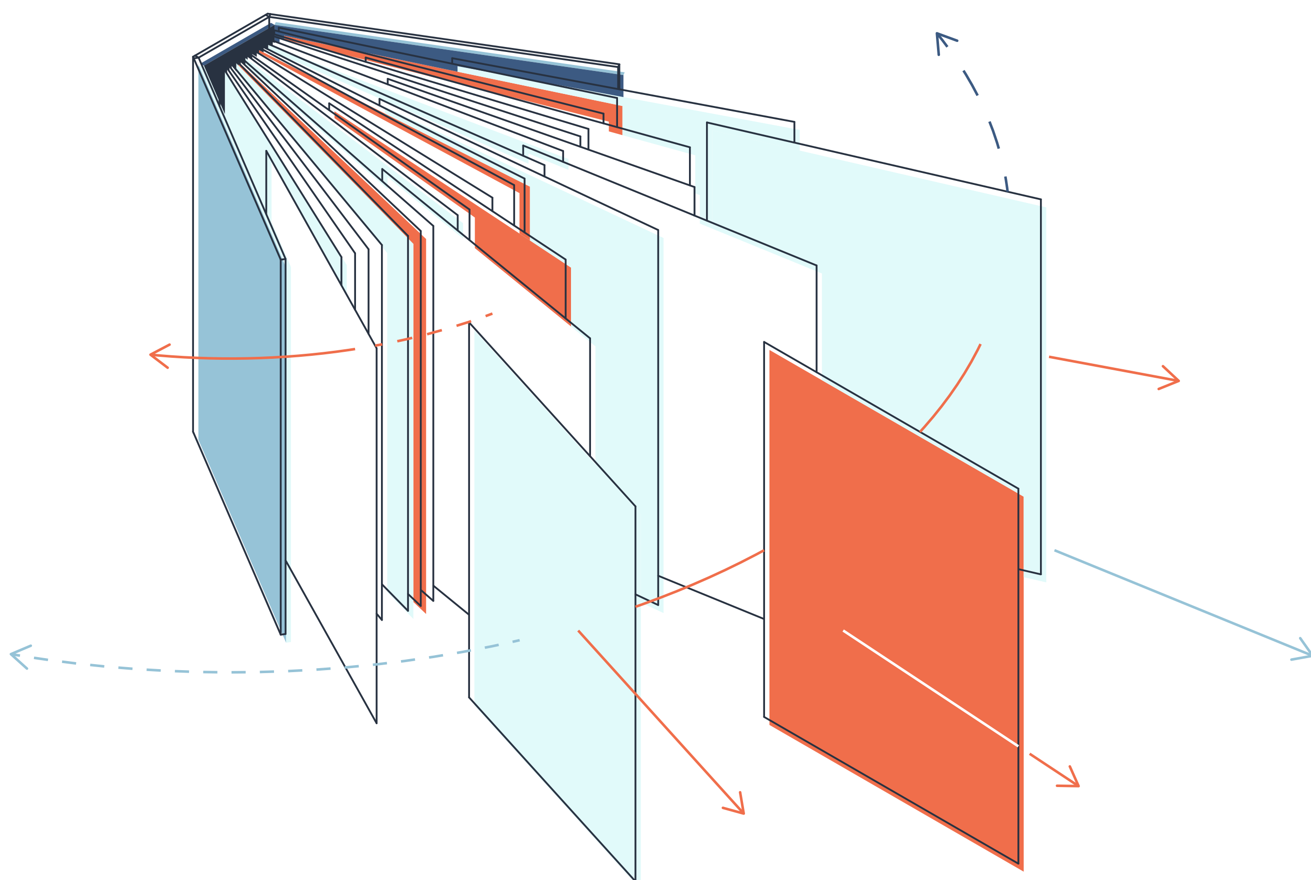
Demonopolizing the European Public Domain

Google Books Exclusivity Clauses and the Open Data Directive



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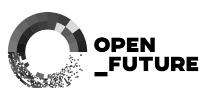

This report is the result of a collaboration between Open Future and the Glushko & Samuelson Information Law and Policy Lab at the Law Faculty of the University of Amsterdam. Open Future is interested in understanding the evolving landscape around the use of public domain and openly licensed works for the purpose of training Generative AI systems. One of the largest sources of such data are the digitization partnerships between a number of European libraries and Google that were launched from 2010 onwards. These digitization partnerships were controversial at the time because they contain clauses that ensure that Google enjoys an exclusivity period with regard to commercial use of the digitized works. As a result, Google has a privileged position when it comes to access to large swaths of the European public domain. In the context of the emergence of generative AI as a new technological paradigm, access to this data likely constitutes a significant competitive advantage that is hard to reconcile with both the public domain status of these collections and policies aimed at providing a level playing field for smaller and European AI developers.

In April 2024, Open Future approached the Information Law and Policy Lab with a request to examine the legal status of the datasets produced by the Google Books project in regard to their exclusivity clauses.

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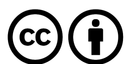

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1. Preamble

1.1 Introduction

Late 2004, as part of the Google Books Project, Google announced that it had entered into agreements with five of the biggest research libraries in the US to digitize books from these libraries' collections. The goal of the project was to create a digital library and expand access to library content. Google's plan meant that the full text of the book would be scanned and added to Google's search database. Users would then be able to browse the full text of public domain materials, but only a few sentences of texts around a search term in books still covered by copyright. This project was controversial and gave rise to a lawsuit in the US, arguing that it led to copyright infringement. The case was eventually settled by the Courts in Google's favour.[1]

In 2010, Google also signed several agreements with European libraries in order to digitize a large number of books. These agreements concerned only the digitization of books in the public domain. As such, the digitization of these books does not amount to copyright infringement. The result is that EU copyright rules are of little relevance in this context.

Under these agreements, both Google and the European libraries can use the digital copies of the books. The agreements contain a clause restricting the commercial use of these digital copies by others. The clauses are often agreed upon for up to 15 years. This means that Google and the libraries are the only ones with unrestricted use of the copies for the duration of this period, i.e. at the latest until 2025.

The number of books digitized amounts to a large digital dataset, stemming from the collections of different European libraries. Through these clauses Google has exclusive access to this dataset, which has put them in an advantageous – if not monopolistic – position to use them for the training of Artificial Intelligence (AI) models.

These exclusivity clauses are potentially problematic, especially in light of EU law. In particular, the 2019 Open Data Directive (ODD)[2] explicitly regulates these types of clauses. According to this Directive, an exclusivity clause in itself may be needed for a private partner to recoup its investment. However, recital 49 states that the period of exclusivity should be limited to as short a time as possible in order to comply with the principle that public domain material should stay in the public domain once it's digitised. This period should not exceed 10 years, and if it does, it should be subject to review.

In this light, the Open Future Foundation (OFF) has approached the ILP Lab to examine the legal status of the datasets produced by the Google Books project in regard to their exclusivity clauses. The OFF strives to achieve a level playing field for access to data. The exclusive use by Google means that these datasets are withheld from other parties. These

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[1] United States Court of Appeals for the Second Circuit 16 October 2015, Authors Gild vs. Google Inc., No. 13-4829.

[2] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) (Open Data Directive or ODD)

datasets could be of vital use for new AI developers in the development of large language models (LLMs) and other forms of generative AI.

1.2 Scope

This research focuses on the legal aspects of demonopolizing the use of digitized books from European libraries by Google. Since these digitalized books are in the public domain, this research will not focus on whether the digitization of books from European libraries' collections violates copyright law.

The main research question that we address is:

- *To what extent can libraries provide broader access to digital versions of their public domain books, including for AI training purposes, in view of their agreements with Google?*

The following sub questions were formulated to help us answer the main question.

1. What are the contractual conditions placed on European libraries that partnered with Google when it comes to the use of the digitized collections for commercial use, including for generative AI training purposes?
2. How does article 12 of the Open Data Directive influence exclusivity clauses?

1. 3 Research Methods

The aim of this project is to gain insight into the agreements between Google and European libraries and whether (and if so, how) third parties are affected by these agreements.

We initially conducted a literature review in order to obtain background information and to define the scope of the project. This also made it possible to formulate the main- and sub-questions, as well as the questions for the interviews with different parties.

In addition, we analysed two agreements between Google and European libraries that were publicised, specifically the contracts with the Dutch Royal Library and the British National Library. By identifying and analysing the relevant provisions we were able to further understand the existing contractual relationship between Google and the libraries. This was especially relevant for formulating the interview questions.

Moreover, we conducted qualitative research in the form of interviews with different parties, including an ex-Google employee and employees of two European libraries. By conducting interviews, we gained different perspectives on the Google Books Project. The findings from these interviews were vital to understanding how the restrictions were perceived by employees working on the project on behalf of Google, and most importantly the libraries.

2. The Google Books Project: Contractual Scope

As mentioned, two agreements from the British Library and the Dutch Royal Library (hereinafter "the Contracts") regarding the Google Books Project were made publicly available. The relevant provisions of the Contracts are outlined below.[3] The contract with the Ghent University Library – which forms part of our analysis – was not made publicly available.

Through the interviews, we came to understand that the content of the Contracts can vary from one library to another. The possible substantive differences between the Contracts with different libraries are discussed in chapter 5.

2.1 Contracts

The contract between Google and the Dutch Royal Library was signed in 2010. It starts by emphasising that the provisions are not meant to be exclusive, meaning that the contract is not meant to hinder the libraries from entering into other agreements with third parties to digitize the library's collection. The contract between Google and the British Library, signed a year later in 2011, does not include the same provision.

It was agreed that parties shall in good faith identify the books to be digitized. The volume of books to be digitized varies per library. The Dutch Royal library committed to no less than 160.000 volumes, and the British Library committed to no less than 250.000 volumes. From interviews and the contracts, we understood that there were two digital copies made of each book: one for Google and one for the library; these are referred to respectively as the "Google Digital Copy" and the "Library Digital Copy".

2.2 Costs & Responsibilities

In broad terms the libraries were responsible for locating, pulling and moving the selected books to and from a designated location. The libraries were also responsible for several costs relating to the digitization of the selected books. The libraries had to cover costs related to the participation of its employees and agents, as well as network bandwidth and data storage required to receive the digital copies. The libraries also had to provide existing bandwidth for Google to transfer digitized files to its data centers. Furthermore, the libraries needed to offer acceptable space for Google to use during the digitization process and manage transportation of the selected content to and from the digitization facility. Any conservation efforts chosen by the library prior to digitization and barcoding the selected content, including associated data entry, were also the library's responsibility, as well as the costs related to creating standard metadata.

Google was responsible for the expenses related to the participation of Google employees, as well as the hardware and software required for digitizing the selected content. Google also covered the costs of any space needed for digitization that the library did not provide. Google was likewise responsible for transporting the selected content from the library to a designated Google facility, if this was not provided by the library. Lastly, Google ensured

[3] The contracts can also be found in appendix I and II.

insurance against the risk of loss, damage, or destruction of materials while they were being transported and while they were in Google's custody.

2.3 Google Digital Copy

Google owned all rights, title, and interest in and to the Google Digital Copy. Google could use the Google Digital Copy, in whole or in part, at its sole discretion, as part of its Google services. If portions of the Google Digital Copy were in the public domain or if Google had obtained authorization, Google had the right to index the full text or content, serve and display full-sized digital images of those portions, make the full text available for printing and/or download, and make copies of such portions to provide, license, or sell, including to its partners. For other portions of the Google Digital Copy, Google could index the full text or content but could not serve or display the full-sized digital image or make the full content available for printing, streaming, and/or download without appropriate legal authority. Instead, Google could serve and display excerpts that complied with copyright law and bibliographic information (e.g., title, author, date). If Google received a license or other permission from the copyright holder, it could use the works in any manner permitted under the terms of such license.[4]

If the digitized content was in the public domain, the Contracts state that Google had to provide access to the full text of the digital copy of that work at no cost to end users. Beyond this, the Contracts do not specify what type of access Google must provide. If Google failed to do so for a certain period of time, the restrictions and requirements for the use of the Library Digital Copy would terminate, except in cases where Google was not able to provide this service due to quality or technical reasons, or due to legal issues. However, the library would have to serve Google a notice of this failure and grant them 30 days to remedy this failure in order for these restrictions and requirements to terminate. To the best of our knowledge, this never occurred.

2.4 Library Digital Copy

The libraries owned all rights, title, and interest in the Library Digital Copy. The use of this copy was subject to several restrictions. One of them being that the libraries had the right to provide access to their copies to individuals for research, scholarly or academic purposes, but subject to these purposes being non-commercial. Commercial use of the Library Digital Copy was only permitted subject to Google’s written permission.

The libraries were allowed to charge to recover printing and production costs, but could not charge, receive payment or other considerations for the Library Digital Copy in connection to the library's website. The libraries also had to implement measures to restrict automated access or systematic downloading (including bulk-downloading) of their copies, as well as develop methods and systems to ensure that substantial portions of their copies were not publicly disseminated. Security procedures for the Library Digital Copy had to be mutually agreed upon.

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4 This last provision turned out to be less relevant for the European libraries that we spoke to, since only books that were no longer protected by copyright law were selected for digitization.

The libraries are allowed to provide a digital copy of a public domain work to academic institutions, research or public libraries, or not-for-profit/government entities not offering services similar to Google's, with Google's consent. Print-on-demand services are also permissible under certain conditions. Any additional institutions had to enter into a written agreement with Google before receiving the digital copy, which agreement prohibited redistribution or using the same for services similar to Google's.

All restrictions were agreed upon for a term of fifteen years, starting from when Google made the digital copy available to the library.

When combining the relevant contractual provisions with the information gathered by the interviews, we see that libraries firstly mention that the restrictions agreed upon are not in any way perceived as an “exclusivity clause” and do not appear to hinder the libraries as they rarely (if ever) get asked to use their corpus of digital copies for commercial purposes. This, however, does not negate the fact that libraries are restricted in granting access to third parties for any commercial purposes, as Google would have to give written permission to do so. The results from the interviews are discussed in more detail in section 5.

3. Article 12 of the Open Data Directive

3.1 Introduction

Article 12 of the Open Data Directive (ODD) pertains to exclusive arrangements between public sector bodies or public undertakings and third parties regarding the re-use of documents. Our second sub-research question essentially asks whether and how article 12 ODD influences a potential exclusivity clause agreed upon by European libraries and Google. Paragraphs 3 and 5 of Article 12 ODD are the most relevant for our purposes and are discussed below in more depth. However, we first briefly discuss the rationale behind the provision, as stated in recital 49 of the directive.

3.2 Rationale Behind Article 12 ODD

Recital 49 ODD provides insight into the rationale behind Article 12. Recital 49 specifies, *inter alia*, that:

> *"There are numerous cooperation arrangements between libraries, including university libraries, museums, archives and private partners, which involve digitisation of cultural resources granting exclusive rights to private partners. Practice has shown that such public-private partnerships can facilitate worthwhile use of cultural collections and at the same time accelerate access to the cultural heritage for members of the public. It is therefore appropriate to take into account current divergences between Member States with regard to digitisation of cultural resources, by a specific set of rules pertaining to agreements on digitisation of such resources. Where an exclusive right relates to digitisation of cultural resources, a certain period of exclusivity might be necessary in order to give the private partner the possibility to recoup its investment. That period should, however, be limited to as short a time as possible in order to comply with the principle that public domain material should stay in the public domain once it is digitised. The period of an exclusive right to digitise cultural resources should in general not exceed 10 years. Any period of exclusivity longer than 10 years should be subject to review, taking into account technological, financial and administrative changes in the environment since the arrangement was entered into. In addition, any public private partnership for the digitisation of cultural resources should grant the partner cultural institution full rights with respect to the post-termination use of digitised cultural resources."*

In the context of the Google Books Project, the ODD accepts that a period of exclusivity might be necessary for Google to recoup its investments for the digitization of public domain books held by libraries. However, that period of exclusivity should be as short as possible to comply with the principle that public domain material should stay in the public domain once it has been digitised. For that reason, any period of exclusivity longer than 10 years is always subject to review.

One point of contention is the interpretation of the term "exclusivity", as the directive does not explicitly define this. The agreements between Google and European libraries technically do not prohibit the libraries from entering into digitization projects with parties other than

Google. But these agreements do restrict the use of the (library) digital copies. "Exclusivity", as we see it, refers to the use of the digital copies by parties. Accordingly, during the exclusivity period, the libraries are only allowed to grant third parties access to these digital copies for research or non-commercial purposes. Thus, third parties may still receive access to these digital copies under certain circumstances. The Contracts between Google and European libraries effectively prevent libraries from taking the entire corpus that was digitized by Google and providing third parties with access to it, who then could commercially exploit it and reap benefits from Google's initial investment.

However, a large-scale digitization project such as the Google Books Project demands a significant amount of (financial) resources. As such, the digitization market is not (equally) accessible to all market actors. Few actors have the resources to embark on their own digitization project and to compete on the digitization market, which would ultimately allow them to make full use (i.e., commercially exploit) of the entire corpus of digitised public domain books. As such, allowing Google to impose contractual exclusivity on top of its natural infrastructural and resources advantage enables Google to have a de facto "exclusivity" over the digital copies of public domain books held by libraries. The question, of course, is to what extent this contractual practice is prohibited or restricted under article 12 ODD.

3.3 Article 12(3) of the Open Data Directive

Pursuant to article 12(1) ODD, the re-use of documents shall in principle be open to all potential actors in the market. As such, contracts or other arrangements between public sector bodies or public undertakings holding the documents and third parties generally shall not grant exclusive rights. However, Article 12(3) then acknowledges that exclusive arrangements might be necessary to facilitate the digitization of cultural resources, such as libraries.

Article 12(3) ODD allows for an exception to the principle that re-use shall be open to all potential market actors in cases where exclusive arrangements will allow private partners to recover the costs incurred for the digitization of cultural resources. It follows from recital 49 that there are numerous arrangements between libraries and private partners (e.g., Google) which involve the digitisation of cultural resources and that grant exclusive rights to private partners. As noted, according to Article 12(3), these exclusive rights can generally not exceed a period of 10 years. Where that period exceeds 10 years, the arrangements become subject to review during the 11th year, and if applicable, every seven years thereafter.

The type of exclusive arrangements that the European libraries entered into fall under the scope of Article 12(3) of the ODD because they pertain to the digitization of cultural resources. However, the transitional period in Article 12(5) does not pertain to these types of contracts (i.e. cultural resources).[5] This leads us to conclude that the review regime of Article

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[5] Article 12(5) states: "Exclusive arrangements existing on 17 July 2013 that do not qualify for the exceptions set out in paragraphs 2 and 3 and that were entered into by public sector bodies shall be terminated at the end of the contract and in any event not later than on 18 July 2043. Exclusive arrangements existing on 16 July 2019 that do not qualify for the exceptions set out in paragraphs 2 and 3, and that were entered into by public undertakings, shall be terminated at the end of the contract and in any event not later than on 17 July 2049."

12(3) is directly applicable to the existing exclusivity arrangements, such as in the Contracts examined here. However, given that most Contracts are nearing the end of the period of exclusivity, the relevance of this review regime seems minimal in these cases.

Nevertheless, according to the interviews, most libraries intend to renew the Contracts with Google. For these contracts, and contracts that Google will sign with new libraries in the future, the regime of Article 12(3) will play a vital role. One important feature of that regime is its transparency obligation, according to which the arrangements granting exclusive rights have to be transparent and made public. The libraries and/or Google will therefore have to make all new contracts publicly available.

3.4 Subject to Review

The Contracts between Google and the British National Library, the Dutch Royal Library were signed in 2010 for a period of 15 years, meaning that the Contracts will expire in 2025. If the Contracts were to be extended, these exclusivity clauses should adhere to Article 12(3) and be limited to a maximum period of 10 years. However, by noting that “the period be limited to as short a time as possible”, recital 49 implies that 10 years is the upper limit and not the default. As such, contractual parties may need to provide a justification as to why a period of 10 years may be necessary. It remains unclear what these justifications should entail.

Given rapid technological developments, such as the rise of AI, a 10-year period is fairly long. Even after this period, the exclusivity clauses do not end automatically. According to Article 12(3) ODD, the duration of the exclusivity clauses becomes subject to review. However, this review is not clearly defined in the ODD. Recital 49 only specifies that technological, financial and administrative changes in the environment since the agreement should be taken into account. Thus, the criteria to exceed the 10-year period ex Article 12(3) ODD remain unclear. This means that it is theoretically possible to extend the period of exclusivity indefinitely, if it were to withstand the review. From the perspective of legal certainty, it is desirable to define the criteria to which a review must adhere.

An interview with representatives of the Austrian National Library revealed that this library has signed a contract for an indefinite period of time, meaning that this contract will not expire in 2025. This contract was conceived with the idea in mind that new books enter the public domain every year and that the digitization of public domain books should therefore be an ongoing project. While this contract also stipulates that the exclusivity relating to these digitized copies lasts for a period of 15 years, it is unclear whether and how the current contractual arrangements between the Austrian National Library and Google are affected by Article 12(3) ODD, given the 10 year limit and review requirement. Arguably, the contract should be amended to take account of the obligations laid down in Article 12(3). The mandatory review will therefore also have to be part of future negotiations between libraries and Google, even if it is unclear exactly how.

4. Assessment

4.1 Introduction

To gain a better understanding of the exclusive arrangements between Google and European libraries, we employed a number of research methods. We initially conducted a literature review on the Google Books Project as a whole and evaluated the Contracts signed between Google and the British National Library and the Dutch Royal Library. Subsequently, we conducted interviews with an ex-employee of Google and representatives of different European libraries. In this section, we discuss the most important findings of our research.

4.2 The Collaboration

The representatives of the libraries we spoke to all expressed their gratitude for the collaboration with Google. This was in part because the mass digitization of these library books would not have been possible without Google's investment in the project. There were several reasons for the libraries to participate in the project. First, the Google Books Project allowed for the digitization of books at an unprecedented scale. For illustration, one library could easily provide 300.000 books to be scanned. This mass digitization of books was unheard of at the time, and even to this date, the libraries have never been approached by other parties in attempts to start or trial a similar project. Thus, the possibility of digitizing books *en masse*, without having to make that investment completely by themselves, particularly sparked their interest in the project.

Another reason for participation in the project was that the mass digitization of books would make them accessible to a larger, worldwide audience. This would in turn also create more awareness of available library collections. It was also mentioned that the Google Books Project prompted the libraries to invest into their own online infrastructure. As part of the contractual agreements, libraries also received a copy of the digitized books and were therefore able to create and expand on their own (online) services.

Nevertheless, libraries are public institutions and therefore largely depend on government funding and subsidies. Given the fact that a digitization project such as the Google Books Project demands resources and large financial investments, the libraries would not have been able to digitize thousands of books without the help of a third party like Google, which explains their gratitude for the collaboration with Google. While the collaboration was described as positive for both parties, it does raise questions as to how desirable it is for public institutions to be so dependent on private entities to fund these types of projects.

4.3 Third Parties

The contract allows European libraries to extend the digital copies to third parties for non-commercial purposes, such as research purposes. Both European libraries are regularly approached by third parties who wish to use the digital copies of public domain books for research purposes, such as historical reconfiguration, or for non-commercial use in the context of open-source AI.

According to the former Google employee interviewed, the agreements with the libraries do not hinder the libraries from entering into agreements with other commercial parties to digitize books, meaning that the contracts are not perceived as “exclusive” to them (but see section 3.2. above). The contracts simply prevent libraries from extending the entire corpus of digitized books to third parties for commercial purposes. With this contractual restriction, Google aims to protect its investments by preventing third parties from commercially exploiting these digital copies without having to make their own (financial) investment in the digitization of the books. As such, Google has argued that if third parties want access to the entire corpus of digitized books for commercial purposes, they should either wait 15 years or set up their own digitization project.

However, it may be difficult or even impossible for smaller companies to set up their own digitization project, given the scale of the project and the required investment. Smaller commercial parties will have to compete with Google, which may be a reason not to commit to such a project. This could potentially explain why the libraries have to date not been approached by other commercial parties to digitize books. Unfortunately, attempts to speak with AI developers with possible interest in the library's corpus were unsuccessful. Hence, the exact reasons for a lack of competition in the digitization market remain unclear and are thus subject to speculation.

4.4 Exclusivity

It should be noted that the librarians interviewed felt strongly that the contractual restrictions imposed on them should not be perceived and referred to as “exclusivity” clauses. In principle, both Google and the European libraries are free to use these digital copies. In addition, third parties may access these digital copies upon request and for non-commercial (research) purposes. However, since the libraries are contracting parties, it is not surprising that they believe the provisions are not restrictive. After all, the contract is intended to serve, in part, their interests. As such, the (un)intended side-effects of this restriction on third parties may be overlooked.

In contrast to the position of Google and the libraries, OFF takes an “open access” approach to the interpretation of this restriction. They aim to expand access to the digitized database that Google and the libraries have created, such that this database is also readily available for commercial use by other parties. This open access approach stems from the notion that public domain books should stay in the public domain, even after being digitized. Even though public domain books are freely accessible through Google Books and can be downloaded as PDFs, it is not possible to download the entire corpus of public domain books. A third party may receive access to the entire corpus for research purposes only. Third parties who wish to access the entire corpus for commercial purposes must be granted permission by Google.

4.5 Use of the Digital Copy

The interviews also revealed that the digitized corpus might not be suitable “as is” for training AI models. From their experience it appears that AI developers prefer a mass volume of text which the corpus of the libraries in first instance is not. The corpus consists of a large

quantity of individual digitized books. Subsequently the texts from these individual digitized books need to be extracted and bundled in order to be suitable for AI training.

Even so, this does not negate the fact that Google has unbridled access to a very large corpus of digitized books. This collection is also ever-expanding, as new books enter the public domain every year. As such, Google has access to a continuously growing supply of data, with which it can train its own AI models and create new commercial services. This gives Google a competitive advantage and allows them to strengthen their already existing monopoly position.

Regardless of whether this corpus is suitable for AI training "as is"', Google is the only commercial entity that has access to the dataset, allowing them to transform it into a format that is suitable for training purposes. Thus, under the current contractual arrangements, third parties must essentially obtain a license from Google to commercially exploit the entire corpus of digitized public domain books (i.e., books that should arguably be widely available to everyone). The prospect of widespread access to a database consisting of digitized public domain books will therefore likely be valuable to other commercial parties.

5. Recommendations

The review requirement introduced in Article 12 ODD will most likely play a big part in the future assessment of exclusivity regimes. However, while the purpose of the review may be clear, the substantive criteria for conducting the review itself are not. The ODD also does not specify which parties may request a review to be conducted or who is responsible for doing so. Nonetheless, this does not negate the fact that the review opens the door for parties to argue that extending an exclusivity clause would be unreasonable or inadequate.

Policy and legislation on exclusivity regimes should reflect a balance between competing interests. On the one hand, an exclusivity regime allows commercial entities such as Google to protect their investment. It can be argued that commercial parties would not invest in such projects unless they could recoup that investment through some type of exclusivity regime. Thus, abolishing the exclusivity regime altogether might not be desirable.

On the other hand, the current exclusivity regime raises a number of concerns, not only regarding Google's monopoly position and the subsequent lack of competition on the digitization market, but more importantly about the fact that the "licensing" of digital copies of public domain books to third parties for commercial use can be contrary to the principle that public domain books should remain within the public domain once digitized. As such, keeping the current exclusivity regime intact would not sufficiently take the interests of third parties into account.

One obvious path towards reconciling these competing interests is to increase government funding for digitization projects involving cultural resources. This would allow libraries to be less dependent on private partners such as Google to fund digitization projects.

However, a complementary solution could be found within the legal framework of the ODD. Article 12 and recital 49 suggest that exclusive arrangements should be limited to as short a time as possible and that it generally should not exceed a period of 10 years. Where an exclusivity clause exceeds that period of 10 years, it becomes subject to review. Recital 49 states that a number of elements should be taken into account when conducting the review, namely any technological, financial and administrative changes in the environment since the arrangement was entered into. However, the ODD does not provide any further clarification on how this review should be conducted or to which criteria it should adhere. In addition, Article 12 ODD does not specify who should be responsible for conducting the review. More specifically, it does not establish whether this review should be conducted by the contracting parties themselves or by an external party, and under what conditions. As such, this provision contains gaps that need to be filled by Member States upon national implementation of the directive. This leaves room for Member States to limit the duration of exclusive arrangements involving the digitization of cultural resources, either by reducing the initial period of exclusivity to a period of less than 10 years and/or by devising strict criteria and guidelines for the review of exclusive arrangements in cases where the initial period of exclusivity does exceed 10 years or is otherwise deemed unreasonable.

One solution might be to have the Commission issue a Guidance on the interpretation and application of Article 12(3). More specifically, the Commission could clarify whether the period of exclusivity should be 10 years by default or should be viewed as the upper limit, and

contractual parties should substantiate why a period of 10 years may be necessary. As previously mentioned, the rationale behind the exclusivity regime is that it enables commercial entities to recoup their investments. As such, it can be argued that a period of exclusivity should not extend beyond the time necessary to earn back those investments. However, the question then arises how it can be established that an investment has been sufficiently protected or recouped. Does this impose an obligation on an investor to accurately track the costs and benefits of a project? Or is it enough to estimate that an investor should, and could have recouped its investment after a certain period of time?

In addition, such a Guidance with criteria for the review could be formulated with the help of representatives from different European libraries. As mentioned, the criteria for this review should be clear and practical. Although the gratitude for the Google Books Project might be very prevalent, an exclusivity clause is there to essentially protect an investor. It could be argued that balancing the scales by conducting a stringent review after a period of 10 years is justified in order to effectively protect the contracting parties as well as third-party interests.