Response to Consultation on a Modern Copyright Framework for Online Intermediaries

Submitted by:
Canadian Federation of Library Associations

with
Canadian Association of Research Libraries
Canadian Urban Libraries Council

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Introduction

This submission is prepared by the Canadian Federation of Library Associations (CFLA), with the support of the Canadian Association of Research Libraries (CARL), and the Canadian Urban Libraries Council (CULC). It is a response to the *Government of Canada's Consultation on a Modern Copyright Framework for Online Intermediaries*.

The Canadian Federation of Library Associations/Fédération canadienne des associations de bibliothèques (CFLA-FCAB) is the united, national voice of Canada's library community. Our purpose is to advance library excellence in Canada, champion library values and the value of libraries and influence national and international public policy impacting libraries and their communities. Our membership includes national, provincial, regional, special and territorial library associations across Canada.

Libraries have a societal role to provide equitable access to information and preserve knowledge. In Canada, the *Copyright Act* recognizes the unique function of libraries to achieve the government's public policy objectives around research, innovation and lifelong learning through the Act's exceptions and limitations.

This submission provides the library community's perspective on ways that libraries may be impacted by policy changes that are intended to regulate the "web giants", and includes recommendations that will ensure that libraries and affiliated organizations, such as archives, museums, and educational institutions, can continue to carry out their public service missions and not be subject to the same onerous restrictions as web giants. Libraries act as online intermediaries in several ways: by providing free internet connections and access to computers, by creating digital collections of materials for education, preservation, and research purposes, and by offering platforms that enable user participation.

CFLA appreciates the statement in the Consultation Paper that "significant changes to Canada's basic model of intermediary liability" are not presently being contemplated. The library community notes the complexity of copyright issues associated with online intermediaries and the short timeline provided for response to the Consultation Paper, which has limited our ability to fully explore the potential implications of the changes contemplated.

Summary of Recommendations

- Maintain the safe harbours associated with Communication to the Public by Telecommunication 2.4(1)(b) which states that a person whose only act consists of providing the means of telecommunication to the public does not communicate that work or other subject matter to the public.

- Maintain the safe harbours associated with Network Services 31.1(1) which states that a person who provides services related to the operation of a digital network that provides means for telecommunication or reproduction of a work does not infringe copyright by providing those means.
- Clarify that these safe harbours apply to libraries, archives, museums and educational institutions that provide internet connectivity and/or devices that enable access for the public for non-commercial purposes.
- Do not introduce new obligations for monitoring use, blocking sites, or storing user information at the digital network provider level.
- Maintain the limitations on statutory damages for failure to perform obligations related to notices found in s.41.26(3) and ensure these limits continue to apply to libraries, archives, museums and educational institutions operating internet access for non-commercial purposes.
- Provide an exception that excludes libraries and educational institutions from the definition of online intermediaries, and excludes libraries and educational institutions from any increased responsibility or liability being considered for content repositories and information location tools that they manage or host.
- Maintain limitations on statutory damages for non-commercial infringement found in s.38.1(1), and limitations for LAMs found in 38.1(6)(b)
- Ensure that there are continued limitations on remedies available under s.41.27 against providers of information location tools for non-commercial purposes when those providers are libraries, archives, museums, and educational institutions.
- Continue to apply the notice and notice, rather than the notice and takedown regime as a way to deal with allegations of copyright infringement.
- Limit new obligations applied to non-commercial intermediaries such as LAMs and educational institutions.
- Recognize the importance of research and education and the application of fair dealing to any intermediary activities conducted by LAMS and educational institutions in considering new enforcement measures.
- Do not introduce an ancillary copyright regime for press publishers due to risks to the use of the Internet for researchers and the general public.
- Do not introduce extended collective licensing for online intermediaries.
- Exclude works subject to Crown copyright from any categories of works considered for remuneration through collective licensing schemes.
- Assign a Creative Commons licence to all publicly available government works.
- Require that rights management organizations publicly disclose the funds received that are distributed to rights holders in Canada, retained when rights holders cannot be located, and retained to administer the collective society.
- Introduce transparency into the validity of copyright claims under the notice and notice regime.

Background: Values of Libraries, Archives and Museums

CFLA recognizes the cultural importance of Canadian writers and the need to support Canadian heritage. Canadian libraries have consistently demonstrated a clear commitment to supporting Canadian authors and publishers by year over year purchases and promotion of their print and digital content. The library market remains an important segment of book publishing sales in Canada, accounting for an estimated 70 million dollars in 2017.[1] The 31 member libraries of the Canadian Association of Research Libraries (CARL) spent $363 million on information resources in 2018-19,[2] and 32 members of the Canadian Urban Libraries Council spent over $94 million in 2019,[3] demonstrating a clear commitment by both academic and public libraries to rewarding content owners.

LAMs are concerned that revenue is not flowing to creators, but rather the benefits are received by rights holders who are intermediaries. LAMs are aware that many creators have experienced diminishing income from their creative works in the digital environment. Libraries and creators have a long and lasting history of collaboration and mutual support. Creators write the works that are the heart of library collections. Archives and Museums have similar strong alliances with creators. Creators also use the holdings of LAMs to create new works in many different formats and LAMs promote those works in many different ways. We believe the loss of income is due to many factors at play in the digital environment and the undesirable effects can be mitigated in many ways. Creation can be rewarded in several ways, other than directly by imposing restraints through copyright legislation, and we believe those solutions, including public policy options, must be actively pursued.

Freedom of expression is a fundamental human right and a cornerstone principle of libraries, archives, and museums (LAMs). The ability for citizens to freely express ideas and views is essential to a free and democratic society. Surveillance and fear of oversight of ideas and opinions fundamentally interfere with the most vital of human rights. The potential to track the online activity of individuals invades privacy rights and impinges on other human rights, such as intellectual freedom, and the increased regulation of the Internet threatens the principle of net neutrality, further impinging human rights, such as freedom of access to information .

LAMs and other not-for-profit institutions demonstrate their strong commitment to their essential public service mission by providing the public with access to works in their collections for research, education, and culture.

LAMs are society's safe havens, where access to information is ensured and facilitated. Because of their distinction and essential public service roles, LAMs must be specifically excluded from any legislative controls that even hint of surveillance or oversight that would impinge on the freedom of expression of citizens.

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[1] Rivera, E. IBISWorld Industry Report 51113CA. Book publishing in Canada, May 2017, IBISWorld Database.
[2] Canadian Association of Research Libraries. "Total materials expenditures," CARL statistics, 2018-2019. 2021, Ottawa, ON.
[3] Canadian Urban Libraries Council. 2019 CULC Public Library Statistics. 2019 http://culc.ca/projects/key-performance-indicators/

4.1 Clarify Intermediaries' Safe Harbour Protections

As noted above, CFLA appreciates that the Consultation Paper notes "significant changes to Canada's basic model of intermediary liability… are not presently being contemplated." CFLA supports the existing Canadian model and the Government's commitment to maintaining the current approach in its international commitments, and recognizes that the Parliamentary Review of the *Copyright Act* also recommended that this approach continue. Our recommendations below are provided to ensure the continued ability of libraries and affiliated organizations to deliver our mandates of public access to information, education and heritage as changes are contemplated that are intended to affect large online intermediaries or "web giants", commonly known as "Big Tech".

4.1.1 Recalibrate the Knowledge Standard for Eligibility

Recommendations:

- Maintain the safe harbours associated with Communication to the Public by Telecommunication 2.4(1)(b) which states that a person whose only act consists of providing the means of telecommunication to the public does not communicate that work or other subject matter to the public.
- Maintain the safe harbours associated with Network Services 31.1(1) which states that a person who provides services related to the operation of a digital network that provides means for telecommunication or reproduction of a work does not infringe copyright by providing those means.
- Clarify that these safe harbours apply to libraries, archives, museums and educational institutions that provide internet connectivity and/or devices that enable access for the public for non-commercial purposes.
- Do not introduce new obligations for monitoring use, blocking sites, or storing user information at the digital network provider level.
- Maintain the limitations on statutory damages for failure to perform obligations related to notices found in s.41.26(3) and ensure these limits continue to apply to libraries, archives, museums and educational institutions operating internet access for non-commercial purposes.

The Consultation Paper observes that the Government may consider adjusting the degree to which an intermediary must know that its services are being used for infringement to be considered for safe harbour protections. Adjustments to the knowledge standard for the "hosting", "mere conduit" or "caching" safe harbours have the potential to affect libraries and these changes could be detrimental to libraries' ability to deliver services to the public.

Libraries act as intermediaries in two distinct ways. Most public libraries in Canada act as providers of public internet access by offering computers with internet connections and free wifi. These services may also be offered by libraries associated with educational institutions. In addition, college and university libraries, and some large public libraries, maintain content repositories that permit the uploading of content by end users, and/or the addition of comments

and links by users. The discussion below considers the safe harbours necessary for libraries to undertake both of these roles.

In 2016, the CRTC declared broadband internet a basic service. While 94% of Canadians have home internet access, income and location continue to significantly affect Canadians' ability to connect to the Internet. For the 19% of low income Canadians who do not have access at home, their reasons include the cost of internet service (28%), equipment (19%), and location.[4] These Canadians depend on libraries and other public locations to bridge the digital divide they face. This divide is most significant in the lowest income quartile, among whom 14.2% of Canadians access the Internet at a public library, and 25.6% at another public location.

It is critical that existing safe harbours that apply to LAMs and educational institutions that provide public internet access are maintained in the *Copyright Act*, by continuing to recognize that those who provide a means of telecommunication are not responsible for the content being transmitted[5], and the provision of equipment does not authorize the use of that equipment to breach copyright law.[6]

New obligations must not add to the burdens that public institutions face when providing computers and internet connections for Canadians. New obligations, such as monitoring internet traffic, site blocking, or tracking and retaining all user data would add substantial complexity to providing internet service, and add new costs. The identity of users of wifi or computers in most public spaces is not tracked and retained, nor is a record kept of their activities while using the Internet. Introducing this type of retention would be a substantial administrative burden for many libraries. In addition, public institutions are often the only place where an individual with lower income has access to the Internet. An individual with higher income with an internet connection at home should not be entitled to a greater level of privacy than the 14.2% of Canadians in the lowest income quartile who access the Internet at a public library. While users at home have options to enhance their privacy, these are more limited on computers in public facilities, and new obligations could lessen these options further. People who use libraries for computers with internet connectivity are communicating with loved ones, accessing government services, applying for employment, and pursuing education. They are entitled to the robust privacy protection that using library computers and internet connections currently provide.

Libraries and educational institutions that provide computers and internet access for their users would benefit from greater clarity in the definitions that apply to online intermediaries, with a clear distinction between entities that provide means for access and telecommunication, and those entities that actively interact with the content through curation, promotion, or commercial activity.

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[4] Statistics Canada. Table 22-10-0081-01 Location of Internet access by age group and household income quartile. DOI: https://doi.org/10.25318/2210008101-eng

[5] See discussion in Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 (CanLII), [2004] 2 SCR 427, https://canlii.ca/t/1hddf

[6] See discussion in CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, https://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html

4.1.2 Clarify the Permitted Involvement of Qualifying Intermediaries

Recommendations:

- Provide an exception that excludes LAMs and educational institutions from the definition of online intermediaries, and exclude libraries, archives, museums and educational institutions from any increased responsibility or liability being considered for content repositories and information location tools that they manage or host.
- Maintain limitations on statutory damages for non-commercial infringement found in s.38.1(1), and limitations for LAMs found in 38.1(6)(b)
- Ensure that there are continued limitations on remedies available under s.41.27 against providers of information location tools for non-commercial purposes when those providers are libraries, archives, museums, and educational institutions.

LAMs also act as intermediaries that manage and host content platforms such as repositories, or operate information location tools.[7] In this role, LAMs make content available for purposes such as preserving the scholarly record, promoting Canadian heritage and accessing educational materials. The materials may be in the public domain, or they may be materials that are in copyright and are used under fair dealing or other copyright exceptions. In addition, libraries operate institutional repositories for faculty and student works, with rightsholder authorization when required. Institutional repositories enhance accessibility for their individual communities and in some cases make material available to the public. The repositories managed by LAMs and educational institutions offer a free service to their users or to the public that is non-commercial in nature, exists to support research and education, and is entirely different from the purpose of social media platforms like Facebook or YouTube, or search engines like Google.

CFLA has concerns that any new definition of online intermediary that is intended to capture social media platforms and search engines is also likely to unintentionally capture Institutional Repositories and other platforms hosted by LAMs or educational institutions. The *Copyright Act* in sections 30.1, 30.2 and 30.3 and 30.4 recognizes the unique nature of libraries and archives in the context of copyright, and CFLA recommends that this distinct role also be acknowledged in any changes to online intermediary responsibilities. If new responsibilities are introduced for online intermediaries, CFLA recommends an exception to those responsibilities for LAMs and educational institutions, given the copyright exceptions that are likely to apply to activities by these institutions.

In addition, the existing safe harbours available to online intermediaries as internet content providers currently apply to LAMs. Should modifications to safe harbours be considered for the purpose of addressing concerns related to social media platforms and search engines, the platforms like Institutional Repositories and information location tools managed by LAMs must be considered separately. As noted above, the *Copyright Act* in sections 30.1, 30.2 and 30.3 and 30.4 recognizes the unique nature of libraries and archives in the context of copyright, and

[7] Defined in *Copyright Act* at s.41.27(5) as “any tool that makes it possible to locate information that is available through the Internet or another digital network”

CFLA recommends that this distinct role also be acknowledged in any changes that affect intermediary liability by creating limitations and exceptions for repositories managed by libraries and educational institutions.

4.1.3 Enact New Obligations for Qualifying Intermediaries

Recommendation:

- Continue to apply the "notice and notice" rather than "notice and takedown" regime, as a way to deal with allegations of copyright infringement

Over the past decade the Canadian library community has expressed its support for a "notice and notice" rather than a "notice and takedown" regime as a way to deal with allegations of copyright infringement.[8] We continue to support this made-in-Canada solution and oppose any measures that would compel non-profit LAMs and educational institutions to monitor and remove content and face potential liability for actions of their users. Under the Canada-United States-Mexico Agreement (CUSMA) Canada can maintain its current "notice and notice" system,[9] and any move toward a more restrictive system could potentially limit Canadians freedom of expression, and make Canada's innovative exception for non-commercial user-generated content (s. 29.21 of the Canadian *Copyright Act*) irrelevant. For example, content posted under one of Canada's copyright exceptions such as fair dealing or the user generated content exception could be mistakenly subject to takedown requests, particularly takedowns sent or processed by artificial intelligence that have no human intervention. In other jurisdictions that have implemented "notice and takedown" regimes there has been a history of misuse of notice and takedown requests. In a 2016 U.S. study, it was found up to 31% of "notice and takedown" requests seemed to be notices of "questionable validity".[10] In 2019 amendments were made to Sections 41.25 and 41.26 of the *Copyright Act* in an effort to repair the problems of misuse by copyright holders or their agents who sent settlement demands within their "notice and notice" messages. Bad faith actors can use "notice and takedown" to remove web content that they disagree with even if this use would be covered by copyright exceptions such as fair dealing. In 2013, Travel Alberta used the "notice and takedown" regime to remove an anti-oil sands video that used four seconds from its "remember to breathe" ad campaign.[11] The clip likely could have been used in Canada under the fair dealing exception (and in the US could have qualified as fair use) for the purpose of satire.[12] Similarly, Australian

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[8] Canadian Library Association, "Protecting the Public Interest in the Digital World", December 12, 2011,
[9] Government of Canada. Canada-United-States-Mexico Agreement. Summary of Outcomes. https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary-sommaire.aspx?lang=eng
[10] Urban, J.M.; Karaganis, J. and Schofield, B., Notice and Takedown in Everyday Practice, March 22, 2017, UC Berkeley Public Law Research Paper No. 2755628, Available at SSRN: https://ssrn.com/abstract=2755628 or http://dx.doi.org/10.2139/ssrn.2755628
[11] Stephenson, A. "Travel Alberta demands anti-oilsands film trailer be yanked from YouTube (with video)". August 25, 2013, *Vancouver Sun*. https://vancouversun.com/News/Metro/travel-alberta-demands-anti-oilsands-film-trailer-be-yanked-from-youtube
[12] Electronic Frontier Foundation. "Crude Copyright Complaints To Silence an Oil Company Satire". August 14, 2013. https://www.eff.org/takedowns/crude-copyright-complaints-silence-oil-company-satire

coal mining companies have issued takedown notices to stop anti-mining websites in Australia.[13] Under a "notice and takedown" regime, web content creators are guilty until proven innocent.

4.2 Compel Remuneration through Collective Licensing

Recommendations:

- Do not introduce an ancillary copyright regime for press publishers due to risks to the use of the Internet for researchers and the general public.
- Do not introduce compulsory licensing or extended collective licensing for online intermediaries.
- Exclude works subject to Crown copyright from any categories of works considered for remuneration through collective licensing schemes.
- Assign a Creative Commons licence to all publicly available government works.

Compulsory Licensing Schemes

CFLA does not support the introduction of compulsory licensing schemes for online intermediaries.

As noted in the discussion paper, the issue of whether such mandatory obligations exist for copyright tariffs is presently before the courts in the York University v. Canadian Copyright Licensing Agency (Access Copyright) SCC appeal. A license scheme, as described in section 4.2, could have the effect of overriding the judgement of the court, and may adversely impact stakeholders such as libraries and educational institutions and therefore should not be considered.

Also, while a compulsory licensing scheme for snippets of news content is not referred to in the Consultation Paper, CFLA has significant concerns about the potential introduction of a "link tax" or ancillary copyright regime for press publishers in Canada and its effect on library users and the general public. The ability to link, and to provide summary text drawn from destination content, is fundamental to the use of the Internet and is critical for the general public, and for researchers in libraries and educational institutions. The introduction of a right to compensation for linking to news content in Canada could reduce the quality and utility of search engines and other information location tools used by researchers. Explanatory headlines and snippets of text provided by search engines and social media excerpts provide value to the user and prompt the decision to read further. This supports an informed population and can reduce the spread of misinformation. In addition, CFLA notes the risk that an ancillary right for press or magazine publishers could unintentionally apply to links provided in research databases that libraries produce or subscribe to, particularly those that contain newspapers and journal articles. CFLA does not support an ancillary right for press publishers, however, if this is to be considered, it

[13] Frew, W. Industry Closes Anti-coal Website. *Sydney Morning Herald*, March 5, 2007. http://www.smh.com.au/news/national/industry-closes-anticoal-website/2007/03/04/1172943275688.html

will be important to exclude research databases and information location tools produced by or for libraries and educational institutions from the regime.

We also want to reiterate the importance of transparency in revenues received by collective management organizations (CMOs) under compulsory licensing, and transparency in the distribution of revenues to creators, as well as revenues retained by the collective management organization, based on the type of content and the use of the content.

Extended Collective Licensing Schemes

CFLA does not support the introduction of extended collective licensing for online intermediaries. Extended collective licensing is most appropriate for narrow categories of works, when there is a narrow scope of use. The Consultation Paper does not offer specific content areas to consider for extended collective licensing, however, CFLA notes that in the context of online intermediaries, the scope of content that could be encompassed is broad, and includes work of a wide variety of legal statuses, with rights held by many different types of organizations or creators, who are from both within and outside of Canada. The potential uses of the works are varied and many different exceptions and limitations could apply. These are not appropriate conditions for the introduction of extended collective licensing.

Extended collective licensing means that creators who have not consented to an agreement to be represented and have funds collected on their behalf by the collective management organization (CMO) are mandatorily represented by that CMO. The revenues collected on their behalf do not always reflect the existence of contact between the creator and the CMO. Creators are not always contacted by the CMO to report that the CMO is receiving funding on the creator's behalf. In particular, extended collective licenses are difficult to apply when works come from all over the world.

Extended collective licensing also means the potential that the CMO will collect revenue for uses of works that Canada's *Copyright Act* intends to be excluded from compensation, that the creator never intended to commercialize, or revenue that is destined for rightsholders outside of Canada. Extended collective licensing can mean setting up a system that creates financial exploitation of public goods in a way that benefits the CMO more than the public or Canada's creators. The complexity of the administration is likely to be significant in this context, and the revenue may not be able to be effectively distributed to creators.

As we noted in our response to the Copyright Term Extension[14] submitted on March 29, 2021, in particular CFLA considers it important that royalty payments are not required to copy a work in circumstances where the rightsholder decided long ago that the work is of no commercial value and ceased to make the work available. It is not the goal of Canada's copyright regime to protect the economic interests of a rightsholder who has no commercial interest in the work or

[14] CFLA-CARL Joint Response to Consultation on Copyright Term Extension. May 2021. http://cfla-fcab.ca/wp-content/uploads/2021/04/CFLA-CARL_Joint_Response_to_Consultation_on_Copyright_Term_Extension.pdf

has determined the work is of no further commercial value, and is no longer incentivized to further disseminate the work. Practice demonstrates that collective licensing for out-of-commerce works would block all but the wealthiest of organizations from making available valuable elements of Canada's heritage.

Orphan works, by their nature, do not have a rightsholder who can be remunerated. Therefore, as noted above, a royalty should not be collected for their use. Prof. David Vaver's view of this practice in discussing the Copyright Board's Unlocatable Owners licence scheme is apt:

> "This practice seems questionable. The Board cannot require applicants to make charitable donations as a condition of obtaining licences. A power to authorize copyright collectives to confiscate money is even less plausible".[15]

Royalties should only be collected when they can be paid to a rightsholder. A collective society should not retain monies when they cannot disburse them to the correct rightsholder. Given these risks, transparency in remuneration is critical for collective management organizations.

Works Subject to Crown Copyright

CFLA has provided recommendations below related to remuneration schemes. It should be noted that government works in at least some of the other jurisdictions noted in section 3.3 of the Consultation Paper are either not protected by copyright or have been assigned an open Creative Commons licence that would exempt them from any type of remuneration scheme. Such discrepancies should be taken into consideration when drafting changes to Canadian policy, unless the government takes action to remove copyright protection from government works in Canada or assigns an internationally recognizable Creative Commons non-commercial licence to all publicly available government works by default. Both actions would rectify such discrepancies for the purposes of remuneration provided by or infringement claims pursued by online intermediaries.

In the absence of a default Creative Commons licence or a comprehensive copyright waiver for government works, CFLA recommends that Crown works should be excluded by default from any categories of works considered for remuneration through collective licensing schemes.

4.3 Increase Transparency in Remuneration Processes

Recommendations:

- Require that rights management organizations or collective societies publicly disclose the funds received that are distributed to rightsholders in Canada, retained when rightsholders cannot be located, and retained to administer the collective society.

[15] Vaver, D., "Intellectual Property Law, 2nd ed", Irwin Law, 2011, p. 263

- Limit new obligations applied to non-commercial intermediaries such as LAMs and educational institutions.
- Introduce transparency into the validity of copyright claims under the notice and notice regime.

CFLA supports transparency in remuneration processes, and recommends that rights management organizations or collective societies be required to publicly disclose the funds received that are distributed to rightsholders in Canada, retained when rightsholders cannot be located, and retained to administer the collective society.

Where greater transparency is required from online intermediaries, the government should limit these obligations such that they do not create an undue burden on non-commercial actors such as LAMs and educational institutions.

In addition, CFLA supports the measurement of valid and invalid copyright infringement claims under the "notice and notice" regime. Libraries believe that visibility on claims of invalid copyright infringement could prevent some rightsholders or other individuals from making abusive claims for compensation on content that they do not have the rights to, or that is not subject to copyright, such as content in the public domain or published under an open licence.

4.4 Clarify or Strengthen Enforcement Tools Against Online Infringement

CFLA notes that in considering options to clarify or strengthen enforcement tools, the Government's focus is stated to be primarily commercial-scale infringement rather than infringement by individuals. Options considered must recognize that court processes place a burden on organizations, and any changes must protect LAMs and educational institutions that act as intermediaries from these additional enforcement tools. The Government must recognize the importance of education and the application of fair dealing to any intermediary activities conducted by LAMs and educational institutions.

Conclusion

CFLA recommends that existing safe harbours be maintained for libraries, archives, museums, and educational institutions, to ensure that they continue to be able to carry out their public service missions, and that any new obligations introduced for the purpose of managing copyright infringement on platforms controlled by web giants have exceptions for repositories and information location tools operated by libraries, archives, museums, and educational institutions.