and lend any book available in the marketplace. Libraries across Europe are reporting problems buying, licensing and lending eBooks to members of the public. Even where books are not available electronically, libraries don't have the right to digitise and then lend books, while applying payment to authors in line with the public lending right.

The problems are not technological. In fact, technology can be used to ensure that 'frictions' or differentiators exist, so as not to undermine viable eBook markets. In some cases, libraries are unable to purchase the material because publishers refuse to sell to them. Some publishers offer artificially higher pricing to libraries, making it difficult for libraries to purchase the range of titles their patrons want. Impractical licensing models are not uncommon, and not all books are available in electronic form.

Required Copyright Modernisations: To ensure that the public can continue to access all information, irrespective of where they live or their financial situation, European law needs to provide public libraries with the right to:

1. Purchase any eBooks, at a reasonable price, as is the case with paper books;
2. Lend eBooks. We acknowledge that, as is the case now with paper book lending, where the prime market for a book is an individual consumer, eLending should not conflict with the consumer-focused eBook market;
3. Remunerate authors fairly through the public lending right, where remuneration is not included in the licence fee paid to publishers by libraries;
4. Digitise and lend any book if not available electronically.

Addressed in the DSM Proposal? No.

5. Harmonisation of the Term of Copyright

The Term Directive 1993 was intended to harmonise the duration of copyright and related rights (such as performances and sound recordings) across the EU.

Problem: The Directive has only achieved partial harmonisation. This causes problems for libraries, archives and museums as, in essence, the EU has 28 different public domains for 28 Member States. Examples where different durations of copyright exist include unpublished works and documentary photographs. This makes putting European cultural history online and the work of organisations like Europeana much more difficult.

Required Copyright Modernisations: The EU should standardise the term of all copyright for published and unpublished works in the single market.

The stated aim of the Term Directive was to remove different durations of copyright as it *'impeded the free movement of goods and freedom to provide services, and to distort competition in the common market.'*

For Europeana, education and research organisations, libraries, archives and museums this distortion continues due to a lack of harmonisation of the duration of copyright laws.

Addressed in the DSM Proposal? No.

6. Making Copies for Users of Libraries

Library users often ask librarians to make copies of copyrighted materials on their behalf. A researcher, for example, may need access to a specific collection, or an article or a book chapter, which is not held by their local university library but *is* found in another library. In addition, librarians commonly supply copies of articles to students and researchers working remotely, under existing Member State exceptions.

Problem: Much modern research is done in international research teams. Cross-border research has, for example, increased by circa 150% in France, Germany and the UK between 1996 and 2005. In the single European Research Area (ERA), however, there is a lack of clarity about whether research copying exceptions are valid across EU borders. This has a chilling effect on research. Imagine a researcher in Germany, working with Greek colleagues on an EU-funded project. If the Greek research team has access to an article via their library but the German colleague's library does not have the same journal in its collection, can the German researcher ask the Greek colleague's library to send a copy of an article? The answer is unclear.

Required Copyright Modernisations: If an article or a book chapter is not available in a student's local library, the library should be able to ask a library in any EU Member State to make a copy of the relevant content. It seems anomalous that, while the EU is investing €80 billion into research and development in Europe under Horizon 2020, a student in Belgium cannot ask his local library to supply a copy of a research article to him that has been sourced in France or the Netherlands. The provision of articles in this manner supports research enormously as not every university can purchase every book or journal.

Addressed in the DSM Proposal? No.

7. Making Digital Copies Available on the Premises

The Copyright Directive allows libraries to digitise and / or make available material in its collections that are not subject to a contract, on 'dedicated terminals' on the premises.



Problem: Most people now have portable devices, so requiring an individual to sit at a particular dedicated computer seems very old fashioned.

Required Copyright Modernisations: Individuals should be allowed to access content made available under this exception on any device, as long as it is only on the premises.

Addressed in the DSM Proposal? No.

8. Mass Digitisation of Out of Commerce Works

Nine Member States have laws that are specific to, or can be used to allow, the mass digitisation of commercially unavailable works by libraries and archives. One such country is Germany, which has a law to allow the mass digitisation of commercially unavailable books published before 1966.

Problem: European 20th century in-copyright materials are vastly unrepresented on the internet compared with US works. Having more European history and culture available online will support cultural diversity, further research and innovation. This, in part, is the mission of Europeana.

Clearing rights *en masse* with individual rightsholders is impossible. A collective licensing solution⁷ and/or an exception is needed. Given that the aim of mass digitisation of commercially unavailable works is to put them on the internet, any individual Member State solution must be able to work across jurisdictional borders. This requires EU-level legislation.

Required Copyright Modernisations: Legal provisions that would allow material to be put online which is no longer commercially available, or was never produced for commercial purposes in the first place, should reflect the following:

1. The introduction of an obligation on all Member States to implement legislation to specifically allow mass digitisation of material not commercially available;
2. Ensure that material that has been lawfully digitised in one country can be made available lawfully across jurisdictional borders (eg. the Orphan Works Directive includes a 'country of origin' principle. We believe that activities which are lawful in one Member State should be lawful in any other Member State).
3. Ensure when implementing legislation that due consideration and a solution is provided where the works are not represented by a collecting society, or the works were never intended for commercial publication in the first place.

Addressed in the DSM Proposal? Instead of a copyright exception, the DSM Proposal suggests solving the issue of access to Out of Commerce works through licensing schemes on a Member State level between users and Collective Management Organisations (CMOs, also known as collecting societies). Through a legal mechanism, such licensing schemes should then apply also to rightsholders outside of the CMO:

LIBER believes the licensing solution for Out of Commerce works as put forward by the Commission does not adequately address the following situations:

1. Where a collecting society exists but will not offer a library a licence to digitise;
2. Where there is no collecting society for a particular type of work;
3. Where a work was never intended for commercial publication.

7. See Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works signed by libraries, authors, collecting societies, visual artists and publishers. http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

9. Non-Commercial Research

In 2001, the Copyright Directive introduced the concept of non-commercial research exceptions as a distinct type of research.

Knowledge Transfer from universities to private industry is very important in many areas (e.g. bioscience, pharmaceuticals, agriculture, medical, transport, aeronautical industries)⁸. According to the World Economic Forum Report, five EU countries are ranked in the top 10 of university / industry collaboration: Finland, UK, Belgium, Germany and Sweden.

Problem: It is extremely difficult to know when a research copy is for commercial purposes, and when not.

- Is copying by a PhD student, sponsored by a commercial company, commercial or non-commercial?
- Is copying by a salaried pharmaceutical worker, working at a university research institution, commercial or non-commercial?
- Are publicly funded hospitals commercial or non-commercial?
- Is a research project undertaken by university researchers, and part-funded by a pharmaceutical company, commercial or non-commercial?
- What happens when a copy is made for non-commercial purposes, but the project later becomes commercial?

Different Member States have varying interpretations of what constitutes commercial copying. In some EU countries, a commercial company's employee can make a copy under the personal copying exception. In other countries this is regarded as a commercial activity and not allowed under exceptions. This distorts competition within the single market.

Required Copyright Modernisations: In reality the non-commercial research exception is impossible to apply to many real-world situations. It is also interpreted differently in different Member States. This hinders university and industry collaborations.

In order to facilitate Knowledge Transfer and industrial innovation, the Copyright and Database Directive should simply have exceptions for research. The post-2001 requirement for all research copying to be non-commercial should be removed.

(The *FAQ* section on p. 5 gives more information on the economic importance of publicly-funded research and how it is routinely commercialised by private companies. Examples of industries benefiting from Knowledge Transfer from universities include the Biosciences, Design, Medical, Chemical, Energy, ICT, Space, Environmental and Transport industries.)

Addressed in the DSM Proposal? No.

10. Orphan Works Directive

Educational establishments, libraries, museums and archives can enjoy the Orphan Works Directive, which allows works where the rightsholder cannot be traced to be put online.

Problem: Currently the Directive only allows artistic works, such as photographs, which are embedded in another copyright work to be used. Whilst the Directive allows unpublished works to be used, it only allows those that have been placed in an archive with the consent of the rightsholder, to be used. Very few unpublished items are likely to become orphan works because, by definition, at that time the archive knew who the rightsholder was. This makes the unpublished

8. <https://connect.innovateuk.org/knowledge-transfer-networks>

provision in the Orphan Works Directive effectively useless, given that most unpublished orphan works will have been deposited by third parties.

Required Copyright Modernisations: Libraries, universities, archives and museums have large collections of photographs, other stand-alone artistic works and unpublished works that help us to better understand history. Preventing European citizens from accessing such works online — from collections which they pay to preserve and maintain — benefits no one.

According to the Orphan Works Directive, a review of the Directive should have been done in 2015. This has yet to be addressed by the Commission.

Addressed in the DSM Proposal? No.

11. Personal Copies / Research and Study Copies

Members of the public are allowed to make copies of in-copyright works to which they have lawful access for their own personal use, including private study and non-commercial research. Collections owned by university and school libraries, for example, can be copied from by individuals.

Problem: In 2001, the Information Society Directive introduced the concept of non-commercial research. Previously, Member States often allowed exceptions for research purposes. How the term 'non-commercial' is interpreted appears to vary widely across the EU. Some countries allow copying by individuals in a commercial company under the private copying exception, whereas in other Member States this is viewed as commercial research. In addition to this, given the large Knowledge Transfer agenda between universities and industry, distinguishing between commercial copying and copying for the purposes of research is frequently impossible.

Required Copyright Modernisations: Exceptions for research copying should be both for commercial and non-commercial research. This would facilitate university and industry research collaborations: the so-called Knowledge Transfer agenda.

Addressed in the DSM Proposal? No.

12. Protecting Copyright From Contracts

The Database Directive, as well as the Software Directive protects certain activities from override by contracts. Similarly, a number of EU countries (eg. Belgium, Portugal, UK and Ireland) also protect limitations and exceptions in copyright law from being removed by contracts.

Problem: Unlike other directives, the Information Society Directive does not protect limitations and exceptions from being removed by a contract. This means that limitations and exceptions given by governments are routinely made null and void by licences. As most digital material is regulated by contractual terms and conditions, which are very often not negotiable, exceptions and the ability to copy and share information for education and research purposes is being compromised. This is made worse by the fact that:

1. Each and every licence is different;
2. Contracts often have confidentiality clauses (so students, researchers and lecturers at a university cannot see the licence);
3. They are often in the laws of another country, requiring legal expertise in the laws of the US for example.

Required Copyright Modernisations: Following the lead created by the Database Directive and the Software Directive, provisions should be included in the Information Society Directive which

ensure that libraries, universities, education and research can enjoy the limitations and exceptions given to them in copyright law. For example, the UK provision that protects copyright law from contractual override states: *To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

Addressed in the DSM Proposal? The proposal only prevents contracts overriding exceptions in regards to the Big Data / TDM exception.

13. Replacement Collection Copies

An item in a library or archive may become damaged, be destroyed or, if held digitally, become corrupted ('bit rot'). Existing EU exceptions allow libraries, subject to certain terms and conditions, to ask another library or archive in the same country for a replacement copy.

Problem: In a single market, and single European Research Area, it makes little sense that a library has to look for a replacement copy only within its own country. Under current EU law, a library in Ireland cannot ask a library in Northern Ireland for a replacement copy, nor could an Austrian library ask the same of a German library.

Required Copyright Modernisations: When an item is destroyed, damaged, or digitally corrupted, a library should be able to source replacement copies anywhere within the EU.

Addressed in the DSM Proposal? No.

14. Teaching

Using public domain and copyright works to illustrate points while teaching is central to all education (e.g. showing a painting or playing part of a broadcast). So is the use of and quotation from copyright-protected works in academic theses. Modern education routinely takes place online, or as distance learning.

Problem: Although the teaching exception is not mandatory, the Information Society Directive's exception for teaching and research — Art 5.(3)a — is extremely generous. The problem is that implementation across Member States varies enormously. Just a few examples from the WIPO study on Teaching and Research Exceptions includes the fact that it is unclear if the copyright laws of Cyprus, Estonia, Latvia and Poland allow online use of teaching exceptions or not, and that very few countries (Malta, the Netherlands, Poland and Slovenia) allow translation for teaching purposes.

Required Copyright Modernisations: Given that universities and research institutions now have branches in other countries, and that teaching itself is increasingly cross border, ensuring greater harmonisation across Member States is highly desirable. This is a pressing issue for universities offering Massive Open Online Courses (MOOCs). In a modern, digital higher-education environment, course material must be accessible cross-borders. Given the unique collections of national libraries, they should be classified as educational establishments in all Member States.

Addressed in the DSM Proposal? The proposal does not create a situation where national libraries, whose collections are unique and support education, benefit in all countries from this proposal.

15. Technical Protection Measures

Publishers use Technical Protection Measures (TPMs) to protect digital publications, and to guard against uses of digital materials that may be undesirable.



Problem: TPMs have near absolute protection in EU Copyright law. Even when TPMs prevent the beneficiaries of exceptions from enjoying those exceptions, there is no automatic right to ignore TPMs.

This can cause problems, for example, in the areas of preservation and TDM. It also causes problems for libraries who buy electronic access to materials and then find usage is fixed to a single individual. After the first person has used the item, it can no longer be used by anyone. Perhaps most concerningly, EU law does not allow TPMs on most electronic content subscribed to by a university to be circumvented, as it is subject to a contract. In this instance not even Member States have the powers to require a publisher to give access.

Required Copyright Modernisations: For educational, research and cultural heritage purposes, people should have the automatic right to circumvent TPMs, where TPMs prevent the enjoyment of activities lawful under copyright exceptions. For example, Swiss law (S.39a.4) allows circumvention of TPMs where such circumvention is taking place in order to perform an act that is legal, for instance under a copyright exception⁹.

Addressed in the DSM Proposal? The DSM proposal will allow publishers to continue to use TPMs in all instances, other than the Big Data / TDM provision. In regards to this exception, Member States will be allowed to intervene to force a publisher to give access but TPMs can still be used in other ways. For instance, LIBER are concerned that the TPM provisions in the DSM proposal could be used to justify a so-called API (Application Programming Interface), which restricts research and monitors the behaviour of the researcher.

For Further Information

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Bibliography

WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives *prepared by Kenneth Crews, J.D, Ph.D, Attorney at Law*

WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired *prepared by Judith Sullivan, Consultant on Copyright and Public Affairs.*

WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel *prepared by Professor Raquel Xalabarder, Chair of Intellectual Property at the Universitat Oberta de Catalunya, Barcelona*

DISCLAIMER: Copyright law is extremely complex. It is subject to differing interpretations, varies greatly between countries and changes frequently. This is a basic guide, which may not always reflect the complex nuances of provisions in differing countries. The guide was produced in good faith based on a number of copyright studies undertaken for the World Intellectual Property Organisation and conversations with librarians across the EU. It reflects LIBER's own experiences and views of EU copyright law.

⁹. Swiss Copyright Act. S.39a.4. The ban on circumvention may not be enforced against those persons who undertake the circumvention exclusively for legally permitted uses.



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