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Response by Electronic Information for Libraries (EIFL)

**to the European Commission Public Consultation
on the review of the EU copyright rules**

March 2014

knowledge without boundaries

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Name: Stichting eIFL.net (EIFL)

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TYPE OF RESPONDENT (Please underline the appropriate):

€ **Institutional user** (e.g. school, university, research centre, library, archive) **OR**
Representative of institutional users

€ → for the purposes of this questionnaire normally referred to in questions as
"institutional users"

This response is made by Electronic Information for Libraries (EIFL), an international not-for-profit organization that works with libraries in more than 60 developing and transition economy countries in Africa, Asia, Europe and Latin America¹ to enable access to knowledge for education, learning, research and sustainable community development.

EIFL partners with national library consortia - groups of libraries that work together to coordinate activities, reduce duplication of effort and combine expertise for example, to manage a joint automated library system, or to negotiate access to e-resources. EIFL works with consortia in the following European countries that represent 645 libraries:

- EU Member States: Estonia², Latvia³, Lithuania⁴, Poland⁵, Slovenia⁶
- EU candidate countries: Former Yugoslav Republic of Macedonia⁷, Serbia⁸
- Potential candidates: Albania⁹, Bosnia and Herzegovina¹⁰, Kosovo¹¹

Libraries in other EIFL partner consortia throughout the world are affected by EU copyright law and policy because bilateral trade and economic partnership agreements may require the adaptation of local copyright laws in accordance with EU rules and standards.

EIFL welcomes the opportunity to respond to the European Commission Public Consultation on the review of EU copyright rules. EIFL supports the submission of the International Federation of Library Associations and Institutions (IFLA).

We hope that the consultation will help to inform global discussions at the World Intellectual Property Organization (WIPO) on copyright Limitations and Exceptions that concern some of the issues raised in this Consultation¹². EIFL, together with IFLA and the International Council on Archives (ICA), is advocating for an international instrument setting minimum, mandatory limitations and exceptions for certain core library and archive activities.

¹ <http://www.eifl.net/where-we-work>

² Consortium of Estonian Libraries Network (ELNET) Eesti Raamatukoguvõrgu Konsortsium

³ Culture Information Systems Centre (Latvia)

⁴ Lithuanian Research Library Consortium (LMBA) Lietuvos mokslinių bibliotekų asociacija

⁵ Poznan Foundation of Scientific Libraries (Poland)

⁶ Consortium of Slovene Electronic Collections (COSEC) Konzorcija Slovenskih knjižnic

⁷ Macedonian Electronic Libraries

⁸ Serbian Library Consortium for Coordinated Acquisition (KoBSON) Konzorcijum biblioteka Srbije za objedinjenu nabavku

⁹ Consortium of Albanian Libraries

¹⁰ Electronic Information Consortium of Bosnia and Herzegovina (EICBIH)

¹¹ Consortium of Electronic Libraries in Kosova (CELK)

¹² http://www.wipo.int/meetings/en/details.jsp?meeting_id=29944

Our response will focus on the following questions:

- Limitations and exceptions in the single market (question 22)
- Access to content in libraries and archives
 - Off-premises access to library collections (questions 32-33)
 - E-lending (questions 36-37)
 - Mass digitization (question 39)
- Disabilities (questions 50-51)

For ease of reference, the above parts only are included in this document.

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC¹³.

Exceptions and limitations in the national and EU copyright laws have to respect international law¹⁴. In accordance with international obligations, the EU *acquis* requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)¹⁵, these limitations and exceptions are often optional¹⁶, in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")¹⁷.

The cross-border effect of limitations and exceptions also raises the question of fair compensation of rightholders. In some instances, Member States are obliged to compensate rightholders for the harm inflicted on them by a limitation or exception to their rights. In other instances Member States are not obliged, but may decide, to provide for such compensation. If a limitation or exception triggering a mechanism of fair compensation were to be given cross-border effect (e.g. the books are used for illustration in an online course given by an university in a Member State "A" and the students are in a Member State "B") then there

¹³ Plus Directive 96/9/EC on the legal protection of databases; Directive 2009/24/EC on the legal protection of computer programs, and Directive 92/100/EC on rental right and lending right.

¹⁴ Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971); Article 13 of the TRIPS Agreement (Trade Related Intellectual Property Rights) 1994; Article 16(2) of the WIPO Performers and Phonograms Treaty (1996); Article 9(2) of the WIPO Copyright Treaty (1996).

¹⁵ Other than the grandfathering of the exceptions of minor importance for analogue uses existing in Member States at the time of adoption of Directive 2001/29/EC (see, Art. 5(3)(o)).

¹⁶ With the exception of certain limitations: (i) in the Computer Programs Directive, (ii) in the Database Directive, (iii) Article 5(1) in the Directive 2001/29/EC and (iv) the Orphan Works Directive.

¹⁷ Only the exception established in the recent Orphan Works Directive (a mandatory exception to copyright and related rights in the case where the rightholders are not known or cannot be located) has been given a cross-border effect, which means that, for instance, once a literary work – for instance a novel – is considered an orphan work in a Member State, that same novel shall be considered an orphan work in all Member States and can be used and accessed in all Member States.

would also be a need to clarify which national law should determine the level of that compensation and who should pay it.

Finally, the question of flexibility and adaptability is being raised: what is the best mechanism to ensure that the EU and Member States' regulatory frameworks adapt when necessary (either to clarify that certain uses are covered by an exception or to confirm that for certain uses the authorisation of rightholders is required)? The main question here is whether a greater degree of flexibility can be introduced in the EU and Member States regulatory framework while ensuring the required legal certainty, including for the functioning of the Single Market, and respecting the EU's international obligations.

21. *Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?*

YES – Please explain by referring to specific cases

.....
NO – Please explain

.....
NO OPINION

22. *Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?*

Yes. EIFL believes that the exceptions in Directive 2001/29/EC should be made mandatory. The Directive itself states that existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights, and that such differences could become more pronounced in view of the development of trans-border exploitation of works.¹⁸. Since the Directive was enacted in 2001, cross-border activities for information resources have developed exponentially.

A requirement in international law to mandate certain uses of protected works stems from the need to set limits to absolute protection in the public interest¹⁹. While international treaties and European Directives have generally chosen to provide permissive exceptions²⁰, the two most recent examples of such instruments include both mandatory exceptions and a cross-border effect: the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled adopted by WIPO Member States in 2013, and the 2012 Orphan Works Directive. Both instruments concern issues heightened by the digital environment, not solved by the market that consequently required intervention by the legislator. These policy responses, that EIFL supports, show that changing needs necessitate a modern approach.

As the EU is expanded to 28 Member States and new technologies increase the desire for cross-border co-operation, trans-national activities such as large-scale library

¹⁸ Directive 2001/29/EC Recital 31

¹⁹ e.g. Berne Convention Article 10(1)

²⁰ For European Directives, with the exception of certain limitations: (i) in the Computer Programs Directive, (ii) in the Database Directive, (iii) Article 5(1) in the Directive 2001/29/EC.

digitization projects, online learning opportunities and joint research information infrastructures must be facilitated by law. The Study on the Application of Directive 2001/29/EC (2013) by De Wolf and Partners, commissioned by the European Commission, found that mandatory exceptions could in particular be justified in the case of the library exception to achieve, inter alia, a key policy objective to promote Europe’s cultural heritage in the online environment²¹.

In order to ensure that the exceptions are given effect for licensed resources (that concerns most electronic resources in libraries), the exceptions must be protected from overrule by contractual terms in copyright contracts. Unlike Directive/96/9/EC on the Legal Protection of Databases, and Directive/2009/24/EC on Computer Programs that protects beneficiaries of exceptions from such contractual terms²², the InfoSoc Directive gives priority to the rights of rightsholders.

As discussed in the De Wolf study “Where it is permissible to exclude the application of an exception by contract on a national basis, the beneficiaries of the exception may find their position weakened by the contractual practices of the right holders. This tension between the exception and the possibility to override it by contract may have cross-border effects.”²³ Therefore discussion on making exceptions mandatory or harmonizing their effect, must be accompanied by a measure that will give binding effect to the exceptions that are otherwise subject to the consent of the rightsholder.

In addition to Member States that have opted to safeguard exceptions in contractual terms²⁴, the UK government accepted a recommendation by the Hargreaves Review of Intellectual Property and Growth that contractual terms should not undermine the benefits of exceptions²⁵, and the report of the Copyright Review Committee in Ireland makes a comprehensive recommendation to support exceptions against contract terms²⁶.

23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

[Open question]

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

YES – Please explain why

.....
NO – Please explain why
.....

²¹ De Wolf & Partners Study on the application of Directive 2001/29/EC on copyright and related rights in the information society - 16.12.2013, p. 301

²² Article 15 Directive/96/9/EC, and Article 9(1) Directive/2009/24/EC.

²³ Ibid p. 436

²⁴ Ibid Belgium, Portugal, Denmark Ibid FN 548 p. 255

²⁵ The Government Response to the Hargreaves Review of Intellectual Property and Growth, <http://www.ipo.gov.uk/ipresponse-full.pdf>

²⁶ Modernising Copyright. Review Report. <http://www.enterprise.gov.ie/en/Publications/CRC-Report.pdf>

NO OPINION

25. *If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.*

[Open question]

.....

26. *Does the territoriality of limitations and exceptions, in your experience, constitute a problem?*

YES – Please explain why and specify which exceptions you are referring to

.....

NO – Please explain why and specify which exceptions you are referring to

.....

NO OPINION

27. *In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of “fair compensation” be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)*

[Open question]

.....

A. Access to content in libraries and archives

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving²⁷ and enable on-site consultation of the works and other subject matter in the collections of such institutions²⁸. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive²⁹.

Questions arise as to whether the current framework continues to achieve the objectives envisaged or whether it needs to be clarified or updated to cover use in digital networks. At the same time, questions arise as to the effect of such a possible expansion on the normal exploitation of works and other subject matter and as to the prejudice this may cause to rightholders. The role of licensing and possible framework agreements between different stakeholders also needs to be considered here.

²⁷ Article 5(2)c of Directive 2001/29.

²⁸ Article 5(3)n of Directive 2001/29.

²⁹ Article 5 of Directive 2006/115/EC.

1. Preservation and archiving

The preservation of the copies of works or other subject-matter held in the collections of cultural establishments (e.g. books, records, or films) – the restoration or replacement of works, the copying of fragile works - may involve the creation of another copy/ies of these works or other subject matter. Most Member States provide for an exception in their national laws allowing for the making of such preservation copies. The scope of the exception differs from Member State to Member State (as regards the type of beneficiary establishments, the types of works/subject-matter covered by the exception, the mode of copying and the number of reproductions that a beneficiary establishment may make). Also, the current legal status of new types of preservation activities (e.g. harvesting and archiving publicly available web content) is often uncertain.

28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?

(b) [In particular if you are a right holder:] Have you experienced problems with the use by libraries, educational establishments, museum or archives of the preservation exception?

YES – Please explain, by Member State, sector, and the type of use in question.

EIFL notes that if implemented, these exceptions allow acts including of preservation and archiving³⁰.

NO

NO OPINION

29. If there are problems, how would they best be solved?

[Open question]

.....

30. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?

[Open question]

.....

31. If your view is that a different solution is needed, what would it be?

[Open question]

.....

2. Off-premises access to library collections

Directive 2001/29/EC provides an exception for the consultation of works and other subject-matter (consulting an e-book, watching a documentary) via dedicated terminals on the premises of such establishments for the purpose of research and private study. The online

³⁰ Article 5(2)c of Directive 2001/29. “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”;

consultation of works and other subject-matter remotely (i.e. when the library user is not on the premises of the library) requires authorisation and is generally addressed in agreements between universities/libraries and publishers. Some argue that the law rather than agreements should provide for the possibility to, and the conditions for, granting online access to collections.

32. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?

(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?

Yes.

1. Publishers in developed countries demand very high prices for remote access to e-resources by university students. This affects in particular small and medium sized institutions, and institutions that are less well off. To give an example of the costs involved in licensing electronic resources in a developed country, the national university site licensing initiative in the UK³¹ manages agreements for 15 major journals with 15 publishers identified by the community as being important for their researchers and students, at an annual cost of approx. £63 million (€75 million) of public funds in 2013. These 15 agreements represent 60-70% of the total journal budgets. Due to the monopolistic nature of copyright, libraries (in every country) are forced to pay the prices charged and to adhere to whatever conditions are ultimately imposed, otherwise they cannot have access to materials needed by their faculty and students.

2. Licences are country and governing law specific, and cross border access is not allowed.

3. EIFL wishes to address in particular the issue of cross-border inter-library document supply (ILDS). As no library can acquire every published work and some libraries have specialist collections that are not available anywhere else, a library may wish to obtain a copy of an item, in response to a request from an end user, from another library where necessary. This established system of co-operation is known as “inter-library loan” for returnable items such as books, and “inter-library document supply” for items such as a copy of a book chapter or journal article. If the requested item is not available locally, it can usually be requested from a library in another country. Inter-library document supply services are a vital adjunct in meeting the specialist information needs of scholars and researchers. ILDS must be supported through an exception because it is not possible or practical for every library to obtain a licence for each item that may be requested by an end user.

Here are two examples from EIFL partner countries that illustrate the need for an exception:

Example 1. In 2013, a PhD student in Estonia was undertaking comparative research on historiographical narratives in five Baltic and Nordic countries. The student needed to consult materials and book chapters from c. 1920-1930 that were not available in

³¹ <https://www.jisc-collections.ac.uk/nesli2/>

Estonia. The university library in Estonia sent electronic requests to libraries in Latvia, Norway and Iceland that each had some of the requested materials in their collections. Latvia satisfied the request, but it was not possible to get the material from either Norway or Iceland due to copyright and licensing restrictions.

As a result the student could not get information that was needed purely for research purposes that was important for their study. In these cases, it is especially hard for a library to explain to the end user why they cannot reasonably get the material, and when it seems to the end user that the only way to get information needed for their bona fide research request is to circumvent the law – a bad outcome for copyright and for libraries.

Example 2. Libraries in developing and transition economy countries often look to major research libraries such as the British Library, the national library of the United Kingdom, to obtain articles from serials and journals not available in institutions in their own country. In January 2012, the British Library withdrew its copyright-based Overseas Library Privilege Service, and replaced it with a publisher licensing arrangement, known as the International Non-Commercial Document Supply (INCD) service. Through INCD, overseas libraries serving educational users can order articles from a limited number of journals under certain conditions at a reduced royalty rate.

However, there are important differences. Some items that are requested are no longer available. Other items are available but have become prohibitively expensive because they are not part of the INCD (non-commercial) title list, and so attract the publisher's full commercial royalty fee. New administrative obligations and conditions of use that vary from publisher to publisher can apply that can create confusion and uncertainty - variables include the territory of the library, electronic delivery to the end user may be permitted or not, extra charges for direct supply may apply or not.

A library serving academic and research users in south-eastern Europe had been using the British Library's overseas document supply service since the 1980s. Until 2012, the service was used frequently because it was fast, reliable and affordable. Now the licensed service is being abandoned because it has become too strict and expensive to use. Some items are not available, or are only available at commercial rates that are unaffordable. For example, the price per article of some requested items increased from c. £13 to £52 (c. €15 to €63). The high costs have put the service out of reach for other libraries e.g. for a library of education science in Lithuania.

An array of inflexible rules regarding supply options can create practical problems. In particular, developing countries need reasonable options that can accommodate local conditions. Librarians in Malawi have had supply problems with the licensed service. Where the option of forwarding an electronic copy of that particular item to the end user is not available, the end user is required to pick up a paper copy in person. So when a researcher at Mzuzu University in Malawi requested such an item, they would have had to travel over 440 km to the University of Malawi in Zomba, which is the location of the account holder, the Malawi Library and Information Consortium (MALICO). In addition, when it is not possible to send the item electronically to the end user due to local connectivity problems, suitable alternative methods of delivery are needed including download, print, scan or fax. Librarians need reasonable copyright and licensing rules that work in the real world.

(c) [In particular if you are a right holder:] Have you negotiated agreements with institutional users that enable those institutions to provide remote access, including across borders, to the works or other subject-matter in their collections, for purposes of research and private study?

[Open question]

.....

33. *If there are problems, how would they best be solved?*

[Open question]

One suggestion to address the problem of the imbalance in negotiating power is through the establishment of an independent body with intervening powers in case of abuse of monopoly position by publishers. It could be styled, for example, on the work of the European Ombudsman³². While the ombudsman model is largely used to resolve complaints made by individuals against public bodies³³, there are examples of interventions in the private sector that might usefully be applied in the situation of libraries and publishers described above³⁴. We would welcome further exploration by the Commission of this idea or alternatives that might help to diffuse tensions and provide support to libraries in negotiating fair licences with publishers.

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34. *If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?*

[Open question]

.....

.....

35. *If your view is that a different solution is needed, what would it be?*

[Open question]

.....

3. E – lending

Traditionally, public libraries have loaned physical copies of works (i.e. books, sometimes also CDs and DVDs) to their users. Recent technological developments have made it technically possible for libraries to provide users with temporary access to digital content, such as e-books, music or films via networks. Under the current legal framework, libraries need to obtain the authorisation of the rights holders to organise such e-lending activities. In various Member States, publishers and libraries are currently experimenting with different business models for the making available of works online, including direct supply of e-books to libraries by publishers or bundling by aggregators.

³² The European Ombudsman investigates complaints about institutions and bodies of the European Union, <http://www.ombudsman.europa.eu/>

³³ <http://www.ombudsmanassociation.org/about-the-role-of-an-ombudsman.php>

³⁴ <http://www.bbc.com/news/business-21117701>

36 (a) [In particular if you are a library:] Have you experienced specific problems when trying to negotiate agreements to enable the electronic lending (e-lending), including across borders, of books or other materials held in your collection?

YES. EIFL provides examples of specific problems in two partner countries relating to e-lending.

Example 1. Tallinn Central Library, a member of the Consortium of Estonian Libraries Network (ELNET), is a public library that serves the city of Tallinn, Estonia. In part due to high internet penetration, literature is becoming more widely available in English than in Estonian, leading to concerns about the future reading, speaking and writing skills of young people in Estonian. One of the Library's objectives is the promotion of the Estonian language, spoken by about 1.3 million people, and to increase access to Estonian literature.

In 2012, the Library took the initiative to introduce Estonian e-books, that first became available in 2009. With cooperation and goodwill from local publishers and authors, the library has developed an e-book service known as ELLU (E-raamatute laenamis- ja lugemiskeskond) that has had success. But the process and basis of the system, that depends on voluntary agreements with right holders, highlights problems that cannot be overcome without changes to European copyright law. For example,

- libraries no longer have the right to decide for themselves which published books to acquire – the loss of a fundamental freedom. The right holder can refuse a licence, or impose an embargo period after publication. 58.7% of the Library's requests for Estonian titles have consequently been refused.

- the Library is therefore in an unequal bargaining position when seeking to negotiate the terms and conditions of the licence. Such conditions, some of which act like digital roadblocks that are counter-intuitive to the digital environment include single-user use only; online, streamed access only - no downloading to a device; the licence is valid for 20 "loans" after which a new licence must be purchased (reduced from 35 "loans" in 2013).

- the process of seeking individual permission from publishers, or sometimes directly from authors to acquire the title is costly and time-consuming even for a small country such as Estonia, especially since the administration is handled by a single municipal library.

Libraries, authors and publishers have a common goal to encourage reading and writing in the Estonian language, essential to preserve national culture and identity. While the market continues to develop, important issues such as fear of piracy and compensation for authors for e-book lending are discussed with local publishers. But progress will be slow and piecemeal until the intractable issue of copyright is addressed at European level to give equal treatment to information carriers (print and electronic books), and leverage to libraries to negotiate fair deals with right holders.

Example 2. The library community in neighbouring Latvia also seeks action at European and international level to resolve the e-lending problem. During an eight month project (2013) to develop agreement on best practice principles for e-book

acquisition and lending³⁵, a draft Memorandum of Understanding did not succeed in getting publisher endorsement and efforts to offer e-books to library readers on reasonable terms for libraries and their readers have stalled.

In the absence of a sound legal framework for e-lending, it can be expected that frustrated readers will look elsewhere for their e-reading materials with the effect of driving them away from literature in local languages, or towards illegal file-sharing sites. At the same time, libraries will be forced to succumb to whatever access rules that publishers and intermediaries set in order to fulfil reader expectations, thus forfeiting their social mission to provide access to information to all members of society without discrimination.

36. If there are problems, how would they best be solved?

EIFL believes that libraries need a clear right to acquire commercially available e-books, and to lend e-books under reasonable terms and conditions. While various cases are pending before the European Court of Justice that relate to the issue of digital exhaustion that may take many years to settle, the legislator should amend Directive 2001/29 to include a provision that prohibits the vendor from refusing to license, or to sell a copy of, a commercially available copyright work to a library.

An independent body with intervening powers in case of abuse of monopoly position by publishers (see question 33) could also be helpful.

The European Commission should share their experiences of library e-lending problems at WIPO's Standing Committee on Copyright and Related Rights under the agenda item Limitations and Exceptions, and make proposals that seek a solution at international level, such as that set out in the Treaty Proposal on Limitations and Exceptions for Libraries and Archives from EIFL, IFLA, ICA and Innovarte³⁶ that reflects Principle 1 of the IFLA Principles for Library eLending³⁷.

4. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other³⁸. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective

³⁵ **Thought leaders in Latvia: libraries and e-books, <http://www.eifl.net/case-study-libraries-and-ebooks-in-latvia>**

³⁶ See Article 6 in http://www.eifl.net/system/files/201401/tlib_v4_4_december_2013.pdf.

³⁷ <http://www.ifla.org/node/7418>

³⁸ You will find more information about his MoU on the following website: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm.

Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)³⁹.

40. [In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management organisation:] Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?

41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters’ archives)?

The 2011 MoU on key principles on the digitisation and making available of out of commerce works recognizes that the large-scale digitisation and making available of Europe's cultural heritage contained in the collections of publicly accessible cultural institutions is in the public interest, as well as in the interest of the cultural and creative sector.

EIFL notes that large-scale or “mass digitisation” by libraries is usually undertaken within the context of a specific project or collection, and does not usually involve scanning the entire content of a library (see the introduction to this section). Library policies on digitization usually set out the scope and selection criteria (taking into account copyright status or permission to digitize), technical standards and access. Many policies can be viewed online.

EIFL can relate experiences concerning mass digitization as follows:

Experience from Lithuania:

Lithuanian copyright law (Article 22 Part 1 §3) contains an exception that enables memory institutions to use a work for non-commercial research or personal study by making it accessible via computer networks on the premises of the institution, provided the work is not on public sale and the copyright holder has not prohibited its exploitation. A library may reproduce copies of works but only for the technical purpose of making them accessible via a computer network, and only up to the equivalent number of copies held by the institution. This provision makes it very complicated to make works accessible to library users.

Martynas Mažvydas National Library of Lithuania is authorized to perform the function of representing the State in Europeana, the European Digital Library that is co-funded by the European Commission, with a view to ensuring consistent promotion of Lithuania’s cultural heritage and its dissemination in the area of European cultural heritage. Accordingly, the Library is implementing two digitization projects funded by EU Structural Funds.

³⁹ France and Germany have already adopted legislation to back the effects of the MoU. The French act (LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du xxe siècle) foresees collective management, unless the author or publisher in question opposes such management. The German act (Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes vom 1. Oktober 2013) contains a legal presumption of representation by a collecting society in relation to works whose rightholders are not members of the collecting society.

In accordance with Lithuanian copyright law (Article 15), the Library signs agreements with authors for works in commerce for the non-exclusive right to exploit such works by digital reproduction or making publicly available. However restrictions in the agreements mean that the Library cannot contribute certain important project materials to Europeana. In some cases, it is impossible to get agreements at all because although the works are not orphaned, the copyright status of the work still cannot be ascertained.

The project “Development of the Virtual Electronic Heritage System” has difficulties with musical works. According to the author agreements, musical works may only be listened to, and only within the territory of the Republic of Lithuania. Other uses such as downloading onto mobile devices are prohibited, as well as making the materials publicly accessible via third party computer networks, including cross-border. As a result, these works must be excluded from Europeana.

The second project concerns the digitization of works of modern classical literature from the 20th and 21st centuries. For works in commerce, the National Library engages in processes to find the author for every work that takes much time and financial resources, and involves lengthy debates with publishers. One of the problems is that the authors or other copyright holders, with whom agreements should be signed, often do not know if the publisher is the owner of the copyright, for what period of time the copyright has been transferred, or if this period has expired. In addition, translators, illustrators, book or cover designers must also be found to give their permission.

Experience from Poland:

In Poland, the limitation of access to digitized material on dedicated terminals on the premises is a huge problem for university libraries. A broad definition of “the premises” is crucial for everyday activities. Digitization and mass preservation is a costly process. Libraries (in Poland and elsewhere) believe that duplication of costly digitization efforts, where an item is digitized by several times by different university libraries and is available only on the premises of each particular library, is no longer feasible. Libraries believe that in the near future they will share infrastructures for digitization activities. Libraries need an exception that meets the realities of the online environment - a modern equivalent of “on the premises” - that permits access at least within the network of the library.

Experience from Latvia:

While the state invests in the digital preservation of protected works that are considered part of the national heritage of Latvia, the digital works cannot usually be made available for society to enjoy (even in low resolution formats). So there is no equality between the interests of society, that has invested in the preservation of the work, and its availability for the benefit of society.

Libraries in Latvia have highlighted problems digitizing photographs that are orphan works e.g. photographs from Soviet times that do not include the photographer’s name, and photographs from private collections. In rural areas, the local library (and museum) is a quasi cultural centre for the region documenting local history, culture and customs. Photos are an important part of studies and local publications, but it is hard for the

institutions to undertake expensive investigations of copyright holders, and to make qualitative decisions. As photographs are excluded from the scope of Directive 2012/28/EU on certain permitted uses of orphan works, libraries are looking to the legislator to resolve this outstanding issue. (Subject-matter not currently included in the scope of the Directive, in particular stand-alone photographs and other images, is subject to review in the Directive by October 2015).

D. Disabilities

Directive 2001/29/EC⁴⁰ provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)⁴¹.

The Marrakesh Treaty⁴² has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

50(b) [In particular if you are an organisation providing services for persons with disabilities:] Have you experienced problems when distributing/communicating works published in special formats across the EU?

YES. EIFL will comment on cross-border problems relating to the provision of services for persons with disabilities.

The Lithuanian Library for the Blind (LAB), a member of the Lithuanian Research Library Consortium (LMBA), is a state-designated library with a mandate to ensure that blind and visually impaired people have equal rights to access information, participate in social life and learn about Lithuanian culture. LAB is the only producer of talking books – about 200 titles annually - in Lithuania. For school children and students, LAB produces academic materials in the user’s preferred format e.g. enlarged text, MP3, read by a speech synthesiser, and in multi-formats that comprise merged text and audio files. The copies are made under an exception in the Lithuanian Copyright and Related Rights Act (2012) Article 10.

In 2010, a Virtual Library for the Blind (known as ELVIS), co-funded by the European Regional Development Fund, was established to provide materials in DAISY and other digital formats to end-users. Since then, 228 registered users who are blind, low sighted

⁴⁰ Article 5(3)b of Directive 2001/29.

⁴¹ The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons (http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (<http://www.visionip.org/portal/en/>).

⁴² Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

or have a print disability can download or stream about 7,000 digital audio publications that has helped to empower readers who no longer have to travel to the library.

There are two problems relating to cross-border services.

(1) While special format material is available only in the Lithuanian language, national minorities in Lithuania need literature in other languages. For example, books in Polish and Russian are in demand among senior readers, who constitute the greater part of the readership. However receiving physical and digital material from libraries in other countries, even within the EU, is difficult or impossible due to copyright rules.

(2) With increased migration and movement of peoples around Europe, there is a growing demand for materials from Lithuanians with a visual disability living in other countries. For example, LAB has been contacted by emigrants living in Germany, Ireland, and Norway who would like to get reading material in their own language through ELVIS. As the service develops, LAB envisages increased demand from qualified users living abroad. The lack of a unified copyright exception throughout Europe, and the lack of import/export provisions is a major impediment to the service. In addition, the definition of persons with a visual impairment in the 2012 Act does not include other reading disabilities, such as dyslexia.

51. If there are problems, what could be done to improve accessibility?

EIFL urges the European Commission to ratify and implement the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. The Commission should expedite its transposition into EU law as a matter of urgency and amend, if necessary, Directive 2001/29/EC. Ratification would be in line with the European Disability Strategy 2010-2020 that aims to ensure effective participation in society on an equal basis with others by, inter alia, removing legal barriers to education and lifelong learning systems.

It is 29 years since a joint WIPO-UNESCO report recommended an international instrument that would permit production and distribution of accessible formats. EU ratification should not be bundled with other copyright issues under consideration, as this could have the effect of further delaying implementation into national law by several years. The current situation represents a market and a policy failure that must be fixed without delay.

It is really unfortunate that persons with disabilities other than print disabilities, such as deaf people, were excluded from negotiations in the Marrakesh Treaty. In order to maintain the inclusive formulation of Article 5(3)b of Directive 2001/29, the provisions of the Treaty should be extended for the benefit of European citizens with any disability, to the extent required by the specific disability. An inclusive definition of the beneficiaries would avoid the inadvertent creation of a two-tier system of access to information depending on the nature of the disability.

52. What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?

[Open question]

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