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**European Commission Green Paper  
Copyright in the Knowledge Economy  
COM(2008) 466/3**

**Response by Electronic Information for Libraries**

**Introduction**

Electronic Information for Libraries (eIFL.net) is a not-for-profit organisation that supports and advocates for the wide availability of electronic resources by library users in developing and transition countries. The guiding principles of eIFL are that access to information is essential in education and research and has a direct impact on the development of societies; the combined purchasing and negotiating power of libraries can lead to affordable and sustainable access to electronic information in countries in transition; the empowerment of citizens and the spread of democracy depend on equal access to information and knowledge worldwide: eIFL.net is committed to levelling the playing field.

Its core activities are negotiating affordable subscriptions and the best terms of use for member libraries with commercial publishers on a multi-country consortial basis, supporting the development of national library consortia and building a global knowledge-sharing network. There are programmes on open access publishing, the development of institutional repositories of local content, free and open source software, and copyright for libraries. “Advocacy for Access to Knowledge: copyright and libraries”, known as eIFL-IP, aims to protect and promote the interests of libraries in copyright.

eIFL.net is a membership-based organisation with national library consortia in 50 developing and transition countries in Africa, former Soviet Union, central and south-east Europe and south-east Asia, including

- EU Member States: Bulgaria, Estonia, Latvia, Lithuania, Poland, Slovenia
- EU candidate countries: Croatia, former Yugoslav Republic of Macedonia
- Potential candidate countries: Albania, Bosnia and Herzegovina, Kosova, Serbia

eIFL welcomes the opportunity to respond to the European Commission Green Paper “Copyright in the Knowledge Economy” COM(2008) 466/3. We would be glad to provide further information or clarifications on any aspect of the Green Paper.

Our response will include

- Introductory comments
- General issues (questions 1-5)
- The exception for the benefit of libraries and archives (questions 6-12)
- The exception for the benefit of people with a disability (questions 13-18)
- The exception allowing the dissemination of works for teaching and research purposes (question 19)

## **Introductory comments**

### **The EU copyright acquis impacts on eIFL members worldwide**

The EU has a comprehensive external relations policy that oversees bilateral relations and the conclusion of trade and cooperation agreements with countries all over the world. As well as candidate and potential candidate countries, countries in other regions that have EU relations must usually adapt their laws to the copyright acquis. Therefore copyright laws in countries in the eIFL network may have to be amended to “a level of IPR protection similar to that existing in the EC, including effective enforcement means”<sup>1</sup>. Any such changes may impact on the library community in the country. eIFL member countries with EU relations include:

European Neighbourhood Policy. eIFL members: Armenia, Azerbaijan, Belarus, Egypt, Georgia, Moldova, Occupied Palestinian Territory, Ukraine.

Partnership and Cooperation Agreements. eIFL members: Kyrgyzstan, Tajikistan, Uzbekistan.

Economic Partnership Agreements. eIFL members: Botswana, Cameroon, Ghana, Kenya, Lesotho, Malawi, Nigeria, Senegal, South Africa, Sudan, Swaziland, Zambia, Zimbabwe.

eIFL members throughout the world therefore have a strong interest in EU copyright laws and policy. eIFL-IP is working to ensure that members are informed about flexibilities in Directives, implementations within Member States, current discussions and future directions of EU copyright policy, so that they are in a position to contribute to such debates nationally when their laws are being updated.

### **Contribution of libraries to the knowledge economy**

The Green Paper notes that the publishing sector makes an important contribution to the European economy (p.4). The value of libraries to the knowledge economy was recognised by the Commission in its Communication i2010 Digital Libraries (2005). As well as contributing to the cultural and social lives of European citizens, libraries

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<sup>1</sup> [http://ec.europa.eu/world/enp/documents\\_en.htm#1](http://ec.europa.eu/world/enp/documents_en.htm#1)

and archives are “major sectors of activity in terms of investment and employment. In 2001 European libraries employed 336,673 full time equivalent staff with more than 138 million registered users. Their impact on the economy at large is substantial. Digitisation of their resources could considerably increase this impact...Furthermore, digitisation efforts will have considerable spin-offs for firms developing new technologies<sup>2</sup>. The Commission further notes in its Recommendation on the digitisation and online accessibility of cultural material and digital preservation, that cultural material is an important resource for new added value services and will contribute to enhancing growth in related high value-added sectors such as tourism, education and media<sup>3</sup>.

Such findings are supported by the British Library, one of the world’s great research libraries, in which the total value each year of the British Library was measured at €435 million, of which €70 million is direct value and €364m indirect value<sup>4</sup>. The independent study concluded that the Library generates value to the British economy around 4.4 times the level of its public funding.

Information is the fuel of modern economies. In Europe, content industries account for approximately 5% of Europe's GDP and organisations increasingly depend on access to quality information to make informed decisions. Libraries are a major provider of access to such content.

### **Copyright exceptions in the digital environment: contract law and TPMs**

*“As mechanisms of access, limitations and exceptions contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal advancement.”*

Concieving an International Instrument on Limitations and Exceptions to Copyright, P. Bernt Hugenholtz and Ruth L. Okediji, 2008

Exceptions and limitations are the cornerstone of access to copyrighted content for libraries and other users. The agreed statement concerning Article 10 (Limitations and Exceptions) of the WIPO Copyright Treaty permits members to extend existing limitations and exceptions for the digital environment, and to devise new ones that are appropriate for the digital network age.<sup>5</sup>

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<sup>2</sup> Communication from the Commission i2010 : digital libraries {SEC(2005) 1194} {SEC(2005) 1195}

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0465:EN:NOT>

<sup>3</sup> Commission Recommendation on the digitization and online accessibility of cultural material and digital preservation {SEC(2006) 1075} {SEC(2006) 1076}

<sup>4</sup> Measuring our Value. Results of an independent economic impact study commissioned by the British Library to measure the Library’s direct and indirect value to the UK economy <http://www.bl.uk/aboutus/stratpolprog/increasingvalue/index.html>

<sup>5</sup> [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P86\\_11561](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P86_11561)

The Green Paper discusses the application of the exceptions in Article 5 of Directive 2001/29/EC (known as the Information Society Directive) and asks whether non-mandatory exceptions are adequate in the light of evolving Internet technologies. In any discussion of exceptions in the digital environment, two other issues must be resolved: the relationship between copyright law and contract law and exceptions and technological protection measures (TPMs).

Most electronic material in libraries is subject to a licence. While a library may have off-the-shelf electronic products in their collections, most of a library's electronic resources usually comprise large collections of databases, electronic journals, books and newspapers, etc. purchased through commercial suppliers. All are usually subject to a licence agreement with the copyright holder (usually the publisher). Contract law usually takes precedence over copyright law, so anything that the library agrees to in a licence is usually binding regardless of what the copyright law says. The principle of "freedom of contract", however, often puts libraries at a disadvantage because the rightholder has an exclusive, monopoly right over the material. Library experience shows that standard publisher contracts frequently contain clauses that do not recognise user provisions under national copyright law. Because the starting position of the parties is unequal, it can be difficult or even impossible for the library to negotiate better terms. This can mean that publicly funded institutions have to spend time negotiating provisions that are available under copyright law and/or end up paying for the use of material that is otherwise subject to an exception. Fundamentally, it serves to undermine copyright law.

The legislator anticipated the problem in the context of the database right and a solution was provided. Article 15 of the Database Directive<sup>6</sup> states that any contractual provision contrary to the exceptions shall be null and void.

The second issue is the relationship between exceptions and technological protection measures. The implementation of Article 11 of the WIPO Copyright Treaty in Europe through Article 6 of the Information Society Directive, gave rightholders a new tool with which to enforce their copyrights. Using technology, rightholders can set the rules by which content is accessed and used, and can override exceptions that exist for the benefit of users if they so wish. The legislator foresaw the imbalance this would generate and attempted to address it by encouraging voluntary agreements between the parties in the first instance, and by providing that Member States must ensure that beneficiaries avail of certain (but not all) exceptions. However, online content subject to licence is excluded from this safeguard. In any case, Article 6(4) has not succeeded.

The combination of contract terms and TPMs has handed rightholders significant new abilities to control use of digital content, as well as to enforce rights effectively by-passing copyright law. Even if mandatory exceptions as raised in the Green Paper were to become a reality, harmonisation would still not be achieved until these twin

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<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>

issues are resolved i.e. that contract cannot override copyright law and that TPMs cannot prevent a user from availing of a lawful exception. **We urge the Commission, as part of this Review, to address the relationship between contract and copyright law, guided by examples from certain Member States, and to safeguard exceptions from TPMs.**

### **The three-step test**

The Green Paper states that the three-step test has become a benchmark for all copyright limitations (p.5). While this interpretation may be creeping into common wisdom, it is questioned by legal scholars who posit that the three-step test in the Berne Convention applies only to Article 9(1), the right of reproduction, and does not apply to other economic rights guaranteed by the Convention, such as Article 2bis (speeches, lectures), Article 10 (quotations, illustrations for teaching), Article 10bis (broadcast works and current events).<sup>7</sup>

In July 2008, a group of leading European academics issued a Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law<sup>8</sup> and stated that the three-step test's restriction of limitations and exceptions to exclusive rights to certain special cases "*does not prevent*

*(a) legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable; or*

*(b) courts from*

*- applying existing statutory limitations and exceptions to similar factual circumstances mutatis mutandis; or*

*- creating further limitations or exceptions, where possible within the legal systems of which they form a part."*

It goes on to say

*"Limitations and exceptions are the most important legal instrument for reconciling copyright with the individual and collective interests of the general public. In determining the scope of application of limitations and exceptions, the Three-Step Test should not take into account only the interests of rightholders. The need to give equal consideration to third party interests is confirmed explicitly in the Three-Step Test as applied in industrial property law (Art. 17, Art. 26(2) and Art. 30 TRIPS)."*

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<sup>7</sup> Conceiving an International Instrument on Limitations and Exceptions to Copyright, P. Bernt Hugenholtz and Ruth L. Okediji, 2008 p.20  
<http://www.ivir.nl/staff/hugenholtz.html>

<sup>8</sup> [http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration\\_on\\_the\\_three\\_step\\_cfm](http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step_cfm)

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*“The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including*

- interests deriving from human rights and fundamental freedoms;*
- interests in competition, notably on secondary markets; and*
- other public interests, notably in scientific progress and cultural, social, or economic development.”*

Following its incorporation into the Information Society Directive, several EU Member States have transposed the three-step test into their national laws. The general view reported among European scholars, however, is that the test does not belong in national laws because is a drafting tool for the legislator and is not addressed at the citizens of Member States.<sup>9</sup> **It would be helpful if the Commission issued a guideline on this practice.**

## **General issues (questions 1-5)**

### **(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions**

No.

Copyright exceptions are public statutory provisions that apply universally to all beneficiaries to support research, education and other public policy goals. The implementation of copyright exceptions equally should remain in the public sphere and should not be left to negotiations between the private sector and the beneficiaries of exceptions. Groups of beneficiaries, such as consumers and distance learners, are large and diverse by nature so the proposition may not also be very practical.

Exceptions can be flexible by design because the legislator cannot foresee every possible permutation. Once enacted, statutes are handed over to “civilians” for use. The practical value of an exception to a user is in its implementation. A narrow implementation weakens its value to a user, a broad implementation strengthens its value. This critical component should not be determined by contractual arrangements between right holders and users because the parties are not equal. Indeed, the question appears to overlook this fundamental aspect of the copyright system: that the right holder has an exclusive, monopoly right while the library needs access to the material to fulfill its mission.

It is the responsibility of the legislator to maintain a balance between the rights of rightholders and the larger public interest from the drafting phase to implementation. The legislator, and ultimately the courts, must continue to take responsibility for overseeing the implementation of copyright exceptions. Contractual arrangements can never replace copyright exceptions nor their implementation. In addition, the

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<sup>9</sup> P. Bernt Hugenholtz and Ruth L. Okediji op cit p.18

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continued existence of an exception should not be dependent upon the availability of a licence.

**(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?**

It is unclear what exactly may be envisaged by the question. Copyright exceptions must in principal remain the starting point in any debate about user access. Licences should not replace exceptions as an access mechanism. Where there is an identified need and where the law does not fulfill that new need, then new legislation should be enacted. Otherwise, exceptions will become increasingly irrelevant to the needs of modern society and will wither. There are other shortcomings in this scenario.

The question pre-supposes the ability to obtain a collective licence. This is not the reality in every country including many countries in which eIFL works, so it would not be a practical solution everywhere. Exceptions may be compensated or uncompensated depending on their scope and nature. One of the purposes of a collecting society is to represent and obtain maximum benefit for their members, authors and publishers. One wonders what the incentive would be in practice for a collecting society to negotiate an uncompensated use, of the type that might otherwise be covered by an exception.

As explained above, the European copyright acquis applies to countries beyond those of the European Union. At present, such countries have the option to transpose the listed exceptions into their national laws. In a regime that would replace licences with exceptions, such licences would presumably not apply in third countries. At the same time, the option of applying the exception would have been closed off, leaving the obligation to implement the rights but without a mechanism to benefit from a needed exception. This would be unfair to developing and transition countries with the need for policies that foster social and economic development.

There is a role for contractual arrangements for uses that go beyond what is permitted by copyright exceptions, but contracts should never replace exceptions. Independent mediation or arbitration mechanisms should be available to protect the licensee in case of dispute.

**(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?**

No.

The non-mandatory approach has resulted in a failure to harmonise. As a result, the European copyright system is out of balance with harmonised rights and

unharmonised exceptions. The Single Internal Market for the exchange of knowledge goods has not taken hold. As the EU has expanded to 27 Member States, the desire for cross-border cooperation has increased, yet trans-national activities such as library digitisation projects, distance learning course and joint research projects are hampered.

The other notable feature of Article 5 of the Information Society Directive is that the list of exceptions is exhaustive, constraining Member States from introducing new exceptions as technologies and economic and social needs change. Just a couple of years after the Directive was finally implemented in all Member States, the Commission in the Green Paper already raises the possibility of the need for new provisions (orphan works and user-generated content), as it seeks to promote the free movement of knowledge and innovation as the “Fifth Freedom” in the Single Market.

European citizens have shown that they want to access European culture online. Following its launch on 20 November 2008, Europeana, the European digital library, museum and archive received 10 million hits an hour with 3,000 concurrent users searching famous cultural works such as the Mona Lisa and books from Kafka, Cervantes and James Joyce. The popularity of the site exceeded all expectations, even causing its temporary closure.<sup>10</sup>

European libraries go to much effort and expense to collect, organise, preserve and make available an enormous range of material for cultural, educational and research purposes. They are usually paid from public funds and may mandated by statute, yet they are unable to make large portions of their material available online and so cannot meet the legitimate needs and expectations of their users. Unless legal problems are resolved to enable the demand for large-scale European culture online to be met, European policy-makers will be failing their citizens, who will turn elsewhere for their culture and entertainment.

**(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?**

Yes.

Mandatory exceptions would provide legal certainty for beneficiaries of exceptions and would facilitate cross-border activities and exchange of knowledge goods as explained earlier.

**(5) If so, which ones?**

Each exception in the Information Society Directive was carefully considered by the legislator when the Directive was being drafted. Each serves a continuing public

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<sup>10</sup> <http://dev.europeana.eu/>

interest purpose, so they should all become mandatory. All the exceptions are subject to the three-step test. Core exceptions that are of high and immediate relevance to libraries are:

Reprographic copying Art 5(2)(a); private use Art. 5(2)(b); reproduction by publicly accessible establishments Art 5(2)(c); use for teaching and research Art 5(3)(a); use for the benefit of the disabled Art 5(3)(b); news reporting Art 5(3)(c); criticism and review Art 5(3)(d); security and judicial and other proceedings Art 5(3)(e); incidental use Art 5(3)(i); making available electronic works on the premises of publicly accessible establishments (art 5(3)(n)).

## **The exception for the benefit of libraries and archives (questions 6-12)**

**(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?**

No.

The meaning of this question is taken to refer to publishers developing online access to their full-text back-catalogues (different to bibliographic catalogues).

The question confuses and conflates the role of libraries and publishers. Publicly funded libraries exist to serve the public and have special obligations, often mandated by law, to preserve and manage a nation's cultural and scientific heritage. Libraries collect a huge range of material in all formats, both published and unpublished. Libraries take a long-term planning view and have comprehensive collection and preservation policies to serve current needs and to anticipate future requirements. One cannot predict exactly what material will be valuable to future scholars e.g. advertisements from early newspapers and magazines are a rich resource for social scientists today, websites from the pioneering days of the internet are becoming a useful to scholars. Neither commercial nor not-for-profit publishers have the mandate or the capacity to undertake such a role.

Most content nowadays is born digital so publishers are increasingly making their content available online. Some publishers are retro-digitising their back-catalogues. Usually, publishers will undertake the expensive process of retro-digitisation when there is a commercial interest to do so. This is in contrast to libraries who digitise books, maps, recordings, photographs, unpublished documents, paintings and films for cultural and educational purposes and to expand access to the public to their collections.

Where content from publishers is available online, libraries may make this available via a licence agreement with the publisher. Libraries, often working in a consortium, spend time negotiating the terms of the licence and the price to get the best deal. Licence fees for such deals cost millions of Euro each year. Material retrieved from the user's desktop is often done so via the licence negotiated and paid for by the library.

The question appears to be falsely premised because the availability of online materials by publishers is unrelated to the scope and nature of the library exception. To illustrate, access to mass content online from publishers is usually available via a licence negotiated and paid for by an institution. (For single items to individuals, pay-per-view options may be available). Licensed content from a publisher is usually available online until the subscription runs out. In order to ensure continuing access to content paid for during the licence term after the subscription has expired, the library often has to negotiate this separately. If supplied by the publisher on CD-ROM or other physical medium, the library needs an exception to format-shift for long-term preservation as there is no guarantee that will exist online in perpetuity from the publisher.

**(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?**

The meaning of the question is not entirely clear.

Libraries already enter into licensing schemes to increase access to works e.g. electronic journals and other databases. In fact, most electronic material acquired by libraries is subject to a licence with a publisher. Libraries enter into licensing schemes with collecting societies for uses of copyrighted material otherwise not permitted by law.

Conversely, no publisher or collecting society would have the authority to issue a licence that would cover the range of materials in a library. This is because libraries contain vast amounts of material for which collective licensing solutions are not available e.g. unpublished works, orphan works, works where the digital rights belong to the individual rightholder, etc. Licensing cannot offer a complete solution in this situation.

There are two relevant exceptions for print material that the library wishes to digitise. Article 5(2)c permits a library to make a digital copy and Article 5(3)n permits online access on the library premises under certain conditions and provided it is not subject to a licence. For uses over and above what is permitted by statute, libraries may enter into licensing schemes with rightholders.

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**(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:**

**(a) Format shifting;**

**(b) The number of copies that can be made under the exception;**

**(c) The scanning of entire collections held by libraries;**

(a) No, because Article 5(2) already permits format shifting so no clarification is required.

(b) No, this would be a retrograde step. Imposing a specified number of copies for preservation purposes is nonsensical in a digital world. Long-term preservation is an on-going task as technologies change, and formats and hardware become obsolete. The US Section 108 Study Group<sup>11</sup> recommended, for example, that the current three-copy limit of a published work for replacement purposes be amended to permit libraries and archives “to make a limited number of copies *as reasonably necessary* (*italics added*) to create and maintain a replacement copy”.

A helpful clarification would be that libraries must always be permitted to format shift and make as many copies as reasonably necessary under an exception for the purpose required.

(c) It is unclear as to what is meant by “entire collections held by libraries”.

If the question refers to particular collections of works, these may be scanned under Article 5(2)(c) in the same way as individual works may be scanned. It is unclear what clarification for the scanning of an entire library collection would entail. As copyright subsists in individual works and not in the entire library collection as such, it would not in any case, resolve the orphan works problem.

**(9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?**

It is already clear that such a purpose is prohibited by Article 5(3)n.

An amendment for libraries to make digitised copyrighted content searchable online would enable libraries to provide added-value, high demand new services such as those offered by Google Book Search or Amazon’s Search Inside. Unlike commercial entities like Google and Amazon, a library service would not have the same revenue-generating purposes. Libraries could showcase previously hidden collections online, and users would discover materials they would otherwise have overlooked even by visiting the library. It would generate publicity for authors and publishers, encourage new sales and would correspond with online user expectations.

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<sup>11</sup> [www.section108.gov/](http://www.section108.gov/)

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**(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?**

Yes.

As stated in the Green Paper, the issue of orphan works came to the fore in large scale digitisation projects. Such a project is Europeana<sup>12</sup>. In its first phase, Europeana aims to provide access to 2 million digital objects already digitised and available in Europe's museums, libraries, archives and audio-visual collections including film material, photos, paintings, sounds, maps, manuscripts, books, newspapers and archival papers. The intention is that by 2010 the Europeana portal will give everybody direct access to well over 6 million digital sounds, pictures, books, archival records and films. Large scale projects need certainty and an efficient legal framework to ensure success.

But a lot of material will remain hidden unless the orphan works problem is solved. According to one estimate, only about four per cent of copyrighted works more than twenty years old are commercially available<sup>13</sup>. This means that about 96% of twentieth century culture is potentially unavailable, either because it is out-of-print or because it is orphaned. The problem of orphan works can apply both to young and old works, but it has been exacerbated by the extension of the term of protection for literary works.

The failure of the i2010 Digital Library High Level Expert Group to address mass digitisation in its Final Report and Memorandum of Understanding on orphan works, despite several years of discussion, is regrettable and highlights the need for a legislative solution. This would provide legal certainty for libraries and if mandatory, would deal effectively with the cross-border aspects of the orphan works issue (see question 12). Furthermore, an exception is the only way to handle material, such as unpublished works, for which no appropriate licensing body exists.

*“Thus, they (limitations and exceptions) ensure legal certainty and predictability and reduce transaction costs”.*

Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law<sup>14</sup>.

**(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?**

The orphan works problem is recognised as a stumbling block to publicly-funded large-scale digitisation projects across Europe. Policy-makers, politicians and the public will not understand, nor accept, a digital black-hole for twentieth century

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<sup>12</sup> <http://dev.europeana.eu/about.php>

<sup>13</sup> James Boyle: Deconstructing stupidity, Financial Times 21 April 2005

<sup>14</sup> [http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration\\_on\\_the\\_three\\_step\\_.cfm](http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step_.cfm)

material. We urge the Commission to take steps to agree on an efficient, lasting solution. If the Information Society Directive is being amended, it should be done here. If no amendments are being made, then it should be as a stand-alone instrument.

**(12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?**

The cross-border aspects of the orphan works issue should be tackled through a mandatory exception. An orphan works exception illustrates why mandatory exceptions are the only workable and effective solution e.g. an exception implemented in half the Member States would not provide a complete solution to the orphan works problem.

**The exception for the benefit of people with a disability (questions 13-18)**

**(13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?**

Organisations representing people with disabilities already enter into licensing schemes with publishers. However, the World Blind Union estimates that even in the wealthiest markets, less than five per cent of published books are accessible to persons who are blind, and that access in developing countries is often more limited. Clearly, current schemes that are in place are not delivering in a satisfactory way.

Article 5(3)b, the exception in the Information Society Directive for the benefit of people with a disability, should be mandatory. This would provide universal access across EU Member States to all persons with disabilities, and would be a strong statement of European commitment to creating an inclusive society for all its citizens. A mandatory exception would underpin any licence schemes with publishers for enhanced access.

eIFL has a particular interest in the cross-border transfer of accessible material. This is not just a matter for cross-border transfer within Europe, it is a global issue. According to the World Health Organization (WHO), more than 90 percent of visually impaired persons live in developing countries. According to the World Blind Union, far fewer works are available in developing countries than the already small fraction of works available in the developed world. The author of the WIPO Study on

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Copyright Limitations and Exceptions for the Visually Impaired found that copyright exceptions seem to be less common in developing countries<sup>15</sup>.

eIFL has partnered with Bookshare, a US based not-for-profit organisation that increases access to books for blind, visually impaired and other print disabled people. Of the approximately 41,000 titles available from Bookshare, less than 5% are licensed from publishers (the majority are available under the US copyright exception, the remainder are in the public domain). Under current rules, Bookshare can distribute only the licensed works outside the US because the copyright exception stops at the border. This means that only about 2,000 titles in the collection can be offered to eIFL members in developing and transition countries.

eIFL supports the proposal by the World Blind Union for a WIPO Treaty for Blind, Visually Impaired and other Reading Disabled Persons<sup>16</sup> to provide a global, minimum standard for such exceptions and limitations and to enable the import and export of works in accessible formats. Innovations in information technology have created new opportunities to expand access, but the legal framework poses a barrier. While the biggest beneficiaries of such a treaty will be reading-disabled people in developing countries, such groups in all countries will benefit from greater access to foreign collections of accessible works. The Commission is an influential force in global IP policy. We urge the Commission to support this proposal in the interest of fairness, equality and social inclusion.

**(14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?**

Mandatory provisions should specify only that works should be made available in an accessible format. The particular format should be determined by the person benefiting from the exception. If the legislator tries to specify particular formats, the law will quickly become out of date because they are so varied and changing e.g. Braille, large print, audio recordings, various digital formats. The important point is the purpose of the exception, not the format of the delivery.

People with disabilities are as diverse as other groups in society, some may wish to work with paper such as Braille, others may prefer screen-reading technologies such as JAWS. The author of the WIPO study<sup>17</sup> stressed that the diverse needs of visually impaired people should be recognised and that the availability of commercial large print formats, for example, should not rule out other formats needed.

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<sup>15</sup> Presentations on Informative Sessions on Limitations and Exceptions: WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired

[http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=16828](http://www.wipo.int/meetings/en/details.jsp?meeting_id=16828)

<sup>16</sup> [www.keionline.org/index.php?option=com\\_content&task=view&id=210&Itemid=1](http://www.keionline.org/index.php?option=com_content&task=view&id=210&Itemid=1)

<sup>17</sup> See footnote 15

**(15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?**

While a clarification should not be necessary because Article 5(3)b is not limited to people with visual and hearing disabilities, it would be useful because some Member States have chosen to limit the exception to specific groups and/or for specific purposes, as mentioned in the Green Paper. However, a mandatory exception should resolve these discrepancies. Then people of all disabilities would benefit from the exception in the way originally intended by the legislator, regardless of the Member State in which they reside.

**(16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?**

All disabilities which prevent the user from accessing the work are relevant for online dissemination of knowledge. The legislator should not engage in the task of specifying particular disabilities or medical conditions. People with disabilities need to read for reasons just as diverse as other groups. The online environment opens up possibilities of new modes of delivery and economies of scale which will enable many more excluded people to enjoy the benefit of reading for the same reasons as able-bodied people, for study, work, leisure and lifelong learning.

**(17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?**

Yes. People with disabilities acquire works in the same way as other people. The purpose of making the copy is simply in order to be able to read the work. Where a beneficiary has purchased a work, for example, payment of a remuneration amounts to double payment. The conditions in the exception, that the copying should be of a non-commercial nature and its being subject to the three-step test, should not necessitate the need for further payments.

Converting works into accessible formats is costly and time consuming. It is a job often undertaken by specialised agencies with public funding who may supplement their income through fundraising and volunteer efforts<sup>18</sup>. It is inequitable that private sector businesses should derive a gain in these circumstances.

**(18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?**

Yes.

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<sup>18</sup> [http://www.rnib.org.uk/xpedio/groups/public/documents/code/public\\_rnib003465.hcsp](http://www.rnib.org.uk/xpedio/groups/public/documents/code/public_rnib003465.hcsp)

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## The exception allowing the dissemination of works for teaching and research purposes (question 19)

**(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?**

Article 5(3)n of the Directive permits copying for illustration for teaching or scientific research, so a licence for this purpose is not necessary.

Universities and other institutions expend huge resources in terms of time and cost entering into licensing schemes with commercial publishers to access electronic works. Dissatisfaction with pricing models, standard publisher licences and the unequal position of the parties in licence negotiations has led towards other ways of disseminating research, science and educational materials to the public. The scientific and research community should continue to develop the two complementary strategies suggested by the Budapest Open Access Initiative<sup>19</sup>: self-archiving (depositing refereed journal articles in open electronic archives) and open access (OA) journals. Open access journals use copyright and other mechanisms to ensure permanent open access to published articles. Because price is a barrier to access, OA journals don't charge subscription or access fees. Open Access<sup>20</sup> has already permanently changed the field of scholarly communication. It is under discussion by governments, some publishers, including subscription-based, are experimenting and adopting the OA model and it is mandated by funding bodies and universities throughout the world. We believe that this is the best route to increase access to works.

Licences used for OA works provide examples of successful licensing schemes enabling online use of works for teaching, research purposes and much more. Open Access works are licensed to the public for a wide range of uses including to read, download, copy, distribute, print, search, or link to the full texts of the articles. One example of a licensing scheme that supports the ability to disseminate and reuse works is Creative Commons<sup>21</sup>, ported in fifty countries including eighteen EU countries.

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<sup>19</sup> <http://www.soros.org/openaccess/>

<sup>20</sup> Open Access is the free online availability of peer reviewed journal literature permitting any user to read, download, copy, distribute, print, search, or link to the full texts of articles. First defined by the 2002 Budapest Open Access Initiative (<http://www.soros.org/openaccess/read.shtml>), followed by the Berlin Declaration on Open Access to Knowledge in the Science and Humanities (<http://oa.mpg.de/openaccess-berlin/berlindeclaration.html>), and the Bethesda Statement on Open Access Publishing (<http://www.earlham.edu/~peters/fos/bethesda.htm>)

<sup>21</sup> <http://creativecommons.org/>



eIFL encourages the Commission to support the broad goals of open access and to encourage the adoption of open content licences to maximise the visibility and reuse of research outputs for the benefit of all. We believe that wider dissemination of knowledge contributes to more inclusive and cohesive societies, fostering equality of opportunities in line with the priorities of the forthcoming renewed Social Agenda.

Rome, 28 November 2008