Briefing on the JURI compromise on the Copyright Directive in the Digital Single Market

4 July 2018

From the library sector in Europe, we consider that there are some very positive outcomes. However, there are worrying provisions that represent a potential threat to freedom of expression, and to the current functioning of exceptions and limitations in Europe:

PROVISION	OVERALL ASSESSMENT	POSITIVE PARTS	NEGATIVE PARTS
ART 3 **Text and data mining**		We welcome the adoption of a **mandatory exception** that will allow research organisations, including libraries, to conduct text and data mining. We value the clause against **contract override**, and recognition of the need to **store datasets** instead of deleting them after conducting the research.	The **additional non-mandatory exception** in Article 3A, to our opinion, does not add anything to the current landscape or to the one that will be created by the directive. A non-mandatory exception that once in place can be overridden by contract is the equivalent of having nothing in place, where rightholders are able to forbid text and data mining on their works. It will be pointless for member states to adopt an exception that will have no impact and serves to divert member states from adopting a better one as is possible under Article 5(3)(a) of the Infosoc Directive.
ART 4 **Education**		We welcome the amendment allowing educational activities using digital materials **conducted on the premises of a cultural heritage institution** to benefit from the exception, if the activity is led by an educational institution. We also value the clause against **contract override**.	Although this provision is the first recognition of the importance of the life-long learning possibilities libraries offer, we consider that the exception should go further to ensure that licenses always provide better terms and conditions than an exception.

ART 5 **Preservation**		We strongly welcome the **mandatory exception** for preservation, which will also ensure that **cross-border preservation networks** prosper. We also support of the new provision with regards to the public domain, a first step to ensure that reproductions of works in the public domain shall stay in the public domain.	We regret that no **e-lending** exception was adopted, especially after the recent European Court of Justice case (C-174/15 VOB v. Stichting Leenrecht) clarified that libraries buying and downloading e-books available for purchase by the public, and then lending them to patrons on a one-copy-one-user basis, can fall under the Lending Directive.
ART 6 **(i) Use of Exceptions & Limitations** **(ii) TPMs**			(i) This new and barely discussed amendment in **art.6(1)** adopted by JURI provides that once a work has been used under an exception provided for in the Directive, it is not possible to use that content again under another exception. This is a highly damaging step that undermines the functioning of libraries, archives, education and research and their users' hitherto legitimate access and use of the content they hold under existing copyright laws. Even if only applied to the limitations and exceptions covered by the draft Directive, it goes well beyond that into all areas of information, research and teaching. For example, once a work has been subject to preservation copying (i.e. to copy a sound recording from vulnerable media such as audiotape or vinyl to digital form), then it can no longer be used for text and data mining or for online education. (ii) The provision adopted in **art.6(2)** "re-applies" the provision in Infosoc Directive art. 6.4 that ensures that TPMs applied to licensed works are protected, regardless of the harm they cause to users' rights. It completely reverses the Commission's attempt to

			correct an illogicality in InfoSoc art. 6.4, which correction is necessary not only to permit text and data mining to function properly, but to enable complaints to proceed under InfoSoc art. 6.4 where technological protection measures on licensed materials interfere with exceptions and limitations (including those concerning the ability of visually impaired and other print disabled persons to access digital materials). The achievement of the goals of the Directive – education, preservation and scientific progress - will depend on the goodwill of private actors rather than on the legislator's intent. This is not a healthy or credible means of promoting the public interest and renders the rest of the legislation itself rather pointless as the means to complain about interference by TPMs remains cut off.
ARTS 7 to 9 **Out of commerce works**		We are very satisfied with the adoption of the **fallback exception** to the licensed-based system proposed by the Commission to solve the problem of out of commerce works. It means that whenever no appropriate licensed-based solutions are in place, the exception will apply for the reproduction, communication to the public and distribution of out of commerce works by cultural heritage institutions. We are also very supportive of the definition adopted of out of commerce works has been amended to explicitly include works that were never in commerce under the system.	

ART 11 **New press publishers right**			From the library sector, there are worries about the broader implication on access to information, and the impact on linking and sharing information. Art. 11 could also impact public awareness of news articles published by reputable news sources (paywalled or not) and thus encourage people to consult fake news sources. We recommend deleting this provision or creating a presumption of representation for publishers as proposed by IMCO.
ART 13 **Upload filters**		We welcome the exclusion of educational and scientific repositories from the requirements of art.13 in Recital 37a and the new point 4b to Article 2 para 1 definitions.	As information professionals, we consider that the use of filtering software to solve the issues that art. 13 is really trying to address, is a disproportionate measure that will harm access to information and freedom of expression and has adverse wider impact beyond its intended target. This view was underlined by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his report to the Human Rights Council (38th Session)[1].

[1] Within his recommendations, the rapporteur indicates the following: "States and intergovernmental organizations should refrain from establishing laws or arrangements that would require the "proactive" monitoring or filtering of content, which is both inconsistent with the right to privacy and likely to amount to pre-publication censorship".
The rapporteur also indicates the following: "In the light of legitimate State concerns such as privacy and national security, the appeal of regulation is understandable. However, such rules involve risks to freedom of expression, putting significant pressure on companies such that they may remove lawful content in a broad effort to avoid liability (…). Demands for quick, automatic removals risk new forms of prior restraint that already threaten creative endeavours in the context of copyright. Complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due processes standards and whose motives are principally economic".