



**International  
Federation of  
Library  
Associations and Institutions**

25th of March 2021,

The International Federation of Library Associations and Institutions (IFLA) represents the library field including library associations, library institutions and independent practitioners in over 135 countries, including in Norway.

We would like to indicate our support for the position of the National Library of Norway and the Norwegian Library Association in this consultation.

IFLA welcomes the opportunity to submit comments on the EU Digital Single Market Directive and the implementation of effective communication with different stakeholders to develop a meaningful balance between creators' rights and users' rights.

The core missions of libraries and the essence of their existence are to provide access to information, education, heritage materials and research for all citizens. These missions are based on a legal framework closely linked to copyright and in particular to the development of exceptions and limitations implemented by the states.

As public institutions, the ability of libraries and other cultural institutions to act and function depends on the development of a functional, practical and cost-effective framework for practitioners.

### **Articles 3 and 4 - Text and data mining**

The International Federation of Library Associations and Institutions considers it important that these exceptions apply to all legally accessible materials including photographic images, and to ensure that these can be mined both on-site and remotely.

It would be desirable to also include provisions to allow cultural institutions to use private partners as libraries, archives, museums or research and educational institutions sometimes use service providers to fulfil their public service tasks.

IFLA strongly argues that to be effective, the list of beneficiaries of this provision must explicitly include libraries, as well as other cultural institutions such as archives, museums, research and educational institutions and more generally other institutions with a public service mission, so as not to face restrictions that will be detrimental to users and thus to those able to undertake automatic analysis of texts, images, databases and other materials.

Concerning measures to ensure the security and integrity of materials, IFLA considers that libraries and cultural, educational and research institutions already have security provisions

in place to allow the use of legally-acquired materials for their users through existing provisions for user authentication and verification.

Additional and complex measures would unnecessarily limit the effect of this provision to the detriment of research and user privacy.

Regarding the notion of safe storage of datasets, we believe that the choice should be left to researchers as advised by the Research Funder Data Management Practices.

We invite the development of an implementation clarifying that the terms of contracts that aim to prevent libraries, archives, museums and research and educational organizations as well as their users from carrying out text and data mining activities are not enforceable.

Regarding technological protection measures, IFLA stresses the importance of granting users who carry out text and data mining as a minimum the possibility of not waiting more than 72 hours to have access to materials to be mined. Therefore, we encourage the provisions to include the possibility for libraries, archives, museums and research and educational institutions to themselves withdraw the remaining TPMs if the rights holders have not responded to the request within 72 hours.

IFLA notes that rights holders can opt-out of having their works mined by users other than research organisations (as specified in Article 4 of the Directive), but underlines that in order to achieve the goals of the Directive, we believe that this must be kept exceptional and exercised through explicit and machine-readable notices such as robot.txt and equivalent.

### **Article 5 - Use of works in Teaching Activities**

IFLA strongly encourages the establishment of a non-remunerated exception applied to all types of materials and other subjects (such as databases, sound recordings, films, videos and broadcasts), both physical and digital. This will allow both teachers and librarians to tailor materials to suit different learning profiles and specific needs.

We think that the designation of a digital and cross-border use would be welcome to facilitate the work of educational institutions.

Considering the text of the Directive such as: "under the responsibility of an educational establishment, on its premises or at other venues", we consider that educational activities take place in multiple places such as educational institutions, libraries, archives and museums. We believe that it is necessary to name these institutions specifically in the provisions to ensure they can continue their missions.

Regarding the provisions on the secure electronic environment, as mentioned above, we consider that educational institutions including libraries, archives and museums are already deploying secure digital environment measures in making works accessible to their members and users (via authentication, with a password) The development of additional measures would create unnecessary additional constraints.

We encourage the development of an exception that cannot be overridden by contract. Contractual provisions should not be enforceable.

As mentioned earlier, IFLA supports a non-remunerated exception as we believe that an exception is the simpler, cheaper and most straightforward option. If this opportunity is not taken to support educational institutions, we strongly encourage the development of a fair remuneration as educational institutions are supporting education for all. Also, we would like to recommend that educational institutions should not be burdened with an additional administrative process.

Regarding the classroom rule, IFLA supports the fact that the showing of films in the context of classroom instruction is considered to be in a private space and therefore should not be subject to compensation.

IFLA considers that there are many ways of supporting authors and creators by creating tax reductions, by offering direct financial support or by reconsidering rules around contracts to ensure a balance between different stakeholders in the creative chain (in particular, authors and publishers). Such options are being considered by other European countries. These options can permit for more targeted state support for creators and artists while supporting educational institutions.

## **Article 6 - Preservation of Cultural Heritage**

Heritage institutions preserve the cultural heritage of a region and a nation. We consider it essential that all materials, digital or non-digital, can be subject to preservation copies at any time of the life of the work.

IFLA strongly encourages the implementation of this provision allowing cultural heritage institutions to make preservation copies for long-term preservation purposes, including materials acquired through licensing agreements. We believe that the numbers of copies necessary for the preservation should be decided by the institutions, and therefore not be limited.

IFLA welcomes anterior provisions allowing Collections held permanently in the collection of cultural heritage institutions should be covered by the provision, in general we recommend including works in which ownership have been transferred, works held under legal deposit obligations, permanent custody arrangements, and through long-term licencing.

We also encourage making the necessary changes so that international preservation networks can store works in different places, and especially in other countries to ensure security. We also underline the importance of provisions enabling or facilitating the internal operations of libraries and other cultural heritage institutions such as web harvesting.

Once again, it seems important to us to ensure that these provisions are protected by contracts override as well as technological protection measures, as mandated by the Directive itself.

We consider that photographic images should be included within the scope of this Directive. Photographs are an essential part of cultural heritage and need to be included in the scope of the new provisions to enable digital preservation of these artefacts.

### **Article 7 - Contract Override and Technological Protection Measures**

IFLA encourages the implementation of this provision as established in the Directive.

We would like to offer clarifications regarding this proposal to support the work of libraries, archives and museums and research and educational organizations.

Libraries work to provide access to materials to users within a valid legal framework. Professionals are often confronted with technological protection measures which limit their ability to carry out activities permitted - or even mandated - by law.

This provision is therefore an opportunity to allow cultural heritage institutions to establish a procedure to legally remove or circumvent technological protection measures.

We encourage the establishment of a time period of a maximum of 72 hours after reception of an official request to the rights holders to provide the means to bypass or remove TPMs. If no response is provided after these 72 hours (3 working days), cultural heritage institutions and other beneficiaries should be authorised to remove or bypass the TPMs themselves.

### **Article 8-11 - Out-of-Commerce Works**

IFLA supports the development of an exception allowing cultural institutions to digitize and allow access to their collections identified as non-commercial works.

Libraries have long faced the problem of out of commerce works and generally do not have the possibility of licensing the type of works concerned, leading to the much talked-about '20th Century Black Hole'. We encourage lawmakers to take into account that libraries have faced a promise of adequate licensing for many years. We would therefore recommend that once a library or cultural heritage institution expresses its intention to make an out of commerce work available is expressed, an effective licence should be formalised and set up within a period of 12 months. If no license is provided then an exception applies.

We believe that licenses can only be prioritized when collective management organizations have demonstrated their representativeness in a specific sector of works and are authorized to provide the relevant rights to cultural heritage institutions for commercial licenses on the open web. These two conditions are cumulative according to the Directive if a licence is to be used rather than an exception.

Concerning the definition of categories of works, we encourage a careful approach to offer as much clarification as possible, in order to avoid categories being merged. For example, we believe that works like leaflets or correspondence should be considered separately from books.

These definitions facilitate the qualification of categories of works to define whether the collective management organization is representative. We encourage that well-governed collective management organizations offer efficient means in terms of costs for libraries and other heritage institutions and ensure the proper distribution of income among creators.

If a license is put in place, we would like to draw attention to the importance of stipulating that these licenses do not include retrospective financial remuneration. We, therefore, invite the implementation of a period of 12 months gratis from the period of availability of a license for the institutions to decide if they use this license or to withdraw their works or to clarify the licenses with the rightsholders.

We encourage the development of a simple and easy to apply test to determine if a work is not in commerce. We believe that a cut-off-date is appropriate for this type of arrangement. There should, nonetheless, also be the possibility for works published or created after this date to be deemed out-of-commerce. Such a determination should only require consultation of freely available online databases and other resources.

Regarding the development of a stakeholder dialogue, we believe that a balance of stakeholders must be struck, including cultural institutions such as libraries, archives and museums. Representatives of such institutions are vital in order to represent public welfare. All contributions should be public to ensure a well-governed and transparent discussion.

#### **Article 14 - Works of Visual Art in the Public Domain**

IFLA welcomes this provision to ensure that faithful reproductions of works of visual art in the public domain remain in the public domain. As a common good, the public domain supports creativity and innovation.

Regarding the types of materials, we consider that all subjects can be subject to provisions: painting, drawings, graphics and others, but also, 3D works such as sculptures, tapestries, decorative arts, designs and other objects held in the collections of libraries, archives and museums as well as in universities, thus covering a wide range of subject areas, whether artistic, ethnographic, scientific or other (while of course respecting professional codes of ethics).

We recommend using the vocabulary of the directive concerning "faithful reproductions of works of visual art in the public domain" and stipulating that such reproductions should not be subject to copyright or related rights in order not to create new additional barriers to the dissemination of visual works of heritage cultural institutions.

We encourage a wide scope including all types of reproductions because as long as they are faithful to works of visual art, they should not be constrained by a potential evolution of technological media.

We would like to see included 3D scans, scans, photographs, and other forms of reproductions for works of visual art that are not subject to copyright or related rights. We also consider that the European vocabulary established in the information society directive of

2001 such as "author's own intellectual creation" is relevant to adopt to determine the concept of originality.

Finally, IFLA strongly encourages taking the opportunity to define the public domain in national law. Indeed, the public domain plays a role of common good in the chain of creation, offering to all creators resources promoting innovation and creation. The public domain must be protected as such in the same way as the rights of creators.

### **Article 15 - Press Publisher rights**

IFLA strongly values news organizations and journalism. We believe that they are key to allow a healthy public debate by transmitting verified and quality information to citizens. We therefore support interventions that provide real support to press organisations, to enable them to operate in good conditions and in a sustainable manner. However, IFLA has reservations regarding the ability of Article 15 to resolve substantive issues because of its potential harm to users' access to information.

We believe that an unfortunate implementation will be liable to negatively impact the information chain.

Within this framework, IFLA therefore encourages the narrow adoption of the term "press publication", and in addition we call for an explicit clarification and exclusion of periodicals published for scientific or academic purposes such as scientific journals, and other publications in natural and human sciences (as set out in the Directive). This is an important point for libraries because of the significant impact on research if it becomes harder to share abstracts or quotes.

Likewise, IFLA considers it essential that websites managed by libraries, archives, museums and educational and research organizations are not covered by these provisions, to avoid adding additional barriers to the dissemination of knowledge to their users.

We also encourage the exclusion of independent blogs, social media and all content that is not in the form of a newspaper, journalistic website or news agency from the scope of this provision. IFLA also encourages the confirmation that all existing exceptions and limitations to copyright apply to this new right, as well as all of the exceptions developed in the InfoSoc Directive, notably as concerns education, research and the activities of cultural institutions or quotation for purposes of criticism, review and news reporting.

We also believe that to offer citizens the ability to identify relevant content, it is necessary to interpret the term "very short extracts broadly. Indeed, for libraries, such a move will help by ensuring that it is still possible to gain access to a sufficient length of text to understand if the content is relevant for the person carrying out the research. This is an important issue for information management professionals.

We also encourage establishing the possibility for publishers to waive their rights.

### **Article 17 - Use of protected content by online content-sharing service providers.**

As mentioned above, the operations of libraries are based on exceptions and limitations to copyright to enable them to operate and thus allow users to access information, educational materials and research.

Beyond libraries, the exceptions contained in the Berne Convention and the Infosoc Directive cover the rights of users and allow them to make use of their right to freedom of expression and to have access to information thanks to news reporting, quotations, criticism, review parody, caricature and pastiche.

IFLA was invited as an actor in the Stakeholder Discussion on the guide for implementing article 17. During this discussion, it was clear that filters are not able to determine the context of uses of content.

This means that filters are highly likely to identify content making use of copyright exceptions and limitations as copyright-infringing content. In short, unless there is prima facie evidence of infringement, content identified as being potentially infringing should be subject to human review before take-down, with users given adequate possibilities to appeal or defend themselves.

Libraries also use content from the public domain which is therefore not subject to copyright but which can be unfairly identified or claimed as being subject to copyright.

The directive is clear that the implementation must not conflict with legitimate expression and rights and we, therefore, encourage an implementation including proportionate measures.

We want to stress the importance of explicitly excluding educational and scientific repositories. The definition of "online content-sharing service provider" must be restrictive to focus on major commercial platforms and not penalize platforms used by cultural institutions.

We call for the incorporation of a clear and explicit designation of the importance of not filtering legitimate content used under copyright exceptions and limitations and we also encourage the development of penalties for repeated false claims or abuses.