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Protecting Consumers' Rights in Digital Markets: The Need to Uphold Copyright Exceptions in the Face of Contract Override

This note is submitted by the International Federation of Library Associations and Institutions (IFLA), and by the Knowledge Rights 21 Programme (KR21), of which IFLA is a partner, and which is supported by the Arcadia Fund.

KR21 works to build the case and evidence base for a refreshed look at the rules that determine how knowledge products are created, shared and used, in order to place the rights to research, education and culture at the centre. We hold that, while digital technologies have created many new practical possibilities to discover and apply knowledge, consumer laws in the field have not kept up, leading to situations of confusion, complexity, and the non-fulfilment of key public interest goals.

This paper makes a number of key points which, we believe, should shape the review of the EU's *acquis* around digital contracts.

1) The possibilities created by limitations and exceptions to copyright matter, including online: when copyright was first created in its modern form, it was strictly circumscribed in order to avoid the risk that overly extensive rights would stand in the way of the pursuit of public interest goals such as education and research. Over time, rights themselves were extended, but many European countries also developed a robust set of exceptions which serve themselves (in line with the judgement in *Pelham*¹) to guarantee the rights of users. Yet with the rise of digital content, the operation of exceptions is undermined by the possibility for consumers to 'opt out' of these through contracts, despite these usually being non-negotiable (contracts of adhesion). This creates the risk that the rights of users are better protected in the analogue world than the digital.

2) Access through libraries is essential to the enjoyment of wider user rights: as recognised in Dr Christina Angelopoulos' recent study for DG RTD², the possibility for libraries to acquire and give access to materials can be a necessary precondition for the wider population to enjoy the rights accorded it under law. Unless these possibilities are protected from override by contract, these wider rights are therefore in jeopardy.

3) It is possible to protect libraries from unfair contract terms under EU law: Libraries do not typically benefit from traditional consumer protection, while also missing out

¹ <https://curia.europa.eu/juris/liste.jsf?num=C-476/17>

² <https://op.europa.eu/en/publication-detail/-/publication/884062d5-1145-11ed-8fa0-01aa75ed71a1/language-en/format-PDF/source-262392389>

on the safeguards offered by competition law. However, EU law does not completely neglect the interests of libraries and their users, with Article 7 of Directive 790/2019 underlining that contract terms that look to take away possibilities for libraries to use works are not applicable. Nonetheless, this provision is very narrow in its focus (emphasising only text and data mining and preservation meaningfully), leaving all of the other copyright exceptions on which libraries depend vulnerable to copyright (not least the other possibilities created by the InfoSoc Directive³, or the Rental and Lending Directive⁴).

As a result, we believe that a key potential contribution of the EU's current review of the acquis around digital contracts would be to provide a more general protection for libraries, on behalf of their users, against contract terms (and concurrently, technological protection measures with a similar effect) that undermine the possibilities already offered them in law thanks to exceptions to copyright. Such a measure could take inspiration from existing general provisions, such as those in Irish, Belgian or Portuguese law⁵.

In doing so, it would first of all ensure consistency between the digital and analogue worlds, as well as acknowledging the key role that libraries play in delivering on wider consumer and citizen rights. It would also, through removing the necessity for library workers to check, contract by contract, in order to assess what is and isn't possible.

Knowledge Rights 21 would be happy to discuss the issues raised in this paper in more depth at the convenience of DG JUST, and in particular to share, in due course, research that we have commissioned into the degree to which contracts offered to libraries undermine their ability to carry out key activities.

³ Directive 2001/29/EC: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

⁴ Directive 2006/115/EC: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006L0115>

⁵ See IFLA, 2019, Protecting copyright exceptions against contract override: https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf