INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS
FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE BIBLIOTHÉCAIRES ET DES BIBLIOTHÈQUES
INTERNATIONALER VERBAND DER BIBLIOTHEKARISCHEN VEREINE UND INSTITUTIONEN
FEDERACIÓN INTERNACIONAL DE ASOCIACIONES DE BIBLIOTECARIOS Y BIBLIOTECAS
МЕЖДУНАРОДНАЯ ФЕДЕРАЦИЯ БИБЛИОТЕЧНЫХ АССОЦИАЦИЙ И УЧРЕЖДЕНИЙ
国际图书馆协会与机构联合会
الاتحاد الدولي لجمعيات ومؤسسات المكتبات

Response to Public Consultation on the Review of EU Copyright Rules – 5 March 2014

Name: International Federation of Library Associations & Institutions (IFLA)

Type of respondent: Other

The **International Federation of Library Associations and Institutions** (IFLA) is the leading international body representing the interests of library and information services and their users. With over 1450 members in 150 countries around the world, IFLA is the global voice of the library and information profession. IFLA represents over 680 libraries from across Europe, and from every EU Member State.

IFLA is also leading international library advocacy on copyright exceptions and limitations before the Standing Committee on Copyright & Related Rights (SCCR) of the World Intellectual Property Organisation (WIPO). IFLA believes that an international instrument mandating certain copyright exceptions and limitations facilitating use of, and access to information through libraries is a key component of a digitally inclusive, innovative knowledge society.

Overview of submission

In September 2013, the European Parliament recognised the need to reform EU copyright rules within its European Parliamentary resolution on "*Promoting the European Cultural and Creative Sectors as sources of economic growth and jobs"* (T7-0368/2013).[1] In that resolution, the European Parliament:

52. Stresses that the existence of 27 different intellectual property rights management systems is a particular burden for Europe's CCS, and that the current fragmented regime needs to be reformed to facilitate access to, and increase (global) circulation of, content, and in such a way as to enable artists, creators, consumers, businesses and audiences to benefit from digital developments, new distribution channels, new business models and other opportunities;

53. Believes that in the digital era, a modern and balanced system for protecting intellectual property rights (IPRs) which makes it possible both to ensure appropriate remuneration for all categories of rightholders and to guarantee that consumers have easy access to diverse, legal content and a real choice in terms of linguistic and cultural diversity, is an essential condition for ensuring that the CCS are competitive;

54. Stresses that the protection of IPRs should not threaten the neutrality of the internet."

IFLA believes a balanced copyright reform should provide sufficient protections for EU creative industries without restricting essential research and development, and access to information in the public interest.

[1] European Parliament resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs (2012/2302(INI))

IFLA's submission focuses on:

- **Linking and browsing (11-12)**
- **Limitations and exceptions in the Single Market (21-27)**
- **eLending (36 – 39)**
- **Text and data mining (54-55)**
- **Internet intermediary responsibilities (76)**

Questions that are unanswered should not be interpreted as of low importance to libraries in the European Union. A number of IFLA members are putting in their own submissions addressing these questions, with the benefit of regional examples. IFLA's submission limits itself to questions where the experiences of its international membership may prove beneficial.

In summary, IFLA's submission maintains that:

- **There is a need for a flexible, open ended exception to better keep pace with evolving technologies and services;**
- **In an increasingly globalized environment (and the EU Single Market), any exceptions (both existing and proposed) in the EU Copyright Directive should be mandatory, prevented from override by contract, and facilitate cross border access to and use of works in the public interest;**
- **Protections and enforcement mechanisms for right holders must be carefully defined so as not to place onerous responsibilities on public institutions providing access to information.**

Linking and Browsing

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

No.

Linking is a ubiquitous aspect of internet use and essential to the architecture of the internet. Links facilitate the availability of content online, and contribute to site activity and visibility.

Linking is elemental to modern librarianship and research. It is extremely common for librarians to link users to online resources, and to include links to content made available on other sites in library catalogues. Links are a habitual element of wikis, Rich Site Summary (RSS) feeds, engagement on social networks and blogs published by libraries. It is common research practice to include hyperlinks in footnotes and bibliographies of research articles and in general research collaboration.

The final report of the Copyright Review Committee in Ireland considers interconnectedness by linking to be at the 'very heart of the internet'.[2] In that report, the Copyright Committee recommended that linking should not infringe copyright, except where the provider of the link knew or ought to have been aware that it connects with an infringing copy.[3] While IFLA believes the Copyright Committee's recommendation goes some way to recognizing the validity of linking, IFLA is concerned by the condition on links to 'infringing copies'. What constitutes an 'infringing copy' is unclear, and if defined poorly, impossible to police. How is the individual or institution to know whether an item linked to is an infringing copy? In many cases (photographs, for example), it can be difficult to distinguish whether the item is infringing or not.

The European Court of Justice's recent judgment in the *Svensson* case has further increased IFLA's concerns regarding copyright rulemaking with respect to hyperlinking. In their judgment, the ECJ considered hyperlinking to protected works already freely available from another website would not be an infringement of copyright, unless the works were made available to a 'new public'.[4] What would constitute a 'new public' is undefined, and online is arguably hard to pin down. What if a library were to tweet a deep link to an article accessible within their own country, but geoblocked for users in another jurisdictions? Has the library made the article available to a 'new public'? What if the accessibility of an item changes, but at the time a link was provided was generally accessible to the public? Could the ECJ's judgment require institutions and individuals to regularly monitor existing links on their websites to ensure the content they link to does not inadvertently link to a 'new public'?

IFLA believes that reform of copyright rules today must, so far as is possible, work with the architecture of the

[2] Copyright Review Committee Final Report, prepared for the Department of Jobs, Enterprise and Innovation, Dublin (2013) http://www.enterprise.gov.ie/en/Publications/CRC-Report.pdf (p 11)
[3] Ibid.
[4] Case C-466/12 Svensson, judgment issued 13 February 2014, paragraph 24

internet, and not against it. Any consideration of hyperlinking as potentially within the exclusive right of the copyright holder is dangerous to the effective functioning of the internet. IFLA believes that links, which merely

operate as a reference to content available elsewhere on a website (analogous to an index, a catalogue record, listed page numbers), are best considered as "units of information" – not capable of copyright protection. Further, IFLA wishes to reiterate the borderless nature of the internet and online communications. To what extent could a provision subjecting hyperlinking to the authorization of the right holder in the EU be actively enforced, if linking is not an infringement of copyright in other jurisdictions? How could it be actively enforced, if linking – both hyper linking and inline, or embedded linking – is ubiquitous online? Reform of copyright laws for the internet environment must have regard for the global nature of that environment. IFLA cautions against protections for hyper-linking that could place European innovators, researchers, public institutions at a disadvantage contributing to a globally competitive knowledge economy.

12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

No.

Caching, indexing, conduit and other internet-related functions are essential to facilitate efficient internet navigation. Caching and indexing are activities undertaken by every intermediary providing web services – government providers, educational institutions, libraries and archives, consumers and commercial entities.

Libraries use caching and indexing to facilitate speed and efficiency of search. Digital repositories in libraries require caching mechanisms to provide accurate, fast results:

> *"This may be through wholesale replication of datasets using a system such as Akamai to geographically disparate locations, the use of local caching systems such as varnish and memcache on the primary site, or the use of tools such as zoomify to provide different resolution views of data. Sites that use such tools for legitimate purposes to enhance the user experience should not be seen as breaching copyright even if the original licence to use the data does not include such surrogate data."*

The introduction of protections for temporary copies would in effect – in cost and/or authorisations required - prevent libraries from delivering online services.

IFLA reiterates its concerns regarding the creation of new copyright protections in the EU for essential internet functions that elsewhere are considered non-infringing.

In the United Kingdom, the Hargreaves Review of Intellectual Property and Growth recommended the implementation of an exception for 'non consumptive use' – defined in that review as use of a work enabled by

technology that did not trade on the underlying purpose of the work.[5] In considering indexing and caching (and other internet functions), Hargreaves wrote:

"*that these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.*"[6]

The Canadian *Copyright Modernization Act 2012 (Cth)* introduced a specific exception for caching.[7] In New Zealand, a similar exception for caching exists.[8] In the United States, indexing and caching, and related transient copying, is considered non-infringing under the fair use doctrine.[9] In Australia, where a review of existing copyright exceptions and limitations was recently concluded, the final report of the Australian Law Reform Commission recommended the adoption of a fair use provision which would encompass internet functions like caching and indexing.[10]

IFLA urges the European Commission to take into account the impact copyright protection of transient, temporary or otherwise 'non consumptive' copies in the EU will have on the diversity of institutions and individuals providing online services, including libraries. IFLA fears that an inflexible approach to internet activities perceived as non-harmful in the EU would see European libraries disadvantaged, falling behind their North American and Australasian counterparts.

The current wave of legislative reform efforts taking place in jurisdictions around the world, which consider (among other questions) whether accepted internet services, functions and new technologies may infringe copyright, to IFLA speaks to profound problems at the heart of the definition of copyright. If every new product or service which involves the making of a copy could be considered on its face to be copyright infringing, regardless of whether there is commercial harm to the right holder, IFLA considers this both to be detrimental to digital innovation, and an undue burden on the engines of law reform.

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[5] I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 47; it should be noted that Hargreaves also considers data mining a potential non-consumptive use within the scope of his definition
[6] Ibid.
[7] *Copyright Modernization Act, C-11 2012* (Canada)
[8] *Copyright Act 1994* (New Zealand), s92E
[9] *Field v Google Inc* 412 F Supp 2d, 1106
[10] Australian Law Reform Commission, Copyright and the Digital Economy (Report no 122), published 13 February 2014, http://www.alrc.gov.au/publications/copyright-report-122

Limitations and exceptions in the Single Market

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.

Despite the stated intention of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society[11], the optional nature of most limitations and exceptions in that Directive has resulted in a cherry picking approach to implementation at the Member State level.[12]

Article 5(2)(c) of the Information Society directive allows Member States to introduce limitations to the reproduction right for specific acts of copying made by libraries (among other public interest institutions), where they are not for direct or indirect economic or commercial advantage. Implementation of this optional limitation with respect to library acts of reproduction by Member States has varied significantly: some Member States limit reproductions to those made in analogue formats; others specify different rules to prescribe analogue copying as compared with digital copying; and others limit the kinds of digital works that may be copied.[13]

The Study on the Application of Directive 2001/29/EC on Copyright & Related Rights in the Information Society,[14] commissioned by the European Commission and published in December 2013, recognized the need to harmonize limitations and exceptions for libraries and archives at the EU level. The optional nature of limitations and exceptions, it considered, had resulted in a patchwork approach to national implementation which was, contrary to the borderless opportunities offered by the internet environment, preventing cross-border collaboration.[15]

> "*Imagine a national library digitizing its collection of newspapers from the 19th and 20th century, in the frame of a Europeana project to put on line newspapers relating to the construction of the European Union after 1945. It makes no doubt that the on-line dissemination of the newspapers, still protected by copyright, will require authorization of the copyright owners in all Member States. Depending on the national copyright law applicable to the library, the conditions to digitize the newspapers will be either exempted by an exception or not…*
>
> *Indeed, the more newspapers will be digitized, the more they could be of some use for digital projects.* ***Should some libraries be impaired in their efforts to digitize parts of their collections due to lack of harmonization of the exceptions to the benefit of libraries and archives, all cultural heritage institutions will not be on equal footing in such trans-European projects.***

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12 Guibault L, Why Cherry-Picking Never Leads to Harmonisation: the Case of the Limitations on Copyright under Directive 2001/29/EC (2010) http://dare.uva.nl/document/189209

13 Ibid p 60

14 STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY (16 December 2013) http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

15 Ibid 284.

For all these reasons, more efforts should be put on increasing the harmonization in relation to the exception for certain acts of reproduction made by libraries."[16]

The internet environment offers new opportunities for cross border library collaboration on preservation and digitization projects and empowerment of an EU wide inclusive knowledge society. Without harmonization of limitations and exceptions at the EU level, IFLA fears that opportunities for cross border collaboration are creating inefficiencies, leading to information silos and distorting and creating discrepencies in the EU Internal Market.[17]

Libraries and archives are investigating efficiencies in digital preservation, including through shared (cross border) digital infrastructure. To lawfully facilitate cross border resource and infrastructure sharing for digital archiving, preservation exceptions must have a cross border application. Similarly, universities are increasingly introducing remote campuses in other jurisdictions, as well as offering distance (online and offline) education opportunities. University libraries serving distance students often come into conflict with the territorial nature of copyright exceptions, which distinguish the educational materials a student of that institution can have access to based on their location. This is contrary to stated EU goals of common education systems.

As there is no harmonization of national law exceptions facilitating (digital) document delivery, libraries are often called to understand the legal status of this service in the jurisdiction of destination of service. National copyright limitations often differ regarding the technical prescription of the permitted library service, and methods of document supply change frequently with improvements in technology and efficiencies. This further exacerbates legal uncertainties for libraries, and can lead to licensing of services that are (or may be) within the scope of statutory exceptions.

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.

IFLA believes all limitations and exceptions should be mandatory, as equal counterparts to rights and protections afforded right holders.

[16] Ibid.
[17] Above n 26, 301.

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

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?

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.

Yes.

IFLA supports the introduction of a flexible, open ended exception that would encompass emerging library activities like text and data mining, digital preservation and mass digitization, as well as new uses of works in the digital environment. In the event that an open ended exception was not introduced, IFLA would support the introduction of a purpose-based exception to facilitate text and data mining, provided that it adequately meets the needs of researchers, libraries and educational institutions undertaking TDM activities that do not transact on the underlying works of right holders.

It is also essential that, in the context of an increasingly licence-based digital environment, **a limitation be introduced on contractual terms that purport to override statutory exceptions.** Without a provision that safeguards exceptions against override by contract, any new or updated exceptions to respond to the realities and opportunities of the digital environment would be effectively useless.

A flexible, open ended exception meets a number of goals that guide copyright reform processes: it can be technology neutral; it supports innovation and competition; is in line with international obligations; and can include criteria to guard against uses of works unreasonably harmful to the right holder.[18] The UK *Hargreaves Review of Intellectual Property and Growth* considered the benefits of the US 'fair use' provision[19], as one that 'keeps copyright closer to the reasonable expectations of most people and thus helps make sense of copyright law.[20]

IFLA has observed that libraries, and therefore the research sector, in the US undertaking mass digitization projects, text and data mining activities and indexing and caching are increasingly moving ahead of their EU

[18] Australian Digital Alliance & Australian Libraries Copyright Committee, submission to the Australian Law Reform Commission (ALRC) Review of Copyright and the Digital Economy (2012) [speaking specifically about 'fair use] http://digital.org.au/sites/digital.org.au/files/documents/FINAL%20ADA%20ALCC%20CopyRevSub.pdf p 71
[19] Section 107, *Copyright Act 1976* (US)
[20] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011), 43. Countries without a fair use doctrine have "witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people.

counterparts, with the benefit of a flexible exception.

In 2013, in response to the US District Court decision regarding the legality of the Google Books project, IFLA published a statement cautioning against the growing digital information divide for libraries elsewhere:[21]

"IFLA is concerned that the US District Court's decision reflects a widening digital divide between what libraries are able to accomplish in the Unites States, as compared with the rest of the world. IFLA represents more than 1500 library associations and institutions in over 150 countries, many of whom are operating under a patchwork of restrictive copyright provisions ill-suited for the digital environment. IFLA maintains that access to digital library collections of the scale and nature of the Google Books project can be an unprecedented source for the advancement of learning and human development, and that this access should be universal."

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

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?)

Yes.

We believe that the only workable situation will be for member states to apply their own legal traditions in respect to this issue.

[21] http://www.ifla.org/node/8177

eLending

36: 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?

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

38. What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?

Yes.[22]

Copyright challenges associated with eLending have been identified as an advocacy priority by IFLA members. In 2013, IFLA launched its *Principles for Library eLending*,[23] designed to assist library professionals worldwide as they grapple with the complexities of eBook licence negotiations with publishers and resellers. The *Principles for Library eLending* were the result of eighteen months research and consultation by the IFLA eLending Working Group, comprising senior library professionals from around the world. In 2012, the Working Group produced a Background Paper on eLending which summarized emerging eBook, and associated digital lending challenges for libraries at that time:

> *"…Librarians are struggling with how to maintain core principles such as unfettered access to information for all in the context of restricted access to eBooks and imposed eBook licence requirements. A key challenge facing libraries in providing access to eBooks is to arrive at licence agreements which provide sufficient reassurance to publishers and authors that library availability of their work supports rather than undermines their business model while at the same time permitting the library to continue its core functions."*[24]

The Background Paper points to the propensity of digital content licencing to undermine core library functions including preservation, lending, permitted copying, inter library loan, and the provision of accessible format works for the print disabled. It also highlights the vulnerability of long held library values, including the protection of patron privacy, provision of equitable access to information, and the independence of acquisition decisions in the licensing environment.[25]

The internet has profoundly altered the management of library collections. It is undisputed that online collections must be managed in a different way to print collections – and libraries have responded quickly to a number of those changes. While adapting library tools and services to meet new technologies and patron expectations is something libraries have a long history with, the online environment has stymied library adaptability in a number of ways that cut to the heart of their public interest function.

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[22] IFLA's response reflects the input of its EU members
[23] IFLA Principles for Library eLending (2013), http://www.ifla.org/node/7418
[24] IFLA Background Paper on eLending (2011) http://www.ifla.org/files/assets/clm/publications/ifla-background-paper-e-lending-en.pdf
[25] The IFLA Governing Board commissioned an update of the eLending Background Paper in December 2013, to be completed in April 2014. IFLA would be glad to share this with the European Commission when it has been finalized.

The shift to eBooks has impacted on the independence of library acquisition decision making. In print, if a book or other published work was available to the public, it was generally available to a library for purchase for their collection. With online content, publishers have moved towards differential pricing models for libraries, as well as models that restrict the variety of eBooks available to libraries for purchase, and conditions under which they may be lent. These restrictions placed on access to eBooks and other digital content undermine the independent public interest function of libraries and relegates them, in effect, to market access points for publishers. The 2013 Study on the Application of Directive 2001/29/EC on Copyright & Related Rights in the Information Society,[26] commissioned by the European Commission, recognizes the need to preserve the autonomy of libraries:

> *"Fundamentally, in our opinion, the traditional role of libraries in providing an alternative to get access to cultural content should be preserved in the digital environment and their mission should be extended to the provision of e-books and other digital content. To that end, their autonomy should be preserved. Relying only on the market to deliver e-books to library readers could potentially dictate unreasonable terms and conditions to libraries or transform public lending into another commercial service provided by the publishers."*[27]

If the practice of withholding eBooks from libraries continues, publishers/authors should be required in legislation to make eBooks available to libraries under reasonable terms and conditions.[28] IFLA's Principles for eLending set out the problems to be overcome, and ways in which they can be solved:[29]

1. **A library must have the right to license and/or purchase any commercially available eBook without embargo.** If titles are withheld from the library market by publishers and/or authors, national legislation should require such access under reasonable terms and conditions. Libraries must be able to determine their own acquisitions by choosing specific titles from publisher or distributor listings in support of their mandate to provide community access to information and knowledge.
2. **A library must have access to eBooks under reasonable terms and conditions and at a fair price.** Terms of access should be transparent and costs predictable to enable the library to operate within its budget and funding cycles.
3. **eBook licensing/purchase options must respect copyright limitations and exceptions available to libraries and their users in national law**, such as the right to:
    a. Copy a portion of the work
    b. Re-format the work for preservation purposes if it is licensed and/or purchased for permanent access

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[26] **STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY (16 December 2013)**
http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf
[27] Ibid 343
[28] above n 16.
[29] Ibid.

c. Provide a temporary copy of the work to another library in response to a user request
d. Reformat a work to enable access for people with print disabilities
e. By- pass a technological protection measure for the purpose of exercising any non-infringing purpose.

4. **eBooks available to libraries should be platform neutral and developed with standards for accessibility**. Content should be capable of integration into library systems and online public access catalogues, and interoperable across platforms, applications and e-reader devices that the library or library patron has chosen to invest in.
5. **Strategies must be in place to ensure the long term preservation of eBook titles by libraries.** Long term availability of eBook titles should not be compromised by factors such as a publisher ceasing to operate. This can be addressed through measures including the collaborative development of archival databases by publishers and libraries and legislative solutions which require the legal deposit of digital content with specified agencies.
6. **eBook services must protect the privacy of library users**. Libraries and their users must be able to make informed decisions about the control and use of personal information including reading choices.

Text and Data Mining

53(a). [In particular if you are an end user/consumer or an institutional user:] Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?

Yes.[30]

A number of IFLA members have cited licence terms and conditions, technological protection measures and more generally, gaps in digitized resources available, as barriers to text and data mining activities. EU-based members comment on specific text and data mining challenges encountered in their submission.

Some examples of licence terms and conditions which restrict or prohibit text and data mining activities have been provided by IFLA members.[31] One member has provided excerpts from a license for access to Online ProQuest databases, which contains the following conditions:

> *"Downloading of all or parts of a Product in a systematic or regular manner or so as to create a collection of materials comprising all or a material subset of a Product is strictly prohibited whether such collection is in electronic or print form."*

The licence further stipulates, under the heading "Systems Usage":

> *"To protect the Products for the research and educational use of Authorized Users, automated searches against ProQuest's systems are not permitted with the exception of nonburdensome federated search services. Data mining is prohibited."*

Another example licence condition provided by an IFLA member states that,

> *"Neither the Licensee nor Authorized Users may systematically make print or electronic copies of multiple extracts of the Licensed material for any purpose other than temporary caching as permitted in Para. 3.1.1"*

Another licence contained a prohibition against "mak[ing] mass, automated or systematic extractions from or hard copy storage of the Licensed Material."

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

55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

In December 2013, IFLA published its Statement on Text and Data Mining, which calls for text and data mining to be facilitated by copyright exceptions.[32]

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[30] IFLA's response reflects the input of its EU members
[31] The identify of institutions providing licence examples has been anonymized.
[32] International Federation of Library Associations & Institutions, Statement on Text and Data Mining (2013) http://www.ifla.org/publications/ifla-statement-on-text-and-data-mining-2013

"The technical act of copying involved in the process of TDM falls by accident, not intention, within the complexity of copyright laws – in fact, analysis of facts and data has been the basis of learning for millennia. As TDM simply employs computers to "read" material and extract facts one already has the right as a human to read and extract facts from, it is difficult to see how the technical copying by a computer can be used to justify copyright and database laws regulating this activity."

If a researcher or research institution has lawfully acquired digital content, including databases, the right to read should encompass the right to mine.

The lack of legal certainty for researchers and innovators undertaking TDM in the EU stands to significantly affect investment in research and development, and global competitiveness. A 2012 study by global consultancy firm Booz & Co considered the impact of changes to copyright law on early stage investment in internet or digital content intermediaries.[33] Based on a survey of angel investors and venture capitalists in the US and EU, Booz & Co found that 80% of US and 87% of EU angel investors indicated they were uncomfortable investing in an R&D area with an uncertain or unduly restrictive regulatory framework.[34] Australian consultancy Lateral Economics reached a similar finding in their 2012 study into the economic impacts of flexible exceptions, concluding that investors were valuing reduced risk and uncertainty from copyright exceptions and limitations at around $2 billion per year.[35]

Libraries offer researchers and innovators with legal access to a rich array of resources capable of being mined and analysed to facilitate new scientific, economic and creative discoveries. Currently, researchers with access to library collections in countries including Israel, Taiwan, South Korea, the United States and Singapore stand at a competitive advantage over their counterparts in the EU, with TDM facilitated in those countries by flexible, open-ended exceptions. IFLA observes the irony in the fact that due to the Berne Convention and the international nature of copyright law that citizens, researchers and companies in those countries are able to text and data mine content produced by Europeans that Europeans themselves are not able to, without permission.

A 2012 UK study commissioned by JISC found that if text mining enabled just a 2% increase in productivity – corresponding to only 45 minutes per academic per working week, this would result in additional productivity worth between 123.5m GBP and 156.8 GBP in working time per year.[36] In their submission to the UK Government Review of Intellectual Property in 2012, the British Library noted:

> *"It is estimated that for every pound invested by the government in R&D, in the form of funding of the research councils, this returns somewhere between £9 and £17 to the British economy. That is to say £3.5 billion translates into between £30 - £60 billion worth of GDP. Given the size of the education and R&D markets, it is therefore probably reasonable to assume that even small and incremental improvements upstream to the sector's ability to reuse knowledge in the form of copyright works, will downstream lead to a significant and*

[33] Booz&Co, The Impact of US Internet Copyright Regulations on Early-Stage Investment (2012a) http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf
[34] Ibid.
[35] Lateral Economics, Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions (August 2012), 38.

meaningful growth in GDP. In an internationally competitive environment where for example the US is seeking to double public funding in R&D over the next 10 years, any gains in efficiencies that the this country can make in the sphere of research are gains that will translate into GDP growth."[37]

IFLA believes that in the rapidly evolving digital environment, taking into account the diversity of TDM applications and sources from which data can be extracted, text and data mining would be best facilitated by a flexible, open ended exception.

In the alternative, IFLA cautiously supports a purpose-based exception but warns against undue restrictions on the kinds of text and data mining activities that would be permitted. Restricting text and data mining activities to non commercial uses, for example, will impact on public research activities undertaken in partnership with private investors. It can prevent researchers from certain publication or application of the results of TDM, and is vulnerable to overly restrictive interpretation by licensors. It will also prevent TDM by EU technology companies at a time when the Commission is quite rightly supporting activities to encourage EU SMEs.

It is worth briefly commenting as to why a licensing approach fails to fully realise the opportunities offered by TDM. Licences pose jurisdictional and structural challenges to researchers seeking to undertake TDM. A great number of licences are limited in application; they do not facilitate cross border uses of licensed material. In addition, licences deter early exploration of new TDM opportunities. A researcher, faced with the need to purchase and fulfil the requirements of a licence before undertaking a new project involving TDM, may be deterred from embarking on that project by the administrative hurdles to be overcome.

More profoundly, IFLA has grave concerns with any proposed TDM solution that in effect controls how a researcher can read and analyse data it already has legal access to. But for the incidental copying of underlying source content involved in 'computer reading' or TDM, publishers would have no basis on which to claim additional payment. The source content (i.e. legally purchased access to a database) remains unchanged; it is merely the new technology that enables publishers to impose an access toll, in effect, on TDM.

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[36] D McDonald and U Kelly, Value and benefits of text mining, prepared for JISC (2012) http://www.jisc.ac.uk/sites/default/files/value-text-mining.pdf

[37] British Library, Response to HM Government Consultation on Copyright. (March 2012) 3 http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1423 (internal citations removed).

Responsibilities of internet intermediaries

76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

Any legislation dealing with intermediaries on the internet must be thoroughly considered and carefully defined so as not to inadvertently include libraries or educational institutions where not appropriate.

In the United Kingdom and in New Zealand, recent legislative reforms to address the responsibilities of intermediaries have included definitions that encompass internet services provided by libraries - much to the concern of IFLA member libraries in those countries.

United Kingdom

The UK Digital Economy Act introduced in 2010 places obligations on Internet Service Providers (ISPs) to respond to online infringement under an "Initial Obligations Code" and a subsequent "Technical Obligations Code".[38] The core definitions of "ISP", "subscriber" and "communications provider" in the Act have been criticized by UK library associations as overly simplistic, and not reflecting the more complex intermediated internet provision that exists in educational institutions and libraries[39]. Discussions between Ofcom, the regulator responsible for UK communications industries, and libraries and educational institutions in 2010 seemed to confirm that under those definitions, libraries could be treated as both an "Internet Service Provider" and a "subscriber".

"*Under the Act libraries would be treated the same as an individual at home going online. A library acting as an intermediary, providing internet access to hundreds if not thousands of people is fundamentally different from you or I going online at home. This isn't about excluding libraries from the Act, it isn't about breaking copyright law or endorsing piracy - it's about recognising libraries' unique role by creating an exception within the Act - which Ofcom are perfectly able to do. Ofcom are already creating an exception for commercial suppliers of WiFi for example."*[40]

As an ISP, libraries stood to be responsible for the monitoring of their networks for copyright infringement, with significant financial burden. As a subscriber, libraries stood bound to act on notifications from their ISP to the effect that a copyright owner has made a report against them for alleged copyright infringement. Compliance with the stated obligations under the Digital Economy Act meant significant financial and resource burdens for libraries, and raised more fundamental concerns regarding freedom of access to information and patron privacy, two core values to library practice.

[38] Ss 3-16, *Digital Economy Act* 2010 (UK)
[39] http://www.sconul.ac.uk/news/act-risks-limiting-internet-access-in-libraries-schools-and-universities
[40] Phil Bradley, President of Chartered Institute of Library and Information Professionals, ibid.

New Zealand

In New Zealand, the *Copyright (Infringing File Sharing) Amendment Act* 2011, which defines responsibilities of intermediaries dealing with copyright infringement, came into effect in September 2011.[41] It replaced the widely criticized section 92A of the *Copyright (New Technologies) Amendments Act* 2008, which included a definition of "ISP" that encompassed all organisations providing internet access, including schools and libraries. While the new section 122(a) revised the scope of application of the legislation to capture only traditional ISPs, there is some concern it may, in part, still touch on internet services provided by public interest institutions like libraries.[42]

IFLA supports appropriate and effective measures to fight unauthorized peer to peer file sharing, and to protect the rights of content creators. It has long been part of library practice to educate patrons on permitted use of copyright materials, and respect for the rights of creators. IFLA cautions strongly, however, that any legislative measures regarding responsibilities of internet intermediaries fully take into account the diversity of private and public bodies providing internet access, and the importance of these services.

[41] For fixed-line operators; it will come into effect for mobile providers from October 2015: Copyright (Infringing File Sharing) Amendment Act 2011 (N.Z.) s 2; Copyright Act 1994 (N.Z.) s 122S (as amended by Copyright (Infringing File Sharing and Cellular Mobile Networks) Order 2013 (N.Z.) s 3

[42] Pheh Hoon Lim and Louise Longdin, *P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests* 33(11) EUROPEAN INTELLECTUAL PROPERTY REVIEW 690, 692 (2011)