COMMUNIA

POLICY PAPER #18

Limitation of liability for knowledge institutions

MAY 2024[1]

Background

Individuals and organisations who frequently interact with copyright-protected material in a professional capacity are often overwhelmed when it comes to determining what they may or may not do. They may be forced to make complicated choices between potentially risking to infringe copyright or passing up on opportunities to create or preserve knowledge by not using certain materials.

A lot of this has to do with how complex the European copyright system is for educational, research and cultural heritage institutions - or knowledge institutions for short. Currently, there are 13 directives containing semi-mandatory rules directed to Member States, and two regulations with unified rules, all combining to create a multiplicity of different copyright regimes in 27 legal jurisdictions.

[1] Lead author: Teresa Nobre. Contributor: Leander Nielbock.

While full harmonisation of exclusive rights is the norm, knowledge institutions rely on a whole host of limitations and exceptions to copyright that are not harmonised at the European level. This patchwork of divergent rules is challenging to navigate for seasoned experts and almost impossible for everybody else, causing significant legal uncertainty, in particular in cross-border cases. Meanwhile, the rapid development of the digital environment only contributes to the unpredictability of the scope of application of exceptions.

Legal complexity also stems from the specific EU constitutional set-up. Both the national courts of Member States and the Court of Justice of the European Union have a say on the application and interpretation of EU law, and the latter can further develop EU law. While this doesn't affect practitioners directly and can also lead to more harmonisation, in some cases, this has been an additional driver of legal uncertainty in the area of copyright.

In this policy paper, we look at the risks (real or perceived) that European knowledge institutions face from working with third party materials and develop a solution in the form of a limitation of liability for knowledge institutions and their employees, if they infringe copyright in their day-to-day activities without knowing.

A chilling effect

Knowledge institutions have to navigate the copyright framework on a daily basis, as they work very closely with content that is protected under copyright or where the situation of right ownership is unclear. Despite their best efforts, many of these institutions struggle to appropriately assess which rights they have when using copyright-protected works. This is because almost any word in the law can be subject to dispute and legal uncertainty.[2]

Teachers, for instance, have long reported the difficulties they have in assessing conditions of use for specific works, which often forces them to avoid using certain materials to avoid potential liability claims. A 2021 survey of teachers conducted by COMMUNIA and Centrum Cyfrowe showed that more than a quarter of participants were unsure about conditions of use in teaching for specific works. Similar levels of uncertainty were found in a survey from the 2016 impact assessment study on education, commissioned by the EU. Here, only a third of educators surveyed found

[2] See Crews, K. (2008), Study on Copyright Limitations and Exceptions for Libraries and Archives (WIPO SCCR/17/2), p. 64: Probably every statute encompassed within this study holds some element of risk for the library. At the least, almost any word in the statute can be made the object of dispute and uncertainty. The clauses and requirements of the statute often leave serious questions about whether a library qualifies for the exception, or whether the statute covers the materials copies or the activities pursued by the library.

the conditions for the use of copyrighted works for teaching “very clear”, whereas the majority of participants noted at least some level of uncertainty. In fact, over 60% of the responding educators shared that they refrained from using copyright-protected works to avoid any possible problems, which demonstrates the far-reaching chilling effect resulting from the complexity of the copyright framework.

Meanwhile, a 2024 survey of researchers shows that they face very similar issues as many of the respondents reported having encountered uncertainties around copyright law. In some of these cases, researchers were forced to seek assistance from copyright experts to determine the conditions of use, with varying levels of success. In a significant number of cases, however, respondents shared that they were forced to change the research design or abandon (parts of) projects altogether out of fear of litigation.

Libraries and archives have also repeatedly raised the issues that they face in dealing with the European copyright framework. In 2016, the International Federation of Library Associations and Institutions (IFLA) highlighted how easily archives and libraries may inadvertently breach copyright rules in the pursuit of their public service mission. Museums face similar challenges, particularly when they are unable to make a conclusive determination as to the copyright status of the work, as pointed out by the Council of Museums in 2021.

Legal complexity creates an environment that disincentivises knowledge institutions from engaging in activities that are crucial to their mission as they may otherwise risk copyright infringement claims.[3] The level of caution that needs to be exercised by practitioners has a significant impact on the knowledge production as well as knowledge preservation in Europe: teachers refrain from using relevant and interesting materials to educate their students, researchers alter or abandon their projects and libraries and archives are at constant risk of copyright infringement claims.

Legal framework

The current EU copyright framework is unfit to serve the needs of knowledge institutions, which has far-reaching consequences for knowledge creation and

[3] A number of high profile lawsuits, such as Hachette v. Internet Archive, have demonstrated that copyright owners will file lawsuits against knowledge workers and other good faith actors. While these lawsuits are often centred in the United States, they involve the same global copyright owners as in the EU and can have a deterrent effect on knowledge institutions here. In fact, such cases have also presented themselves in Europe, such as in Germany, where a school was sued for a copyright infringement after a pupil-made project containing a protected picture was published on the school’s website.

dissemination in Europe. In order to empower these institutions, the EU should consider introducing a limitation of liability for knowledge institutions, which ensures that they are not required to pay damages for using works or other subject matter if they act responsibly and in good faith or have reasonable grounds to believe that their use of a work is permitted by law.

Currently, it is left up to Member States to decide whether actors who are unaware of their infringement should be required to pay damages. Under Article 13(2) of the 2004 Enforcement Directive:

> "Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established."

Internationally, a few countries have taken important steps to empower knowledge institutions by introducing limitations of liability for designated categories of institutions such as educational establishments, libraries and archives. While some limit the liability of these institutions only for specific activities,[4] others have provisions in place that generally restrict or limit their copyright liability.

The Bahamas, Canada and the US limit or remit the statutory damages that would otherwise be payable by an institution for activities associated with its core mission. In the US, nonprofit educational institutions, libraries and archives, and employees and agents acting within the scope of employment, are not liable for statutory damages if they believed that the copying of a work was within fair use.[5] Likewise, in the Bahamas, non-profit educational establishments, public libraries and archives will not incur statutory damages, if the employee or agent of the institution made a reproduction of a copyrighted work, acting within the scope of their employment, believing that the activity was fair dealing.[6] In Canada, no statutory damages may be awarded when an educational institution, library, archive or museum makes copies of a work where the right holder has not authorised a collective society to authorise its reproduction.[7] Statutory damages are also remitted in the context of other educational activities.[8] Finally, statutory damages can be greatly reduced in Canada, the US and the Bahamas, when the defendant satisfies the court that the defendant was not

[4] For instance, El Salvador and Guatemala have introduced provisions which protect public libraries, archives and nonprofit educational institutions from liability for circumventing technological protection measures for the legitimate use of a work. See El Salvador Ley de Propiedad Intelectual, Art. 85-D; Guatemala Ley de Derecho de Autor y Derechos Conexos, Art. 133 quinquies, Art. 133 septies.

[5] See US Copyright Act Title 17 §504(c)(2).

[6] See Bahamas, Copyright Act, Cap. 323, §41(3)(d).

[7] See Canada Copyright Act, §38.1(6), § 38.2(1).

[8] See Canada Copyright Act, §38.1(6).

aware and had no reasonable grounds to believe that the defendant had infringed copyright.[9]

In addition to limiting the exposure to statutory damages, some countries absolve institutions from indirect copyright infringement. The US absolves the educational institution from being attributed with the infringing acts and knowledge of infringing activities of its faculty member or graduate student, while Australia exempts non-profit libraries, archives and educational institutions from the indictable offence of commercial-scale copyright infringement.[10]

A European approach that shelters knowledge institutions by limiting the legal exposure they might face in the event of copyright infringement would dispel much of the fear around litigation. This would go a long way in reducing the chilling effect that copyright laws produce on knowledge institutions.

Conclusions and Recommendations

Knowledge institutions, such as universities, research institutes, libraries and archives play a crucial role for knowledge production and innovation. Their public service mission is rightfully supported through numerous European programmes such as Horizon Europe.

Unfortunately, however, in many cases the work of these institutions is held back by unfit and overly complicated copyright rules which, at best, cause delays and confusion, but at worst, force institutions to change their approach, avoid international cooperation or abandon projects altogether.

In order to create an enabling environment for European knowledge institutions, a unified approach is needed, to establish that knowledge institutions should not be liable for the payment of damages from copyright infringements that do not happen knowingly and arise in the context of a good-faith pursuit of their public service mission.

Calls to enact copyright liability limitations for the benefit of knowledge institutions have repeatedly been made by civil society organisations and academics.[11] Resolving

[9] See Canada Copyright Act, §38.1(2); US Copyright Act Title 17 §504(c)(2); Bahamas, Copyright Act, Cap. 323, §41(3)(c).

[10] See Australia Copyright Act, §132AC(7); US Copyright Act Title 17, §512(e).

[11] See IFLA (2000), The IFLA Position on Copyright in the Digital Environment, Principle 12; Council of Museums (2021), Policy Paper on the Digitization of Museum Collections, Proposal 8; COMMUNIA (2022), 20 Policy Recommendations for the Public Domain, Recommendation 17; Creative Commons

these issues would ideally be part of a more comprehensive regulation, a Digital Knowledge Act, addressing the needs of knowledge institutions in the digital environment more broadly.

RECOMMENDATION 1

Limitation of liability for knowledge institutions

As laid down in our policy recommendation #17, we call on the EU to establish, through unified legislation, that knowledge institutions, including the persons attached thereto, should not be required to pay damages for using works or other subject matter if they act in a responsible and prudent way, believing or having reasonable grounds to believe that they have acted in accordance with copyright law.

(2022), Towards better sharing of cultural heritage. A Creative Commons Call to Action to Policymakers, Action 4; Gliściński, K., & Lima, F. (2023), A white paper with legal recommendations - v. 2 (Version 2), p. 45.

About COMMUNIA

The COMMUNIA association advocates for policies that expand the Public Domain and increase access to and reuse of culture and knowledge. It acts as a network of like-minded activists, researchers and practitioners based in Europe and the United States who seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

COMMUNIA is grateful for the financial support of Arcadia, a charitable fund of Lisbet Rausing and Peter Baldwin.

For more information on COMMUNIA visit our website: www.communia-association.org; or contact us at: communia@communia-association.org.

This publication is in the Public Domain.