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Directorate-General for Trade
B3 – Investment and Intellectual Property
1049 Brussels/Belgium
By email: TRADE-IP-TEAM@ec.europa.eu,
Stephan.HANNE@ec.europa.eu

9 October 2023

Re: Annual IP Dialogue with Ukraine

Dear Mr. Hanne,

Thank you for your email of September 12, 2023 inviting stakeholders to contribute issues of concern for the annual IP Dialogue taking place on October 19, 2023 under the Association Agreement with Ukraine.

EIFL (Electronic Information for Libraries) wishes to comment on the Law on Copyright and Related Rights that entered into force in Ukraine on January 1, 2023¹. Our comments concern provisions relating to access to copyright-protected content for science, research, culture and other public interest purposes.

We welcome the new copyright exceptions including Article 22 (text and data mining), Article 23 (people with print disabilities), Article 24 (libraries, archives and museums), Article 29 (orphan works). However, the new law falls short of the EU copyright acquis in three substantive areas detailed below (contract override, text and data mining, out-of-commerce works). We also highlight some translation issues with Article 24.

Europe has demonstrated its strong political support for Ukraine through the integration of Ukrainian researchers and innovators into the European Research Area², among other practical

¹ Law of Ukraine No. 2811-IX of December 1, 2022, on Copyright and Related Rights

² European Commission, Directorate-General for Research and Innovation, *Ukraine, support for researchers and innovators*, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2777/7756>



measures. However, shortcomings in the law on copyright risk placing legal barriers in the way of science and research in Ukraine. To maximize opportunities for collaboration, development of seamless research information systems and promotion of Ukrainian cultural heritage, we hope the shortcomings will be addressed. Now more than ever, libraries and researchers in Ukraine deserve to operate on a level playing field with their counterparts in the EU.

We hope our comments are helpful. Please don't hesitate to ask if there are any questions.

Yours sincerely

EIFL (Electronic Information for Libraries) – Teresa Hackett

About EIFL

EIFL works with libraries to enable access to knowledge in over 50 developing and transition economy countries in Europe, Africa, Asia Pacific, and Latin America. In a highly networked digital world our activities help people to access and use information for education, learning, research and sustainable community development. In Europe, EIFL partners with library consortia in Estonia, Latvia, Lithuania and Slovenia, as well as Albania, Armenia, Azerbaijan, Georgia, Kosovo, Moldova, North Macedonia, Serbia, Ukraine.

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**Law of Ukraine No. 2811-IX of December 1, 2022
on Copyright and Related Rights**

Comments by EIFL

1. **Access to digital content may be denied by contract.** The most pervasive problem in the new law relates to access to content in the digital environment. The Law fails to include provisions nullifying contract terms that purport to override specific exceptions for text and data mining, databases, software reverse engineering, accessible format copies, and preservation of Ukraine’s cultural and scientific heritage. The relevant EU Directives require such a provision with respect to these specific exceptions - all are missing from the Ukrainian law. This omission puts Ukrainians at a disadvantage compared to their EU counterparts when it comes to accessing and using digital material governed by contract, because the exceptions might simply be overridden. Just as Article 53(3)(3) ensures that technological protection measures do not prevent the enjoyment of the exceptions set out in the Law, the exceptions should similarly be safeguarded from terms in contracts.

2. **Restrictions on Text and Data Mining.** Article 22(2)(14) permits copying works “for the purpose of searching for text and data included in or related to scientific publications for research purposes.” It applies only if the use of the works has not been expressly prohibited by the copyright holder. While Article 22(2)(14) is modeled on the text and data mining (TDM) provisions in Directive 2019/790 Copyright in the Digital Single Market (DSM), it is far more restrictive. The DSM Directive contains two provisions relating to TDM: Article 3, which permits research organizations and cultural heritage institutions to carry out TDM for scientific research purposes; and Article 4, which permits any entity to carry out TDM for any purpose, subject to an opt-out by the rightsholder. Article 22(2)(14) of the Ukrainian law does not follow this structure, and is narrower in several respects.
 - a. It applies the opt-out requirement to TDM for research, while DSM Article 3 does not have an opt-out requirement.
 - b. It permits TDM only for research purposes, while DSM Article 4 allows TDM for any purpose.
 - c. It permits copying only for the “searching for text and data” while the DSM Articles apply more generally to text and data mining, which is defined to mean “any automated



analytical technique aimed at analysing text and data in digital form in order to generate information which include but is not limited to patterns, trends, and correlations.” In other words, the Ukrainian provision appears restricted to search, while the DSM provisions apply more broadly to the training of artificial intelligence models.

- d. It is directed only to the copyright of scientific publications, while the DSM Articles allow the targeting of any material.
- e. As noted above, the exception is not protected from contract override.

Researchers in Ukraine risk facing more legal uncertainty and more restrictions on text and data mining activities than researchers operating in the EU.

3. **Out-of-commerce works remain locked up.** The Law does not have provisions for uses of out-of-commerce works by cultural heritage institutions, as set out in Articles 8-11 of the DSM Directive. As EUIPO states, European cultural heritage institutions, such as libraries, archives and museums, hold millions of out-of-commerce works in their collections that are of great cultural, scientific, educational and historical value³. It would be unfortunate if institutions in Ukraine cannot also digitize and disseminate out-of-commerce works in their collections. Now more than ever, cultural heritage institutions in Ukraine should be supported in their endeavours to safeguard and promote national heritage by unlocking hidden treasures in their collections that are out-of-commerce, or to give a new lease of life to works that are long out-of-print.
4. **Translation issues with Article 24 Free use of a work by libraries, museums with open access to visitors, archives or organizations for maintaining audio and video recordings**
 - a. Article 24(1)(2) contains a clause that doesn't appear to make sense: “provided that it is impossible to produce the corresponding copy in any other way.” Perhaps this is a mistranslation, and actually means “provided that it is impossible to *acquire* the corresponding copy in any other way.”
 - b. The chapeaux of Articles 24(2) and 24(3) is the same, “Non-commercial libraries may borrow copies of lawfully published works in printed form without the permission of the copyright holder, except for copies of computer programs and databases.” But Article 24(3) has additional conditions such as providing access to only one copy of the.

³ <https://euiipo.europa.eu/ohimportal/en/web/observatory/outofcommerceworks>



work at a time. Further, both paragraphs refer to non-commercial libraries “borrowing” copies of lawfully published books. Perhaps one of these provisions (Article 24(2)?) is redundant, and Article 24(3) should read “lend” rather than borrow. Thus, Article 24(3) may allow non-commercial libraries to lend printed copies of published works that are not licensed to the library.

- c. Under Article 24(4), there is a mismatch in the range of institutions that may provide interactive access to a digital format work by means of terminals on the premises of the institution. The provision states that “archives and organizations for maintaining audio and video recordings may provide interactive access by means of terminals in libraries and museums....” This mismatch should be clarified because as currently written, it doesn't appear to make sense.
- d. The first sentence of Article 24(6), concerning the charging of fees, also appears to have translation problems.