

Right to license and own digital materials

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Background

Users are losing the ability to own copies of copyrighted materials. Today, many materials are only published in digital rather than analogue formats to the point that it has become much more difficult, if not impossible, to obtain movies, music or scientific publications in analogue formats. At the same time, publishers no longer *sell* digital publications. Instead, access in the digital ecosystem is now mostly governed by *licences*, which effectively simulate temporary rentals, allowing publishers and other gatekeepers to exercise much stronger control over their catalogues than ever before.

Knowledge institutions, such as universities, libraries and archives, are particularly affected by this digital shift. The reliance on licences to access digital formats has made it considerably more difficult for these institutions to obtain, retain and provide access to new works, and to preserve them, as licensors can impose subscription bundles, implement licensing restrictions, force institutions to repurchase the same materials on a regular basis, or even refuse to license altogether.

These shifts in the European knowledge market challenge the ability of knowledge institutions to build and maintain permanent digital collections, increasing their

vulnerability to market influences. This affects their public service mission and, by extension, the ability of their users to exercise their fundamental rights.

While promoting the legitimate interests of creators, copyright laws should equally enable access. Instead, current EU legislation offers rights holders access control mechanisms that empower them to restrict access in the digital environment beyond what they should be legitimately entitled to. In this policy paper we discuss solutions to put users on an equal footing with rights holders. We argue that access rights must be established in EU law, when lawful access is needed to allow users to effectively exercise their rights under existing copyright exceptions. Rights holders must be further subject to a positive obligation to grant access to digital formats, by means of a licence or otherwise, to knowledge institutions, to allow these institutions to continue to serve as information gateways in the 21st century.

Failure of the European knowledge market

Knowledge is a singular “commodity” due to its importance for the advancement of our society. Thus, a market for knowledge must strike a balance. On the one hand, those who create knowledge must be appropriately rewarded to encourage their work and its dissemination. On the other, knowledge can only serve a greater societal purpose and create broader benefits when it is accessible under fair conditions.

Unfortunately, the European knowledge market fails to uphold this balance, as the legislator has entrusted rights holders with excessive powers to shape the market without sufficient protections for the interests of the general public. This hierarchy manifests itself in several areas of EU copyright law. Rights holders not only enjoy a high level of harmonisation of exclusive rights across the EU, they also benefit from special enforcement mechanisms. In addition they take advantage of powerful technological tools, which often prevent both unlawful and lawful uses of copyrighted works. Examples of these tools include technological protection measures (TPMs), which have near-absolute protection under EU copyright law.

The power vested in rights holders has also allowed them to exploit the increased digitisation of the market in another way, namely by moving away from selling towards licensing. At the turn of the century, getting access to a work meant buying

an analogue copy (e.g. a CD or a printed book). With the purchase, the buyer would fully control the copy. In the early days of digital media, licences still emulated ownership. Consumers would “buy” digital files and download them to their personal devices. Nowadays access is often temporary and only obtainable in the form of a licence which removes the element of ownership. The “buyer” is not awarded a direct file download — the media is available via an online service. As a result, the rights holder can restrict who can have access to what, when, where and how.

We have seen time and time again that the rights holders do not always exercise these control mechanisms responsibly. Instead, rights holders often exploit their position to segment access and tailor use conditions to the detriment of users rights. In licensing negotiations with knowledge institutions, rights holders are in a dominant position, allowing them to essentially dictate a licence’s content, terms and price. In practice, that means that licences are frequently overly restrictive and unreasonably priced to the point of being prohibitively expensive and almost a privilege.

Beyond that, rights holders have also started to implement licensing practices that are not adequate to the needs of knowledge institutions. This includes “take it or leave it” subscription bundles that include titles over which the institutions have no control over (including titles they do not need), and time-limited or metered licences that force institutions to repurchase the same materials after a number of years or loans. Other problematic practices include collecting user data or disallowing perfectly legal uses of works. In many cases, the licensing terms available to institutions are also less advantageous than those available to ordinary consumers.

At the end of the spectrum, these unchecked powers can also lead rights holders to withdraw individual titles or refuse to license certain media altogether, curtailing the institutions’ ability to build digital collections or datasets without undue influences. A 2024 study commissioned by the European Commission reveals that a significant number of researchers (43.3%, n=344) have been unable to obtain permission from the rights holders to get access to knowledge resources.

Users lack measures to enforce their rights

These licensing practices reveal a systematic problem of European copyright law. Despite the recognition of the rights of users by the Court of Justice of the European Union, these rights remain ineffective. Whereas rights holders benefit from strong legal protection, no adequate enforcement mechanisms exist to protect users.

This is not to say that EU copyright law does not contain some access-enabling mechanisms. A limited number of measures are already foreseen in the law. However, the existing measures are insufficient to effectively realise users rights in the digital ecosystem, even more so when they need to be concretized at the national level, as Member States often fail to develop concrete measures during the implementation process. For example, the EU legislature has specified measures to enforce users rights when the use cannot take place due to the employment of TPMs, but most Member States have no clear mechanisms in place to ensure that beneficiaries of exceptions can use TPM-protected content as permitted by law.¹

This illustrates the current flaws in the copyright system and the need to improve the legal protections available to users at EU level to counterbalance the level of (unjustified) control left with rights holders in the digital ecosystem.

Knowledge institutions as access points to users

In order to address the failure of the licensing market to grant initial access to digital works, the EU lawmaker should consider introducing specific substantive and procedural measures in EU copyright law to facilitate licensing and acquisition of digital works, under suitable access conditions, at least by certain privileged users.

¹ Article 6(4) of the [InfoSoc Directive](#) does not oblige rights holders to remove TPMs nor does it grant users the right to do so. In the absence of voluntary measures by rights holders, users have to follow the procedures defined by national laws to seek the means to access TPM-protected content. Yet in a [report](#) commissioned by the Commission, researchers were only able to identify such mechanisms in 8 EU countries.

Knowledge institutions play an essential role here. It is the mission and key societal function of libraries, archives and universities to serve as a gateway for knowledge and information that would otherwise be unattainable to the general public. These institutions also promote a diversity of sources, facilitate access to and preservation of reliable sources, and offer platforms for discussion, making them crucial actors in sustaining and developing democracy.² Libraries, in particular, play an important part in democratising access to information and enabling cultural participation. They provide lawful access to a variety of media for all members of society, including marginalised communities, disregarding their social status and economic position, often free of charge. They are also essential in producing accessible formats for persons with disabilities.

Hence, any measure that empowers these institutions and strengthens their rights also promotes the public interest, allowing a much broader audience to exercise a number of fundamental rights.

A balanced obligation to license or sell

The Council of Europe has recently recommended that Member States “facilitate the acquisition by libraries of licences for digital books, on reasonable terms, as soon as they are published.” This follows calls from libraries and library organisations around the world for a regulatory intervention. Some of these calls highlight the need to introduce the right to purchase digital materials on the same terms as physical materials, or to at least have certain minimum rights guaranteed, such as the right to purchase and own digital materials.³ Others have called, at a minimum, for requiring publishers to make licences available to knowledge institutions on reasonable terms.

A 2024 study commissioned by the European Commission reveals that research performing organisations also express very strong support (47.3%) or at least support

² Council of Europe/EBLIDA Guidelines on Library Legislation and Policy Europe, Appendix to Recommendation CM/Rec(2023)3 of the Committee of Ministers to Member States on library legislation and policy in Europe.

³ These calls refer to four core rights that should be guaranteed: the right to purchase and own digital materials, the right to preserve digital materials, the right to provide access to them, and the ability to protect reader privacy.

(34.4%) for the introduction of access rights, under strict conditions defined by law, in cases of overwhelming public interest (n=491).

Introducing specific measures in EU copyright law to facilitate digital ownership and licensing of digital works by knowledge institutions would have the effect of strengthening their role in providing an equal and fair chance to access information in the digital environment. We argue that one of such measures could take the form of an obligation to provide access to digital formats, by licence or other means. In order to ensure that such an obligation merely corrects the current market failure, without placing an undue burden on rights holders, the obligation would need to be subject to use-specific proportionality assessment. In addition, the lawmaker would need to ensure that the terms and conditions of licences and other agreements aimed at providing access to institutions are subject to fair and reasonable conditions.

Legal framework

The rationale for a right to obtain access or an obligation to enable access can be derived from the social function of copyright as an access right and more directly from access-based exceptions that embody fundamental rights, which have an horizontal effect.⁴ Employing access restrictions to control uses explicitly permitted by law significantly limits the fundamental rights of users, as they are unable to secure the effective exercise of their rights. Simply put, certain uses cannot take place unless the user obtains access to a physical or digital copy of the work. A student can only analyse a scientific text as part of a school assignment if the text is accessible to them.

A copyright compliant with fundamental rights must equip users with adequate tools to render their rights effective in practice. This is all the more true with regards to users rights that are deeply rooted in freedom of expression, freedom of information, freedom to participate in cultural life, freedom to conduct scientific research or the right to education. Existing human rights instruments oblige the legislator to adopt appropriate measures to provide a minimum level of enforcement and guarantee that fundamental rights-based uses are *de facto* possible in the digital ecosystem, under

⁴ For an in-depth legal analysis, see Christophe Geiger and Bernd Justin Jütte's [independent expert study](#) commissioned and published by COMMUNIA and KR21.

fair and reasonable terms.⁵

When access is a material condition for performing a permitted activity, a refusal to sell or license works to the beneficiaries of exceptions reduces the scope of their rights and the balance envisioned by the legislator. Rights holders have no legitimacy to control uses deemed lawful by the legislator. A fundamental rights-based rationale dictates that lawmakers have an obligation of result to introduce legislative measures to secure access, when access is a *conditio sine qua non* for the exercise of exceptions.

The introduction of mandatory exceptions by the Copyright in the Digital Single Market Directive already confirms that it is appropriate, and sometimes even necessary, to introduce legislative measures to enable “wider access to content” in the digital environment.⁶ The development of the concept of users rights as enforceable rights by the Court of Justice of the European Union also supports the idea that positive actions are needed to ensure their effectiveness.⁷ As noted before, some measures to reduce the level of control that rests with rights holders have already been introduced by the EU lawmaker. For instance, some exceptions are protected against contractual overrides and educational licences need to be adequate to the needs of educational establishments.⁸ However, an obligation to facilitate lawful access to works does not expressly exist in EU copyright law.

There are precedents that indicate that obligations to deal with a potential licensor or licensee of copyrighted materials are possible.⁹ Furthermore, obligations to license

⁵ See Articles 11, 13 and 14 of the Charter of Fundamental Rights of the European Union, Article 10 of the European Convention of Human Rights and Article 2 of the First Protocol to the Convention, Article 19 of the International Covenant on Civil and Political Rights and Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights.

⁶ See Recital 3 of the DSM Directive, highlighting the need to facilitate access: ‘This Directive provides for rules to adapt certain exceptions and limitations to copyright and related rights to digital and cross-border environments, as well as for measures to facilitate certain licensing practices, in particular, but not only, as regards the dissemination of out-of-commerce works and other subject matter and the online availability of audiovisual works on video-on-demand platforms, *with a view to ensuring wider access to content*’ (emphasis added).

⁷ See e.g. CJEU, Case C-314/12, UPC Telekabel Wien, para. 57, Case C-117/13, Eugen Ulmer, para. 43, and Case C-469/17, Funke Medien NRW, paras 70-71.

⁸ See Article 7(1) and Article 5(2) of the DSM Directive.

⁹ Article 15 of the Audiovisual Media Services Directive obliges Member States to ensure that broadcasters have ‘access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction’. Article 17(4)(a) of the DSM Directive, on the other hand, sets an implicit obligation for licensees (the online content sharing service providers) to negotiate with rights holders.

already exist under EU patent and competition laws, supporting the rationale that public interests can supersede the commercial interest of rights holders.¹⁰ The approaches provided by these legal frameworks are, however, inadequate to the needs of users of copyrighted works, as they involve costly and lengthy procedures and do not offer the level of legal certainty required by institutional users. Coupling copyright exceptions with explicit access rights and procedural guarantees would ensure the effectiveness of users rights without placing additional administrative or financial burden on the users and, most importantly, without slowing down activities that require swift access to the work, such as research.

Access rights would need to be subject to a proportionality analysis, taking into account the purpose of the use and certain economic interests of the rights holder. An obligation to offer a licence or to otherwise grant access, under fair and reasonable conditions, would need to be assessed individually; limited to cases defined by the applicable exceptions and only when is technically impossible or economically difficult to obtain initial access due to restrictions imposed by rights holders; and further subject to a general reasonableness standard to protect rights holders against excessive transaction costs (e.g., a library could request the licensing of an e-book for e-lending if the same e-book is already lawfully available through other channels, e.g. for individual purchase by private users).

Conclusions and Recommendations

Knowledge institutions make invaluable contributions to economic and societal welfare. Yet they face numerous challenges to fulfilling their public service mission in an increasingly digital ecosystem, which operates under a predominantly licensing-based model that makes it prohibitively difficult or outright impossible for institutions to build and maintain digital collections without undue influences. Current licensing practices are not suited to the needs of knowledge institutions and are a

¹⁰ For example, patents that protect technologies that are declared essential in a technical standard or specification are subject to fair and reasonable and non-discriminatory (FRAND) licensing terms, where the essential facilities doctrine addresses the refusal to grant access to competitors, on non-discriminatory terms, to infrastructures developed by dominant companies, imposing an obligation to deal on such companies.

threat for users rights overall. They reveal an abuse of copyright and require rethinking the legal tools available to users to secure the effective exercise of their rights.

Implementing access rights for beneficiaries of copyright exceptions and creating a positive obligation to license or sell digital works to knowledge institutions, under fair and reasonable conditions, would go a long way in remedying this situation.¹¹

Resolving these issues would ideally be part of a more comprehensive regulation, a Digital Knowledge Act, which addresses the needs of universities, libraries and other knowledge institutions in the digital environment more broadly.

RECOMMENDATION 1

Introduce ancillary access right for beneficiaries of exceptions

We call on the EU to introduce an ancillary access right for individual beneficiaries of certain copyright exceptions. Users must be able to obtain effective access to a specific format copy of a work or other subject matter, to the extent necessary to benefit from a copyright exception, when such format copy is already lawfully marketed and facilitating access to such copy does not place an undue burden on the rights holder.

RECOMMENDATION 2

Introduce obligation to facilitate access to knowledge institutions

We call on the EU to introduce an obligation on rights holders to facilitate effective access, through licences or other means, to specific format copies of works and other subject matter by knowledge institutions, under fair and reasonable conditions.

¹¹ Other recommended legislative measures include an EU-wide exception for e-lending and secondary publication measures.

RECOMMENDATION 3

Make unfair terms and conditions unenforceable


We call on the EU to establish that licensing offers to knowledge institutions should be adequate to their needs. This legislation should, at the very least, provide that a contractual provision in a licence agreement for knowledge institutions shall be unenforceable if it (i) precludes or restricts the institution from performing their public interest missions, (ii) restricts lawful uses of works, or (ii) charges the institution more for one e-copy than the list price for the public for the same item.

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.

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