

## Copyright in Europe

### Response from LACA: The Libraries and Archives Copyright Alliance

October 2013

#### About LACA

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age<sup>1</sup>.

LACA has submitted a large body of evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years to highlight and communicate to policy makers the deficiencies in the current copyright framework in relation to the organisations that it represents.

#### The importance of libraries, archives and information services in the copyright chain

It is worth noting that libraries, archives and information services are essential stakeholders in the information and copyright chain in Europe. Library and archive services were identified in a recent EPO/OHIM report<sup>2</sup> as a 'copyright intensive' industry<sup>3</sup>, providing 397,800 jobs representing some 5.6% of all 7,049,405 copyright intensive industry jobs in the EU, which in turn form some 3.2% of European IPR-

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<sup>1</sup> <http://www.cilip.org.uk/laca>

<sup>2</sup> Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union - Industry-Level Analysis Report, September 2013. A joint project between the European Patent Office and the Office for Harmonization in the Internal Market.

[http://documents.epo.org/projects/babylon/eponet.nsf/0/8E1E34349D4546C3C1257BF300343D8B/\\$File/ip\\_intensive\\_industries\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/8E1E34349D4546C3C1257BF300343D8B/$File/ip_intensive_industries_en.pdf)

<sup>3</sup> NACE Code 91.01

intensive industry jobs.<sup>4</sup> Added to the 994,600 jobs the report identified within the 'Other information services activities n.e.c.' sector<sup>5</sup>, which are services generally provided by library and information professionals, archivists and records managers, the library, archive and information services sectors together represent some 19.8% of Europe's copyright intensive industries.

### Question 1

1. The European Commission has highlighted a number of areas for consideration in its Intellectual Property Strategy.
  - a. Are there any comments you would like to make on the proposals that have been highlighted?
  - b. Are there any further steps which need to be taken to complete the Single Market in this area? If so, what?
  - c. Are there any areas where European copyright law needs amendment to ensure it is keeping pace with technological development? If so, where?

### LACA's response

The future success of innovation and growth across the European Union (EU) will depend on the accessibility and immediate availability of data and information arising from scholarly research. This is currently being hindered by an archaic and out-of-step copyright system which fails to address the dramatic change in information and communication technology over the last twenty-five years and which presents an unequal balance between users' interests and those of rights holders. European copyright law has consistently sought to maximise protection of the EU's commercial copyright interests, particularly in the digital environment where it is easier to make a copy of a work. However, by attempting to ensure maximum protection for copyright works, the EU has greatly restricted the ability of users of copyright works (such as teachers, students, researchers and the people who work in the creative industries) to make the most effective use of the information and material available.

Article 5.3 of the Information Society Directive (2001/29/EC) provides an exhaustive list of copyright exceptions which Member States may optionally implement as part of their national copyright law on a pick and mix basis. This produces inconsistencies across the EU internal market at a time when copyright, despite still being legislated for nationally, increasingly must follow the flow of information in an international cross-border and virtual environment. Because the exceptions list is both optional and exhaustive, in just a dozen years copyright exceptions in Europe have proven themselves unable to keep up with technological developments. For instance, twelve years ago the potential benefits of text and data mining had not been recognised. These inconsistencies, together with the highly protective tenor of the law, restrict *bona fide* research, teaching and creativity, ultimately preventing the dissemination of knowledge across the EU.

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<sup>4</sup> Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union - Industry-Level Analysis Report, September 2013 p.59 Fig. 5

<sup>5</sup> NACE Code 63.99

## 11 things to change in the European copyright *acquis*

A legislative wish list for libraries and archives in Europe would include:

1. In addition to the existing exceptions in the European copyright *acquis*, introduce a general supplementary “fair use” provision based on the US system to keep apace with changes in technology.
2. Introduce the principle of contracts and technical protection measures not being permitted to override limitations and exceptions in Europe.
3. Introduce mandatory research and education exceptions which do not distinguish between research for commercial and non-commercial purposes.
4. Introduce a ‘right to lend’ for libraries, to include the right to lend digital media such as e-books by remote download.<sup>6</sup>
5. Introduce a clear concept of exhaustion for the sale of digital ‘publications’ such as e-books and multimedia to libraries and archives.
6. Introduce an exception for text and data mining.
7. Introduce an exception permitting libraries, archives and museums to undertake mass digitisation of out-of-commerce works (including orphan works) for non-commercial purposes and to communicate them to the public, without the need for diligent search for the rights holder.
8. Introduce an exception, as has recently been done in Germany, permitting publicly and charity funded published research to be made available to the public free of charge in an Open Access online repository x months following original publication.
9. Introduce an exception to the communication to the public right to permit research access to retracted and withdrawn works held in libraries and archives in digital formats that had previously been communicated to the public.
10. Review the value of the current duration of European copyright term to rights holders compared to the potential gains that might be achieved for all copyright stakeholders by reverting to a term of life plus 50 years.
11. Revisit whether the Database Directive 96/9/EC offers any real value. If not, consider scrapping it.

## Key structural issues

### • **Mandatory and harmonised exceptions across EEA Member States**

The rights of copyright holders and the enforcement measures against criminal copyright infringement have largely been harmonised.<sup>7</sup> In contrast, copyright

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<sup>6</sup> On a separate, but associated point, we note that DCMS is investigating whether extending Public Lending Right to the remote loan of e-books from public libraries, as recommended by the Seighart Review of E-lending in Public Libraries in England, is compatible with EU copyright law. We trust IPO will keep abreast of this matter and take account of the outcome with regard to its contributions to the review of EU copyright law.

<sup>7</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0168:FIN:EN:HTML>

exceptions are an area of law where there has not been any harmonisation across Member States. Given the now commonplace research and teaching activity across national borders, the differences in the exceptions in national copyright law creates divisions that undermine effective collaboration and knowledge sharing. This situation gives rise to an unfair imbalance allowing rights holders to benefit from harmonised protection and enforcement measures whilst not allowing libraries, archives and their users to benefit from harmonised exceptions and cross-border licensing so they can work effectively in the digital environment. Libraries and archives are essential components in the information and copyright chain, yet they and their users (including the very people who invent, create and discover) are at a permanent disadvantage and treated unequally to copyright holders, because they have to engage in costly and time-consuming struggles with complex national exceptions and licensing regimes.

Copyright exceptions must support the EU agenda to “*promote free movement of knowledge and innovation as a "fifth freedom" in the Single Market.*”<sup>8</sup> To do this they need to be media and technology neutral and harmonised (to the very minimum at the highest existing level of implementation in EEA Member States). Copyright exceptions must be crafted in line with the objectives of the WIPO Copyright Treaty (WCT) by “recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”<sup>9</sup> This balance would more easily be achieved if copyright exceptions are relevant for the 21st century, future-proofed as much as possible to allow the adoption of new technologies, are fit for purpose and easy to understand.

Ideally, to ensure harmonisation, all exceptions in the InfoSoc Directive 2001/29/EC and other existing and future Directives in the copyright *acquis* should become mandatory for all EEA Member States. An exhaustive list of optional exceptions, such as we currently have in Art 5.3, is short-sighted, rigid and inappropriate in that it cannot easily be adapted to account for technological developments. New exceptions should be able to be introduced as and when necessary following an appropriate process. There should be a simple mechanism to alter or add exceptions once there is a proven need for a change.

- **Contract law and technical protection measures (TPMs) must not over-ride any copyright exception**

This principle, which the UK government has adopted in regard to its proposed updating of various exceptions in its own copyright law, should be enshrined in EU copyright law. Currently, in the majority of European countries, there are very few instances where contracts and licences for information goods do not take precedence over exceptions provided in copyright law. Power in contractual relationships that vests with the Licensor usually leaves little room for negotiation for

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<sup>8</sup> EC Commissioner Charlie McCreevy: Speech at Internal Market – Achievements and Challenges International Scientific Conference co-organised by the Commission Representation and the Faculty of International Affairs of the University of Economics, Bratislava, 29 November 2007

<sup>9</sup> [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P45\\_2379](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P45_2379)

user benefits and allows the Licensor the freedom to undermine and negate copyright exceptions which would otherwise have applied.

- **More flexible copyright exceptions across the EU including a general “fair use” regime which keeps pace with developments in technology, stimulating innovation and growth**

The 2007 The Computer & Communications Industry Association (CCIA) study assessed and quantified in financial terms the benefits deriving from the application of the “fair use” doctrine in the US.<sup>10</sup> It identified certain economic sectors as “fair use industries” (industries where reliance on “fair use” is critical to their business) and analysed the contributions of these industries to the American economy, their potential to grow, the number of people they employed and other positive economic features.

The study found that:

1. Fair-use dependent industries combined grew faster than the economy as a whole between 2002 and 2007, rising 31% during this period and accounting for around 18% of the US economic growth. From 2002-2007, revenues grew from \$3.5 trillion to \$4.5 trillion.
2. In 2006, “fair use” related industry value added was \$2.2 trillion, one-sixth of the total gross domestic product (GDP) of the United States (where “value added” is defined in the report as “...a firm’s total output minus its purchases of intermediate inputs and is the best measurement of an industry’s economic contribution to national GDP.”).
3. Exports from companies that benefit from “fair use” grew by 41% between 2002 and 2007.
4. The industry contributes significantly to US employment. Indeed, the so called “fair-use economy”: (i) employed nearly 11 million people in the 2002-2007 period, with a \$1.2 trillion payroll; (ii) accounted for a \$300 billion growth in the period considered, with the outcome that firms that benefit from “fair use” employed about one out of every eight US workers.

On the other hand, industries bound by copyright control with no “fair use” aspect contributed just \$1.3 trillion to the US economy.

The findings of the 2007 CCIA study were confirmed by CCIA’s updated “2010 Fair Use in the US Economy” report.<sup>11</sup> These studies show that the US economy is becoming more knowledge-based and is increasingly dependent on information

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<sup>10</sup> Rodgers T. and Szamoszegi A., Fair Use Doctrine in the US Economy. Economic Contribution of Industries Relying on Fair Use, 2007, study commissioned by CCIA to Capital Trade Incorporated, accessed at <http://www.cciagnet.com/libraryfiles/ccLibraryFiles/File/000000000085/FairUseStudy-Sep12.pdf>

<sup>11</sup> <http://www.cciagnet.com/libraryfiles/ccLibraryFiles/File/0000000000354/fair-use-study-final.pdf>

industries. In particular, the findings show that industries that depend on “fair use” exceptions make a large contribution to US productivity. Growth areas dependent on “fair use” include:

- manufacturers of consumer devices that allow individual copying of copyrighted programming
- educational institutions
- software developers
- Internet search and Web hosting providers.

This indicates that a flexible copyright regime, which includes appropriate exceptions, stimulates growth, creativity and innovation, in particular in the field of technology. The US “fair use” regime enables economic growth in its information industries. This would imply that unless the EU also adopts a similar flexible general ‘fair use’ exceptions framework, it will always play second fiddle to the US in one of the few remaining growth industries open to it.

- **Review the value of the current duration of European copyright term to rights holders.**

Only a very small proportion of works remain in commerce for more than one or two decades and few make any money for rights holders for more than their lifetime. Twenty years after the Term Directive 1993, on re-opening the InfoSoc Directive it is now time for the EU to evaluate the duration of its copyright terms to establish:

- Whether the current copyright term of life plus 70 years brings any significant benefits to rights holders.
- Whether these benefits outweigh the burdens to education and research of a growing body of orphan works.
- What economic gains and possibilities could arise for all copyright stakeholders if European copyright term were to be re-established at life plus 50 years allowing works to enter the public domain at an earlier point than currently.

**Question 2. Of the four areas highlighted by the European Commission for their “Licences for Europe” dialogues, are there particular points that you would like to raise?**

**LACA’s response**

- **Text and data mining for scientific research**

Text and data mining (TDM) has the potential to revolutionise the research environment, making large amounts of text and data available for analysis and thereby significantly speeding up discoveries in the fields of science and medicine, as well as within the arts, humanities and social sciences. European researchers and technology companies are at a serious disadvantage because, unlike those located in the United States and Asia, they cannot currently legally undertake TDM of content they already have lawful access without seeking further permissions.

Stakeholder dialogue to find a solution to this problem is welcome, but all evidence, opinions and solutions must be open for discussion and evaluation, including limitations and exceptions. A data and text mining exception across Europe would ensure that developments and innovation in the research field are timely and beneficial to the public and the economy, and would also enable Europe to keep up with international prowess. It is disappointing and concerning that the only solution presented in the Licensing for Europe - Text and Data Mining Working Group (WG4) was re-licensing of already licensed content and by implication licensing of the open internet. These concerns, along with issues regarding the composition of WG4, were set out in a letter to the Commission, which LACA supported<sup>12</sup>.

## Conclusion

Currently, copyright law in the EU leads to confusion across national borders. In particular, it threatens the development of the Single Market in an era when we need harmonised cross-border exceptions and limitations to copyright. The current copyright *acquis* has allowed copyright exceptions to be implemented piecemeal by Member States, making it more difficult for them to collaborate with one another in the fields of culture, education and research.

There is a danger that without mandatory and harmonised copyright exceptions, culture, education and research in particular will suffer in the cross-border digital environment that is the reality of the Internet, making it impossible to achieve “excellent, world-class research. ...[and] the free movement of knowledge, the ‘fifth freedom’, with excellent training and attractive career prospects for researchers moving and interacting freely across Europe”.<sup>13</sup>

In the Internet age, such sentiments apply not only to the European Single Market, but also to the worldwide digital environment and Europe should work to achieve this.

We wish to emphasise that our call for harmonised and mandatory exceptions in all Member States and for an EU-wide ‘fair use’ provision is not, however, an indication of LACA’s support for the introduction of an EU Copyright Regulation. A Regulation would be too restrictive on Member States, removing their ability to exercise any national discretion on copyright law and could curtail their ability to unilaterally introduce national legislation to address new situations as technology advances to suit their national economies, for example as the UK is currently doing to introduce a new national exception for text and data mining for non-commercial *purposes*.

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<sup>12</sup> <http://www.cilip.org.uk/sites/default/files/documents/Licences%20for%20Europe%20Text%20and%20Data%20mining%20letter.pdf>

<sup>13</sup> EC Commissioner Potočník - Meeting of industrial leaders of European Technology Platforms, Brussels, 30 September 2008.  
[http://ec.europa.eu/commission\\_barroso/potocnik/news/docs/20080930\\_speech\\_etp\\_en.pdf](http://ec.europa.eu/commission_barroso/potocnik/news/docs/20080930_speech_etp_en.pdf)

## **LACA's 4 recommendations to the IPO**

1. That all copyright exceptions within EU copyright *acquis* become mandatory for all EEA Member States, ensuring their implementation into every national copyright law.
2. European copyright exceptions should also be regularly reviewed to account for changes in technology and social trends and the EU should ensure a due process to allow Member States to recommend/add new exceptions to the *acquis*.
3. That the UK should actively work to ensure that the EU takes a positive position at WIPO towards the introduction of international harmonised norms for exceptions and limitations for libraries, archives, education and research, ensuring that at the very least the provisions for exceptions in Europe are also made available to countries worldwide through WIPO instruments. This would do much towards establishing a fair playing field for cross-border access to information, and for education and research in the digital environment between developed and developing countries.
4. That the UK does not support the introduction of an EU Copyright Regulation.

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