

## GREEN PAPER “COPYRIGHT IN THE KNOWLEDGE ECONOMY”

### CALL FOR COMMENTS

#### CRUI Open Access Working Group

The Open Access group was born in 2006 within the Library Commission of the Conference of Italian Rectors with the aim of devising guidelines and recommendations to put in practice Open Access in Italian Universities. The group is made up of roughly 60 members, academics and librarians from almost all Italian Universities.

The starting point and the rationale of this submission mirror the principles supported by the 71 Italian Universities which have signed the Messina Declaration advocating the Berlin Declaration, i.e. free access to publicly funded research.

According to a recent British report<sup>1</sup>, 66% of investments in scholarly communication are granted on public funds. Researchers do not receive any remuneration for their works, even when they act as referees. On the other hand, they would like to maximize the dissemination of their work, therefore they do not benefit at all from the restrictions to access enacted by the Directive on Copyright in the Information society. Researchers – as well as libraries and the whole society at large - would gain from stronger exceptions to copyright aimed at widening the diffusion of research outputs. Furthermore many institutions have already established a mandatory policy for the deposit of research outputs in their institutional repositories, and this has to be taken into account in case the directive were emended.

#### ***1: Should there be encouragement or guidelines for contractual arrangements between rightholders and users for the implementation of copyright exceptions?***

No. The prerogatives of rightholders have hitherto been reinforced not through recommendations, but through homogeneous legal provisions in the EU and its Member States. Exceptions to exclusive rights also have to be enforced by law, inasmuch as they protect fundamental rights - recognized as such within the EU – e.g. the right to education, the freedom of the arts and sciences, to cultural heritage etc. – and contribute to pursue the economic and social purposes of copyright itself. The fundamental rights of users and the social purpose of copyright have to be protected and guaranteed by law; this crucial task cannot be left to the discretion of the parties. The exceptions provided for by the Directive should be mandatory for all the Member States.

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<sup>1</sup> RIN, Activities, costs and funding flows in scholarly communications <http://www.rin.ac.uk/costs-funding-flows>.

**2: *Should there be encouragement, guidelines or model licences for contractual arrangements between rightholders and users on other aspects not covered by copyright exceptions?***

First of all we claim for an extension of existing exceptions and limitations, in order to adapt them to the new ever changing technological background. Furthermore exceptions and limitations should also be worded as clearly as possible to prevent restrictive interpretations and applications. The fundamental rights guaranteed by the exceptions must be enforced by law and cannot be left to private negotiations.

Encouragement, guidelines or model licences in favour of public access can be useful in relation to specific limitations to exclusive rights as enforced by law (see below our proposals regarding orphan works or educational uses) or in other specific cases, e.g. regulating the relations between authors and publishers in publishing contracts (Licence to publish or addenda).

**3: *Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?***

By no means. Exceptions have to be mandatory and national legislators will need to comply with these specific Community obligations for that. If exceptions were not mandatory, it would also be very unlikely that a satisfactory level of harmonization will be achieved (as is presently the case).

**4: *Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?* And n. 5: *If so, which ones?***

See above. All exceptions have to be mandatory for educational and research uses.

**6: *Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?***

The exception for libraries and other cultural institutions (*educational establishments, museums and archives*) has to be reinforced and extended in order to ensure its effective implementation in the digital and electronic environment. By no means does the online availability of publishers catalogues supersede the mission of libraries. On the contrary, it calls for an enhancement of this mission in the light of a “knowledge-based economy”. The availability of online catalogues does not ensure the persistence, preservation, retrievability and accessibility of works. Libraries emerge exactly when it is no longer possible to control and get hold of the publishing output at an individual level. In the absence of well performing libraries, the global network widens the digital divide and fosters exclusion.

**7: *In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?***

By no means. In the digital environment most transactions are already governed by non exclusive licences; selling licences has actually become akin to “selling” printed works in the analogical environment. The lack of adequate legislative exceptions has enormously restricted the free use of digital content compared to analogical content; a true nonsense, given that users are interested in content itself and not whether this content is digital or analogical.

This bears out the need for reinforcing and updating exceptions and limitations with the aim of facilitating online access to library and cultural institutions. Licences can provide for the technicalities and enable the implementation of specific exceptions and limitations provided for by law; by no means licences can substitute for accurately drafted law provisions.

Furthermore, in the absence of clear legislative provisions, licences turn out to be totally inapplicable in certain cases. As for orphan works and out of print works, the referral to extended collective licences or framework agreements between interested categories has to be imposed by law, if it were not the case the associations of rightholders would be entitled to represent their associates only and this would not help solving the numerous cases in which rightholders are not identifiable or traceable.

**8: Should the exceptions for libraries, educational establishments, museums and archives be clarified with respect to:**

- a) format shifting**
- b) the number of copies that can be made under the exception**
- c) the scanning of entire collections held by libraries**

Library collections (question no. 8) must be accessible to users whatever the medium, or format. The absence of a physical medium should be a means facilitating access by users; in no way should the dematerialization of the medium transform itself into an additional and totally unjustifiable barrier to access.

The copyright provisions on reproductions made by libraries (question no. 8.a) should be reviewed accordingly, and European and national laws should clarify that format shifting is allowed with respect to whole documents or parts of documents or even to the whole collection.

Namely,

1. format shifting has to be allowed for preservation and security purposes and with respect to public services (reference, lending, document delivery)
2. format shifting has to be allowed in special cases in order to enlarge the circle of the potential users of the work (e.g. to make a document available to users with a disability)

3. format shifting should not increase the number of copies lawfully circulating
4. if files are exchanged between libraries without involving users digital document delivery is not to be considered as format shifting
5. the exchange of works between libraries should be clearly seen as a specific “intra-library” service
6. interlibrary loan and document delivery should be assimilated to local lending and onsite reproduction
7. making a digital work available to one user at a time and for a limited period of time should be assimilated to local lending by the library, since the users can merely decide, within the set time limits, where and when to look it up

The act of scanning whole collections held by libraries (question 8.c) has to be always permitted for preservation and security purposes. Likewise scanning whole collections held by libraries has to be allowed to enhance the value of the collections themselves.

As for the number of reproductions allowed (question 8.b) it is not worthwhile fixing it by law or licence; the rationale should be to make clear that copying is justified only in case of preservation or personal study purposes. Otherwise the making of multiple copies to be circulated has to be forbidden.

***9: Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?***

Indeed, this use falls within the forms of reproduction that do not prejudice the interests of the rightholders. Quite on the contrary, this kind of use improves the retrievability of works, therefore it should be allowed in any case.

***10: Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?***

The registry of orphan works provided for by the Commission Recommendation 2006/585/EC should be mandated by law. In any case works can be reproduced, communicated to the public etc. after a diligent and unsuccessful search for rightholders.

***11: If so, should this be done by amending the 2001 Directive on Copyright in the Information Society or through a stand-alone instrument?***

Given that the 2001 Directive on Copyright has to be emended, this topic could be dealt with by the directive itself.

**12: How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?**

This issue should be expressly regulated by law, through the harmonization of national laws and therefore the prevention of different solutions in individual Member States.

The work of HLEG-DL should facilitate the recognition by the Commission.

The ARROW project aimed at creating an international registry of orphan works is also worthy of attention.

**13: Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?**

By no means. The exception has to be mandatory and it has to be transposed into national laws in its exact original wording.

**14: Should there be mandatory provisions that works are made available to people with a disability in a particular format?**

By no means. A list of formats would turn out to be an unnecessary burden owing to the obsolescence of technology and to the possibility of excluding some for all disabilities.

**15: Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?**

Yes.

**16: If so, which other disabilities should be included as relevant for dissemination of knowledge?**

All the disabilities that prevent users from accessing works.

**17: Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?**

By all means. No additional remuneration should be required as it would prejudice the interest of impaired users and restrict their rights.

**18: Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?**

By all means. Exceptions in favour of people with a disability should be allowed for all kinds of works; therefore the same exception has to be included into Directive 96/9/EC.

**19: Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?**

First of all, the Directive should mandate exceptions 5(3)(a) and 5(3)(d). Secondly, it should establish the general principle whereby only the purpose and the scope of use are relevant, while neither technology nor formats and not even the place of use (whether in presence or at a distance) are relevant.

All use for purposes which comply with fundamental rights and are socially relevant have to be allowed provided that their scope does not significantly prejudice the interests of the rightholders.

From the perspective of the Lisbon strategy, this holds particularly true with respect to educational or scientific uses, which express fundamental rights and are of high public interest. In many cases these uses do not encroach on the economic interests of rightholders at all. Quite on the contrary they contribute to economic and social growth.

**20: Should teaching and research exception be clarified so as to accommodate modern forms of distance learning?**

Teaching and research exceptions should be separately regulated.

The output of publicly funded research must be freely accessible, without obstacles or barriers.

The exceptions for educational purposes should cover possible use both in real or in virtual classrooms for illustration purposes, as well as distribution of excerpts from books, articles etc. -subject to fair compensation for works in print - and revision of works for the sole purpose of teaching and with non-commercial purposes.

**21: Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?**

Yes.

The following cases should be expressly covered by exceptions to copyright and limitations:

- the individual exchange of articles among scholars or teachers;
- the quoting, annotating or summarizing works or extended excerpts of works during a workshop/conference (whether on-site or at a distance) for a defined number of users registered for the natural duration of the workshop/conference;

- the quoting of short excerpts of works during lessons/ workshops/ conferences (whether on-site or at a distance) for an undefined and anonymous number of users for an unlimited period of time;
- the on-site and online access to the traditional and digital collections of a University for alumni;
- the on-site and online access to the traditional and digital collections of a research institution for all the researchers working jointly on a research project promoted by that institution (including non-staff);

Licences might be useful in other cases, e.g. for distributing/communicating printed copies of excerpts of works to the students enrolled to a course, for the whole length of their study period. However these licenses should be encouraged through an ad-hoc limitation established by the Directive. Likewise, the possibility of archiving excerpts after the end of the course, with the sole purpose of documenting teaching activities, has to be likewise provided for.

A partial reserve of copyright should be possible in favour of users whose works are publicly funded; in this case access to public grants should be made depended on the deposit of works in open archives. EU has hitherto “recommended” and even promoted (within the 7<sup>th</sup> framework programme) this kind of policy, supported by highly convincing arguments; it is therefore necessary to step forward and to assert the right of access to the outputs of publicly funded research.

With respect to the output of publicly funded research , European legislation should state that clauses whereby authors transfer exclusive rights of reproduction and revision of their works are void. This will reinforce the position of authors and will enable them to comply with the mandate of depositing publicly funded works.

Recommendations, guidelines and licensing models (e.g. CC) should be adopted to ensure that the authors of scholarly works always authorize the reproduction and reuse of their works for teaching and research purposes.

***22: Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?***

No. Mandating a limit to the length of excerpts in those instances could negatively affect both teaching and research.

***23: Should there be a mandatory minimum requirement that the exception covers both teaching and research?***

Yes. Personal study and research purposes have to be facilitated by all means.

***24: Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?***

No. It would be totally inappropriate to draw a list of forbidden uses. The Directive should however clarify that the exceptions as of art. 5(3) (d) and art. 5(3)(k) cover also user-created derivative works.

***25: Should an exception for user-created content be introduced into the Directive?***

No, if that exception ended by supporting the managers of social network managers in their possible intent of selling that user-generated content to other platforms.