Draft of the Second Law Implementing the EU Directive on Copyright in the Digital Single Market
Response from the International Federation of Library Associations and Institutions

The International Federation of Library Associations and institutions (IFLA) welcomes the opportunity to provide the views of the international library field on the implementation of Articles 8-12 and 17 of the EU Directive on Copyright in the Digital Single Market (the Directive). We apologise for providing this feedback in English, and hope that it will nonetheless be helpful.

Libraries are key stakeholders in this implementation. Concerning Articles 8-12, they are key repositories of heritage, whose capacity to provide access to collections requires adequate laws. With copyright terms massively longer than the commercial life of all but a tiny minority of works - and many works never entering commerce in the first place - we welcomed the intervention of the European Union on the question of out-of-commerce works. This helps address the fact that copyright laws, as they stand, risk creating negative spillovers and opportunity costs in the shape of restricted access to works.

Concerning Article 17, libraries have a major interest in users’ rights, given their role as the physical representation of access to information and to education. Given the importance of allowing everyone to create information - both as a means of enriching the body of material available, and as one of the most advanced forms of literacy - they increasingly have a mission to support citizens in the practice of their fundamental rights such as freedom of expression.

Through this, they aim to ensure that knowledge and information will continue to support the development of enlightened societies. Governments need to continue prioritizing the fundamental rights of their citizens and to ensure the development of well-governed societies.

**Artikel 1, Caricature, Parody and Pastiche**

We support the new exception covering parody, caricature and pastiche, IFLA welcomes this proposal. We would like to ensure that, in line with the current proposal, that this should not be subject to remuneration.

**Artikel 1, Unterabschnitt 5a (Gesetzlich erlaubte Nutzungen nicht verfügbarer Werke; Information über kollektive Lizenzen mit erweiterter Wirkung), and Artikel 2**

We broadly welcome the German implementation of the provisions contained in Articles 8-11 of the Directive, which, we hope, will lead to significantly more works becoming available in order to support education, research and access to culture. In particular, we welcome the new exception under 61f in order to allow previews of works.

We would like to make the following additional points:

1) Definition of works subject to the provisions
We welcome the title of the section - nicht verfügb arer Werke - which covers not only works which are out of print (i.e. have once been for sale, but which are no longer), but also works which have never been in commerce. A large share of the collections of libraries and archives in particular can consist of such works, and so a solution for this is required.

We note that the Ministry intends to leave the definition of the conditions for declaring a work to be unavailable to a later date (61e(4) of the Copyright Law, 51e(7) of the Collecting Society Law). In the light of the widespread recognition that the Orphan Works Directive has broadly failed because of the complexity of ‘diligent search’, we would urge the government to make clear, already, that such conditions should be proportionate, and not stand in the way of the effectiveness of the law.

2) Representativity of Collecting Societies (51a, Collecting Society Law)

We believe that the definition of representativity is a key factor in the success of the Directive, given that collecting societies will potentially be empowered to collect money on behalf of non-members, without the guarantee that any revenues will ever end up in the hands of the original creators.

As such, we believe that while reference to ‘significant’ numbers of rightholders having provided rights (51a(1) of the Collecting Society Law), we would be concerned by paragraph 51a(2), which would appear to give any collecting society, regardless of its representativeness of creators in a given sector, automatic rights to collect money. Given that they would be receiving often public money from libraries and other cultural heritage institutions, there is a duty to ensure that this money is well spent. A higher standard should therefore be in place.

We would therefore advise that, in line with the recommendation made in Directive itself, it would be helpful to bring together government, cultural heritage institutions and collective management organisations in order to determine for which sectors, and which uses, extended collective licencing applies. Furthermore, we advise careful definition of different sectors (such as broadcast, letters, posters and pamphlets), in order to avoid categories of works for which there are no collecting societies ending up subject to licensing.

3) Remuneration for uses of unavailable works (60d(5), Copyright Law)

We note with some concern the provision obliging cultural heritage institutions to pay for any uses of unavailable works, through collecting societies. This is not required by the Directive - and indeed, the failure to do so implies that such uses should be free, while of course protecting the right of rightholders to object to making such works available.

Furthermore, this provision means that, in situations where the extended collective licencing provisions do not apply, due to collecting societies being absent or unrepresentative, collecting societies are still entitled to collect money. This is challenging, in that it effectively means that public money is being paid to such societies in situations where it is clearly going to be difficult to pay this money out to original creators. This risks undermining the legitimacy of the entire system, as well as representing a waste of public money.
We would therefore recommend removing article 60d(5), thereby allowing libraries and other cultural heritage institutions to spend resources on their missions of preserving, digitising and giving access.

Artikel 3 (Article 17 of the Copyright Directive)

Libraries rely on exceptions and limitations to copyright to achieve this public service mission to support their users to develop and use their rights, including:
- by citing sources and books
- by creating parodies and pastiches
- by sharing news reporting
- by preparing reviews
- by developing criticism

IFLA is therefore happy to provide the following suggestions:

_ Users rights must be protected during the implementation of the EU-DSM, including as concerns Article 17. Platforms should not be given an incentive to over-block, for example through a process based only on simplistic technological solutions, such as filters. It has been clear throughout the Stakeholder Dialogues held in Brussels that these are unable to identify the context of works, and so whether an exception or limitation may apply. This can mean that uses of copyrighted works under an exception or limitation risk being recognised as illegal content.

_ Our strong preference remains to avoid using filters in general, progressing rather using notice-and-take-down, and due diligence searches using aspects such as titles, length of uploaded content or other tools. Nonetheless, should filters be introduced, it will be important to take steps to avoid harm to the sharing of content containing copyrighted work (as by filters), but which falls under an exception or limitation. To do this, we believe that in all by the most egregious situations, content should not be taken down before human review.

In more detail, content should be considered as legitimate and stay on the platform until a notification informing the uploader and a human review from the platform have certified that uses made of copyrighted works do not fall under an exception and limitations.

_ Article 17 implementation implies a significant amount of resources such as human, financial and technical resources to fulfill global requirements for organisations to develop.

IFLA would like to raise the importance of defining and targeting only significant digital players for this provision as a broader regulation will impact the capacity of small and medium organisations to compete on the market.

_ Regarding the term “every” effort to obtain authorisation, we would like to suggest a correction of the translation. as the DCDSM directive, terms are describe as “best” efforts. We would welcome a change of wording towards “best” efforts as otherwise this will set à higher threshold in Germany and lead to inconsistent adaptations through Europe.
The requirement behind this ‘best” efforts term should be defined as proportionate to the resources of the platform concerned.

The users’ requirement to pre-flag legal inclusion of third-party content under exceptions and limitations at the time of upload is welcome as an attempt to limit the block of legitimate contents.

Pre-flagging will work in two parts: legitimate uses and illegitimate uses.

On the pre-flagging of legitimate uses, provisions should safeguard exceptions and limitations as the directive mentions.

Since contents falling under exceptions and limitations will be pre-flagged, we require that pre-flagged contents must be maintained online until clarifications have been provided.

The pre-flagging possibility should remain an option for users and must not be enforced as platforms might consider requiring each user to provide additional elements. Users should not be presumed guilty of copyright infringement from the start of their process of sharing contents.

Public domain and openly-licensed contents are legal contents that might require a specific design within platforms. Platforms should address specific needs and develop a clear process concerning these contents.

On notifications and take down of contents, users should receive a notification from the platform to invite them to clarify their uses. A minimum of time of three working days should be set in order to provide the necessary time to address the complaint.

During this period, contents should be kept available on the platform, until information regarding the legality and context of the content has been provided by the user or the organisation.

We encourage more global transparency on notice-and-takedown, especially as it will allow better monitoring of the implementation of article 17. We would also encourage transparency concerning requests and ownership claims made by rightholders.

In order accurately to define the minimum necessary information to exchange between providers and users in order to actively engage in the clarification of contents such as:

- subject of blocking or removal
- legal basis for blocking or removal
- explanation of the process of review including legal remedies available
- share the identify of the third-party involved in the process of the block or removal
- proof of ownership of the content by the claimed rightsholder.

Concerning provisions addressing liability for over-blocking contents and false copyright claims, we believe that this addition is welcome. Excluding actors that have repeatedly claimed
false ownership on works or over-blocking is a positive as stakeholders must be liable for the harm false claims (time, cost, efforts) cause to the platform, uploader, and user.

Concerning the protection of free expression under exceptions to copyright, we would recommend that it be made clear that all of quotation, criticism, review, caricature, parody and pastiche are clearly included as permissible uses which should not be subject to blocking on copyright grounds.

Regarding the de minimis exception proposed in the draft, we welcome efforts to create a fallback mechanism and to bring clarification on minor uses of copyrighted contents.

We welcome the fact that the exception is conditioned by the non-commercial purpose of the use. Nevertheless, we suggest the development of a clear definition of “non-commercial”. Given that libraries are nonprofit and public-funded organisations and due to their public good mission such as in supporting education, we would like to suggest to develop a list of non-profit organisations that would fall under the non-commercial exception.