

## Public Consultation on the review of the EU copyright rules

### SCONUL Response

March 2014

#### About SCONUL

The Society of College, National and University Libraries (SCONUL) is pleased to submit a response to this important consultation on behalf of its members. SCONUL represents all university libraries in the UK and Ireland, irrespective of mission group, as well as national libraries and many of the UK's colleges of higher education. The organisation promotes awareness of the role of academic libraries in supporting research excellence and student achievement and employability, and represents their views and interests to government, regulators and other stakeholders. It helps academic libraries collaborate to deliver services efficiently, including through shared services, and to share knowledge and best practice

#### General comments

At present, copyright legislation across Europe puts significant barriers in the way of the information flows that support research, learning and creativity, and we are very pleased to see the European Commission engaging with the issues through this consultation.

Research libraries are well-placed to ensure that our researchers and students can make use of the enormous potential of networked digital information, but in a number of important ways we cannot offer the necessary services as a result of copyright legislation. We strongly support the introduction of mandatory copyright exceptions with harmonisation across the EU.

Our responses to the specific questions are provided in the attached document. We foresee real benefits in terms of access to, and sharing of, information in connection with some of the proposals, and have made it clear that we support these changes (e.g. resolving issues with text and data mining). In other cases (e.g. placing restrictions on hyperlinks) we are very concerned about the impact on effective teaching learning and research, and the potential such changes would have on the fundamental principles of freedom and openness which underpinned the creation of the World Wide Web. Now is not the time to impose restrictions and erect barriers. Tim Berners Lee himself urges the opposite approach:

*“Now is an exciting time. Web developers, companies, governments and citizens should work together openly and cooperatively, as we have done thus far, to preserve the Web's fundamental principles, as well as those of the Internet, ensuring that the technological protocols and social conventions we set up respect basic human values. The goal of the Web is to serve humanity. We build it now so that those who come to it later will be able to create things that we cannot ourselves imagine.”*

Berners-Lee, Long Live the Web. *Scientific American*, December 2010, p85.  
doi:10.1038/scientificamerican1210-80

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**Q1. Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?**

Due to licensing restrictions, libraries are not able to provide access to subscribed materials to users based outside of the UK. This is particularly detrimental to academic libraries with distance learners and staff and students temporarily located outside of the UK. Researchers need to be able to collaborate around the globe, and increasingly, UK HEIs are delivering learning and teaching across European and international boundaries. Licence fees have increased for UK based students, but do not reflect an increase in the provision of services. Box of Broadcasts is a prime example of a service that can only be accessed by students and academics when in the UK. This flies against the growing need of students for studying at a time and place that suits them.

A further problem is that content providers still insist in trying to sell partner institutions content that has already been licensed at the home institution (i.e. where a University has collaborative provision with an overseas university).

**Q4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?**

Less restrictive licences from right holders and aggregators would assist in this instance. The introduction of a new exception or limitation permitting both the recording of broadcasts and the communication of those broadcasts via secure networks for educational purposes would also address these issues. Contract terms and technical protection measures should not be allowed to override these exceptions.

**Q7. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?**

Harmonisation of the implementation of copyright exceptions across the EU would help improve cross-border availability of content services. Also reducing the territoriality in licensing would improve cross-border availability.

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**Q11. 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, hyperlinks should not be subject to the authorisation of the rightholder. Hyperlinks are essential navigational tools of the internet. Any restrictions placed on using hyperlinks would reduce the ease of access to information currently afforded online. For libraries to be able to direct users to specific resources online, it is essential that hyperlinks can be shared freely without any restrictions or need for licensing. It would be administratively onerous and costly for libraries to have to seek authorisation for such links. It is difficult to see how this could be practical to manage and it has always been acceptable to make stable links to such things as journal articles using e.g. a DOI.

There is a clear distinction between linking to something and downloading it. It seems wrong to try and regulate the simple act of reading through copyright. It is difficult to see how making a link impedes a rightholder from commercially exploiting their work. In fact this could be seen as advertising and, in theory, would encourage sales.

**Q12. 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, viewing of a web-page should not be subject to the authorisation of the rightholder. Being required to seek permission to view and read material already made available online would be hugely constraining. A key role of the internet is the dissemination of information and culture, and this would be severely restricted if authorisation was required. Rightholders are already able to restrict access to their content if appropriate so this does not need further protection in law.

**Q15. Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?**

Currently copyright is automatic and we would wish this to remain the case. Whilst it may be advantageous to have a centralised database of copyright ownership, the creation and administration of such a service is likely to be overly bureaucratic and burdensome on all parties.

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**Q19. What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?**

The EU should continue to work with existing organisations to promote the adoption of identifiers. It is vital that organisations representing different stakeholders are all using the same standards to develop consistency and interoperability. The EU should encourage participation from users, professional bodies such as SCONUL, CILIP, RLUK, and licensing agencies such as the CLA to ensure systems are workable.

**Q20. Are the current terms of copyright protection still appropriate in the digital environment?**

We see no advantage of life plus 70 years as a copyright period. This should be 'base lined' with international norms i.e. life plus 50 years.

**Q21. 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, the lack of consistency in implementing copyright exceptions across the EU makes the use of copyright works across borders very difficult. Greater harmonisation of Fair Dealing and Copyright Exceptions across Europe could improve the ability of libraries to support distance learners living outside the UK, providing that harmonisation is based on the optimal common denominator.

This has a significant impact on the ability for institutions to work with research partners across Europe as all partners are not able to access the same copyright works. It also impacts on the ability to provide equal access to students on the same course but based in different countries as they are not able to access the same resources.

**Q22. 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, the exceptions relating to education, learning and access to knowledge should be mandatory. A harmonised approach would reduce legal uncertainty and promote the wider dissemination of knowledge.

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**Q23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.**

No exceptions should be removed. The following suggestions would significantly improve the ability of our institution to support students, teaching staff and researchers in their work:

1. Contracts and technical protection measures should never be allowed to override existing and new limitations and exceptions in the EU. It should also be an offence to impose technical protection measures on any material that is no longer in copyright.
2. Libraries should have a 'right to lend' which would include the right to lend digital media such as e-books by remote download. This would allow parity with the existing lending of analogue materials.
3. A new exception for text and data mining should be introduced. This would apply to both commercial and non-commercial purposes, as well as published and unpublished works. This is vital to the continued advancement of research.
4. A new exception for the mass digitisation of out-of-commerce works (including orphan works) for non-commercial purposes by libraries, archives and museums would provide users with access to a vast collection of cultural and historical heritage. The exception should allow the institutions to communicate the works to the public without the need for a diligent search for each individual rights holder.
5. A series of educational exceptions would be required that cover any and all use of copyright works for the purposes of non-commercial teaching either in the classroom or online. These exceptions would allow educational institutions to use and reuse content subject to the usual academic practice of citing and acknowledging sources and within clearly defined limits. This should include a new exception which would allow educational establishments to record and communicate broadcasts to students based elsewhere in the EU.
6. Preservation activities should be supported through an exception that allows for these activities to happen across networks and inter-institutions. As the balance of these preservation activities continues to shift away from exclusively analogue materials to increasingly digital, it is vital that preservation copies can be stored in multiple locations.
7. Publicly funded research should be made available openly regardless of any contracts signed with publishers.
8. The distinction between commercial and non-commercial research should be removed.

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**Q24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?**

Yes there is a need to provide a greater degree of flexibility. The existing exceptions are very tightly defined. A greater degree of flexibility would assist with handling changes resulting from the rapid development of technology in contrast to the pace that legislation is able to change.

**Q25. If yes, what would be the best approach to provide for flexibility?**

A fair use provision would create built-in flexibility and allow for changes in technology but still enable the law to protect the legitimate interests of rightsholders.

**Q28. Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?**

The current UK Exception for preservation and archiving prevents further dealing of the copy i.e. in libraries copies made under this exception cannot form part of the lending collection. We ought to be able to use the preservation copy for the same purpose as the original if that is damaged or lost.

**Q29. If there are problems, how would they best be solved?**

Preservation of all formats including sound and film as well as format-shifting should be covered by the exception. The preservation exception should also be flexible enough to respond to changing technology. As the records of our social and cultural lives become increasingly digital, it is vital we are able to preserve these for longevity.

**Q32. Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?**

The level of individual negotiations with rightsholders varies across our members. Many of our libraries are part of a collective licensing scheme, or negotiate primarily with content providers or intermediaries such as Jisc. Whilst these contracts are written up with Higher Education Institutions in mind, there is still some variation in how similar types of content can be used. This can be very confusing for users. Carrying out negotiations with individual rights holders such as publishers only increases the variation and the confusion. Also, the

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process of negotiations is extremely time-consuming and response rates from publishers can be very low. Fees for access or use vary greatly and can be quite prohibitive. Many publishers and aggregators only offer restrictive licences that limit access to specific locations, whether that be on campus or within a particular country.

**Q33. If there are problems, how would they best be solved?**

Legislation should permit libraries across the EU to allow remote access for any user to any content they own or license. Contracts should not be allowed to overrule this legislation.

**Q34. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?**

See Q33.

**Q36. Have you experienced specific problems when trying to negotiate agreements to enable the electronic lending (e-lending), including across borders, of books or other materials held in your collection?**

Yes, the interlibrary loan of e-books and e-journals is very difficult if not impossible due to contractual and technological restrictions. Agreements for reasonable inter-library lending of e-resources can be prohibited under individual licence terms, although more licences now permit this use. It is essential that a library should be able to offer this service for any item in its collection, regardless of format.

**Q37. If there are problems, how would they best be solved?**

The digital nature of library e-collections should improve remote access not restrict it. Off-premise access to paid for content should be enshrined in law and should not be subject to contractual limitations.

**Q38. What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?**

The provision of digital material is more complex. For example there are a large variety of licence agreements to understand; a complex range of financial models to choose from; different publishing platforms that readers have to navigate through to access the content; a

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variety of permissions in relation to how much can be downloaded or printed; and a lack of good quality e-textbook experiences on mobile devices.

**Q40. Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?**

Yes, the 2011 MoU is too limited to enable mass digitisation of collections held by our libraries, as is the 2012 Orphan Works directive. It is difficult for the MoU to be enforced. Also, there are no collecting societies for the majority of archival collections (unpublished literary manuscripts, oral history recordings etc) so the MoU would not support this work. The requirements of a due diligence search under the Orphan Works directive make it practicably unworkable for institutions to undertake mass digitisation. It would require significant resource (both time and money) that libraries do not possess. Much of the cultural heritage content held by our libraries was not made with a commercial intention and so mass digitisation would have a minimal financial impact on the rightsholders. It would, however, have a significant impact on libraries' ability to provide access to valuable cultural, social and historical content. As suggested in Q33 legislation should permit libraries across the EU to allow remote access for any user to any content they own or license. Contracts should not be allowed to overrule this legislation.

**Q41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?**

Yes, as discussed in Q33 and Q40, legislation should permit remote access for users to content owned or licensed by libraries.

**Q42. Have you experienced specific problems when trying to use works or other subject-matter for illustration for teaching, including across borders?**

Yes. Online teaching is now as important to our academic institutions as are traditional face to face lectures and seminars. Unfortunately due to current restrictions, it is not possible to deliver the same broad range of content to users regardless of the method of teaching. Permission for use of images, short video clips or excerpts from books in online courses has either been declined or prohibitively expensive. This is then compounded when users are based outside of the UK. Enabling the critical reuse of materials for learning and teaching through the support of legislation would greatly enhance the user experience and provide significant benefits for the expanding of knowledge.

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**Q43. If there are problems, how would they best be solved?**

A mandatory minimum norm across the EU for the use of any copyright material for illustration in teaching would allow academic institutions to provide a consistent and rich experience for students. This mandatory norm should not be able to be overridden by contract. It is recognised that this would impact on the remuneration model for academic publishers and rights holders.

**Q44. What mechanisms exist in the market place to facilitate the use of content for illustration for teaching purposes? How successful are they?**

There are a range of materials available via subscription and other licences (e.g. Creative Commons). However, the most pertinent or appropriate material is not always available under one of these schemes, or it may be prohibitively expensive.

**Q45. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under what conditions?**

Copyright exceptions for instruction should be mandatory across the EU and not be overridden by contracts or technical protection measures. They should include online teaching as well as traditional face to face methods.

**Q47. Have you experienced specific problems when trying to use works or other subject matter in the context of research projects/activities, including across borders?**

Yes. Publishers copyright restrictions can prohibit either immediate or permanent placement of full text research outputs into subject and / or institutional repositories. We believe that publicly funded research needs to be made available via open access on an international scale but the current copyright legislation and licensing arrangements restrict this.

**Q48. If there are problems, how would they best be solved?**

The promotion and implementation of open access principles would help solve the problems of prohibitive licensing fees. There is a global trend towards making research outputs available to all without charge, and we strongly support this trend. We welcome the requirement laid out in Horizon 2020 that all related publications be made available in a repository.

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**Q49. What mechanisms exist in the Member States to facilitate the use of content for research purposes? How successful are they?**

In the UK the exception for fair dealing for the purposes of non-commercial research and private study does not include audio-visual materials. This limits how useful the exception is to our researchers. Improved licensing for the purposes of study and research would also greatly benefit our researchers. A large proportion of library budgets go towards subscriptions for electronic resources, and there are still significant restrictions on the ways users can access the materials.

Since the publication of the Finch Report in 2012, the UK funding councils have provided funds to ensure that the research they finance can be made available as Open Access, using either the Green or the Gold route. The success first year of this new approach is yet to be measured, but it seems clear that Open Access as a concept is more widely known about as a result.

**Q50. Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception?**

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

Yes, we would strongly support any moves to improve accessibility to published works by our users with disabilities. Any mandatory exception allowing the creation and distribution of accessible copies without the permission of the rights holders should be extended to all non-commercial organisations who support the needs of reading impaired people. Further, publishers should be legally obliged to make their commercially available e-books and e-journals more accessible in the first place. Any technical protection ought to be able to be over-ridden by authorised bodies working on behalf of print impaired people to enable immediate improved access.

**Q51. If there are problems, what could be done to improve accessibility?**

EU copyright legislation should ensure all content is equally accessible for all our users in the most suitable format to their needs.

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**Q53. Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?**

Text and Data Mining for the purposes of private study or non-commercial research should be designated in law as a copyright exception given the fundamental importance and utility of this new tool. In most circumstances, the content being mined will already have been paid for via some form of licence.

**Q54. If there are problems, how would they best be solved?**

A copyright exception for text and data mining for both commercial and non-commercial purposes would help advance research. This would help provide our researchers with a level playing field with colleagues and competitors in countries which already have legislation to support text and data mining such as Japan and the USA. The copyright exception should not be overridden by contracts or technical protection measures.

**Q55. 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?**

See response to Q54

**Q56. If your view is that a different solution is needed, what would it be?**

A copyright exception would be the only viable solution to this issue.

**Q58. Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?**

Yes, the use of “orphan works” or unattributed works from secondary sources is problematic because, by definition, it is not possible to seek permission from the rightsholders. Provision for the clearance of orphan works, whilst at the same time safe guarding the economic interests of any right holder involved, would be beneficial.

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**Q76. 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?**

It is vital that any legislation dealing with intermediaries is very clearly drafted to ensure organisations such as a university do not become defined in the same way as internet service providers. UK HE (and libraries in particular) are currently treated as commercial users and not as educators. We need to have the right to behave responsibly as we are non-profit-making.

**Q78. Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?**

Yes

**Q79. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?**

Implementing a single EU Copyright Title would be extremely complex but would be the best and most effective approach to ensure equal access to content across borders. It may be necessary to address this in stages as there are currently significant differences across the EU. Significant consultation would also be needed across member states and a broad range of stakeholders including universities, libraries, archives and museums.

**Q80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.**

As discussed above, clear exceptions for teaching, research and text and data mining would greatly enhance the work of our staff and students. The consultation does raise a particularly important issue, namely the current ability of a rights holder to override exceptions via a contract. The doctrine of freedom of contract should be limited to protect the copyright exceptions. Technical protection measures (TPMs) should also be addressed, as they prevent us from making accessible copies available to users with disabilities. The EU should permit the breaking of TPMs in certain circumstances in order to provide equal access to resources to all our users. This would bring the law up to date with the digital age, as making copies from print is already possible.

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As a general point, we would welcome an understanding that an academic library's community is far wider than just undergraduate students and includes partners, franchises, alumni, etc. all of whom require access to content. Our inability to share knowledge as we did in the print environment leads to accusations of elitism.

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