



Europeana Foundation Governing Board Meeting

Paper 10
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Koninklijke Bibliotheek
[Prins Willem-Alexanderhof 5](#)
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5th Fl. , I5.200

Update on Europeana Copyright Policy Advocacy Efforts

Action proposed: For information and to take note of the work being undertaken and suggest how to engage the non-library sectors more actively

This document provides an update on the ongoing copyright advocacy activities undertaken by Europeana Foundation with support from [Kennisland](#) and [Helena Lovegrove](#), our Europeana DSI-2 partner, based in Brussels liaising with EU institutions and bodies. The update covers the period since the last Europeana Board meeting which took place on the 16th of November 2016.

At the time of the last board call the Copyright Working Group of the Europeana Network was working on an update of the advocacy mandate. [The updated mandate](#) was approved by the Members Council of the Europeana network on the 6th of December 2016 with 29 votes in favor and 2 abstentions. The updated mandate has subsequently [been published on Europeana Pro](#) and is serving as the basis for the activities of Europeana in the field of Copyright advocacy.

We have operationalized the mandate by focussing on four different issues that are addressed in the Europeana Commission's proposal for a [Copyright in the Digital Single Market Directive](#) (hereafter: "DSM directive"). These issues are:

- Access to Out of Commerce works held by Cultural Heritage Institutions (art 7-9)
- Digitization for Preservation (Art 5)
- An exception for online educational uses (Art 4)
- An exception for Text and Data Mining (Art 3)

Our substantive positions on these issues have been outlined in a Position Paper that we issued in December (see *Annex 1*).

Activities to advance these objectives

After the publication of the Commission's proposal for the DSM directive the current focus of legislative activity is on the European Parliament and the European Council. Discussions in the European Parliament (EP) are further advanced and as a result our main focus over the last three months has been on the EP. Europeana is currently operating on three different levels to advance these objectives:





1. Direct engagement with policy makers involved in the legislative process related to the DSM directive,
2. Direct engagement with other stakeholders affected by the issue of access to Out of Commerce works,
3. Close collaboration with other (library) organizations advocating for copyright reform that benefits cultural heritage institutions.

Direct engagement with policy makers

Our direct engagement with policy makers has focussed on our proposal to improve the mechanisms proposed by the European Commission to improve access to Out of Commerce works. Our analysis of the proposal (which has been undertaken in collaboration with experts from library organizations and academics) makes it clear that the Commission's proposal will not result in a significant improvement of the situation of all cultural heritage institutions (see *Annex 1* for a more detailed summary of this analysis). Given this we have undertaken a series of meetings with Members of parliament (Rapporteurs, Shadow rapporteurs and political advisors - see *Annex 2* for a full list of meetings) in which we have highlighted these shortcomings of the Commission's proposal and have advocated for improvements to the Commission's proposal. Since late January 2017 we have also started to share suggestions for amendments with the relevant Members of European Parliament (MEPs). These meetings have generally been very positive. So far all MEPs with whom we have met, have expressed understanding for our concerns and many have indicated support for our suggestions from improving the Commission's proposal.

In mid January we also met with four officials from the Commission's copyright unit and discussed our analysis of their proposal and our suggestions for improving the proposal with them. While the Commission has signalled that they stand by their proposal, they have signalled understanding for a number of our concerns and have expressed the expectation that some of these issues could be addressed through changes introduced by the Parliament or the Council.

We expect to continue meeting with MEPs involved in the parliamentary procedures related to the DSM directive until at least the summer. We will also intensify meetings with Member States representatives in the upcoming months. It is important that this is made in parallel with CHIs advocating their interests at national level.

Direct engagement with other stakeholders

In parallel we have continued our engagement with rightsholder representatives aimed at nurturing support for our position and proposals. Following a series of initial meetings with Europeana Network members FEP and IFFRO started at the Frankfurt Book fair in October 2016 we have invited a wider set of rightsholder representatives for a stakeholder meeting in Brussels.

This meeting took place on the 11th of January 2017 in Brussels and was attended by representatives from 16 rightsholder organizations. During the meeting we presented a proposal for a more comprehensive solution for the Out of Commerce works problem (see presentations slides in *Annex 3*) and invited rightsholder representatives to give feedback. While the initial feedback was almost universally negative, all stakeholders agreed to continue the conversation about the issue. We have since met with a number of the rightsholder representatives present at the meeting. These meetings have been focussed on creating a better understanding of our proposal and have generally been constructive.



While we do not expect that we will be able to convince any of the rightsholders to come out in support of our proposal, we are seeing the possibility of convincing some of the organizations to refrain from actively working against our proposal. With this objective we intend to continue these meetings in the upcoming weeks.

Collaboration with library organisations

In addition to our own activities Europeana participates in the Library coordination group which includes EBLIDA, LIBER, IFLA, CENL and Public Libraries 2020. In the period since the last Board meeting we have participated in two coordination meetings (in December and January).

The group is focussing on a wider set of issues (which includes all of our four core issues listed above). The purpose of the coordination group is to ensure consistency in our positions and to create synergy among the activities of the individual members.

In December 2016 the group [issued a joint position paper](#) that has been distributed among relevant MEPs and other policy makers. Throughout January the group worked on joint proposals for amendments for all of the issues identified in the position paper. We have started sharing these proposals for amendments with selected MEPs in late January

The library coordination group is currently planning a lunch meeting for MEPs in Strasbourg on the 15th of March. The meeting will be an attempt to raise awareness for underexposed issues relevant to the library community. Europeana will be contributing a session on a more comprehensive solution for the Out of Commerce works issue.

Outlook and concerns

With the parliamentary proceedings having just started (the draft report from the leading JURI Committee is expected to become available at the end of March), it is too early to give an assessment of our chances to achieve meaningful improvements to the Commission's proposal. For the moment we feel that, together with our partners from the library community, we are well positioned to make our position known to policy makers and other stakeholders. Our requests for meetings are honored by all relevant MEPs and other stakeholders. We have constructive discussions with the European Commission and an increasing number of rightsholder representatives.

We do; however, feel that there is insufficient involvement from other parts of the cultural heritage sector. The presence of Archives, Museums and Film heritage institutions is very limited. As a cross sectoral network Europeana has some capacity to speak to the concerns of these sectors, but without a sustained presence of these sectors on the European level it is difficult to convey the urgency of better copyright rules for Archives, Museums and Film Heritage institutions. We have been actively working to increase participation from these sectors with some positive results from IASA and FIAT/IFTA but would request that the Board members help to engage their membership organizations or networks in the debate as the chance to effect change will not come for another generation. The opportunity to influence effectively is now and will only last for a few months. After that it will be very difficult to make any changes in the debate and the advanced text.



- ANNEX I Europeana Position Paper
- ANNEX II Outreach to Policy Makers
- ANNEX III Presentation from the Stakeholder Meeting

Circulation:

Europeana Foundation Governing Board Members & Observers

Classification:

Public



ANNEX I Europeana Position Paper



Position on the Commission's proposal for a Directive on copyright in the Digital Single Market COM(2016) 593

Set up to show the richness and diversity of European cultural heritage, [Europeana](http://www.europeana.eu)¹ contributes to the Digital Single Market, assuring cross border access, complete with copyright information, to our shared past.

Europeana is Europe's digital platform for cultural heritage, collecting and providing online access to tens of millions of digitised items from over 3,700 libraries, archives, audiovisual collections and museums across Europe, ranging from books, photos and paintings to television broadcasts and 3D objects. Europeana encourages and promotes the creative re-use of these vast cultural heritage collections in education, tourism and the creative industries, a role confirmed by [Council's conclusions of 31 May 2016](#)²

We support, wholeheartedly, the need for authors and creators to have copyright rules that help them thrive in the digital world. Equally, we believe that Cultural Heritage Institutions (CHIs), the custodians of our shared cultural history, deserve clearer and fairer regulations to fulfil their missions in the digital environment.

Europeana advocates for copyright reform on behalf of its 3,700 contributing partners and the members of the Europeana Network Association. The positions put forward in this paper have been developed and approved by the Europeana Foundation Board and the Network Association, reflecting the views of the majority. Our position focusses on four issues that are of direct relevance to the activities of Europeana and the members of the Network summarised below.

Use of Out-of-Commerce Works by Cultural Heritage Institutions

One of the main hurdles to the digitization of archived material from the 20th century is clearing copyright for Out of Commerce works. It has created a problem described as [the 20th century black hole](#)³.

Europeana welcomes the Commission's intention to find a solution to this issue with measures to improve licensing practices and ensure wider access to content. However, although the proposed extended licensing based solution might be adequate for a number of sectors and works - mainly published books, journals, music and some types of visual artworks - it does not fit all types of works, or sectors where collective management organisations do not exist. In addition the Commission's proposal for licensing mechanisms is

¹ <http://www.europeana.eu>

² <http://data.consilium.europa.eu/doc/document/ST-9643-2016-INIT/en/pdf>

³ <http://pro.europeana.eu/blogpost/the-missing-decades-the-20th-century-black-hole-in-europeana>



so burdensome for CHIs that it will be of limited use even in sectors where collective licensing arrangements already exist.

What is needed is a solution that covers the whole cultural heritage sector and all types of works and does not create unnecessary bureaucratic overhead. Achievable in 4 steps:

1. Improving of the language in articles 7-9 of the proposed Directive, to ensure that the proposed licensing based approach has practical utility for Cultural Heritage Institutions and Collective Management Organisations (CMOs). This requires the following modifications:
 - a. considering individual translations and manifestations to be out of commerce works in and of themselves,
 - b. Cultural Heritage Institutions only need to deal with CMOs that are established in their own Member States.
2. Adding a mandatory exception to the proposed Directive allowing CHIs to make available out-of-commerce works in their online collections for non commercial purposes. This exception should use the same definition for out of commerce as the licensing provision and should be subject to the same publicity and opt out requirements as laid out in Art. 8 of the proposed Directive.
3. Adding a clause similar to Art. 4.2 of the proposed Directive requiring Member states (in consultation with stakeholders) to ensure that the exception does not apply in sectors and for types of works, where licensing based solutions are available or can be expected to become available.
4. Strengthening the publication requirements and the ability for authors and other rightsholders to object to uses of their works to ensure that authors retain the ability to control uses of their works.

Taken together these modifications make sure that licensing (where it exists) is the primary way of dealing with the Out of Commerce Works in the collections of Cultural Heritage Institutions, but allows Institutions to fall back on an exception in situations where licensing is not possible. By delegating the applicability determination to Member States it preserves the ability to tailor the solutions to national specificities. The publicity and opt-out provisions contained in Art. 8 permit rights holders, at all times, to object to the online publication of their works by cultural heritage institutions even if they are out of commerce.

Preservation of cultural heritage

We welcome the Commission's proposal to address the issue of digitisation for preservation by introducing a new mandatory "harmonised exception for preservation purposes by cultural heritage institutions". Such an exception will create a level playing field for cultural heritage institutions across Europe, but more clarity is needed in the wording.

For the exception to provide maximum legal clarity an explicit reference to digitization, as a



form of preservation, should be included in the text of Art. 5 or in recital 20 of the proposed Directive. In addition, clarification of the language of the exception is needed, to make it explicit that it also allows digitization in joint digitization efforts and by external service providers.

Text and Data mining

We welcome the Commission's proposal to introduce a mandatory exception for the purpose of Text and Data mining. We are, however, concerned that the scope of the exception is much too limited. The scope of the proposal excludes important stakeholders such as cultural heritage institutions, journalists and civil society organisations and needlessly limits the use of Text and Data mining to scientific research purposes. In doing so it significantly curtails how these stakeholders can employ automated analytic technologies as part of their activities.

Given that the exception applies to temporary reproductions that are necessary for undertaking automated analysis and only applies in situation where beneficiaries have lawful access to the works and data that they intend to mine, these restrictions are not justified. In order to maximize the social value potential of Text and Data mining, the proposed exception should be modified to apply to any type of user and covers text and data mining undertaken for any purpose.

Use of works in teaching activities

We welcome the Commission's proposal to introduce a mandatory exception covering the "use of works and other subject-matter in digital and cross-border teaching activities", but consider that this exception is too limited and will not contribute to more widespread educational use of in copyright materials held by CHI's.

From the perspective of Cultural Heritage Institutions there is a clear need for a mandatory exception for use of these materials for educational purposes:

- that does not primarily focus on the type of person or institution doing the teaching, but rather on the educational purpose of the use,
- that permits diversity of educational use – both digital and analogue – of the works and other subject matter in question.

Without such an exception the considerable efforts of publicly funded CHI's to unlock the educational potential of their online collections can only achieve limited returns.

For more information please contact helena.lovegrove@europeana.eu



ANNEX II Outreach to Policy Makers



Meetings with EU policy makers

Period: 16 Nov 2016- 13 Feb 2017

European Parliament

1. **MEP Comodini-Cachia** (MT), EPP, JURI Rapporteur on copyright in DSM proposal
2. Office of **MEP Cavada** (FR) ALDE, *shadow in JURI*
3. Office of **MEP Yana TOOM** (EE) ALDE, *shadow in CULT*.
4. **MEP Helga Trupel** (DE), Greens, CULT, BUDG
5. Office of **MEP Krasnodebski** (PL), ECR, rapporteur in ITRE
6. **Bartłomiej Telejko**, policy adviser to ECR in JURI
7. Office of **MEP Mastalka** (CZ), GUE-NGL, shadow rapporteur in JURI
8. **MEP Julia Reda**, DE, Greens, shadow rapporteur in JURI
9. **MEP Catherine Stihler** (UK), S&D, rapporteur on proposal in IMCO
10. Office of **MEP Koster** (DE), S&D, JURI
11. Office of **MEP Dhzambazki** (BG), ECR, CULT and JURI member
12. Office of **MEP Geringer de Oedenberg** (PL), S&D, shadow rapporteur JURI
13. Office of **MEP Marc Joulaud** (FR), EPP, rapporteur in CULT
14. **Franziska Neher**, legal adviser to EPP in JURI, European Parliament
15. Office of **MEP Tadeusz Zwiefka**, PL, JURI (subst in CULT)
16. **Anne-Catherine Lorrain**, legal adviser to the Greens in JURI
17. **Miriam Schoeps**, ALDE political adviser in JURI
18. **Seminar on the Copyright Reform** in the European Parliament, organised by EWC-FEP-IFFRO, hosted by MEP Comodini and MEP Cavada

Council – permanent representations to the EU

19. **Permanent Representation of Ireland** to the EU: Eamonn Kelly, cultural affairs, and Patricia Brady, copyright attaché
20. **Permanent Representation of France** to the EU: M. Blazy et Mme Fauterelle, Conseillers Culture, audiovisuel et droit d'auteur
21. **Permanent Representation of the Netherlands** to the EU: Anita Nemeth, Attaché Culture and Audiovisual Affairs

European Commission

22. *Copyright Unit, European Commission*



ANNEX III Presentation from the Stakeholder Meeting

Insects and Fruit
Jan van Kessel
1660 - 1665, Rijksmuseum
Netherlands, Public Domain

Europeanana

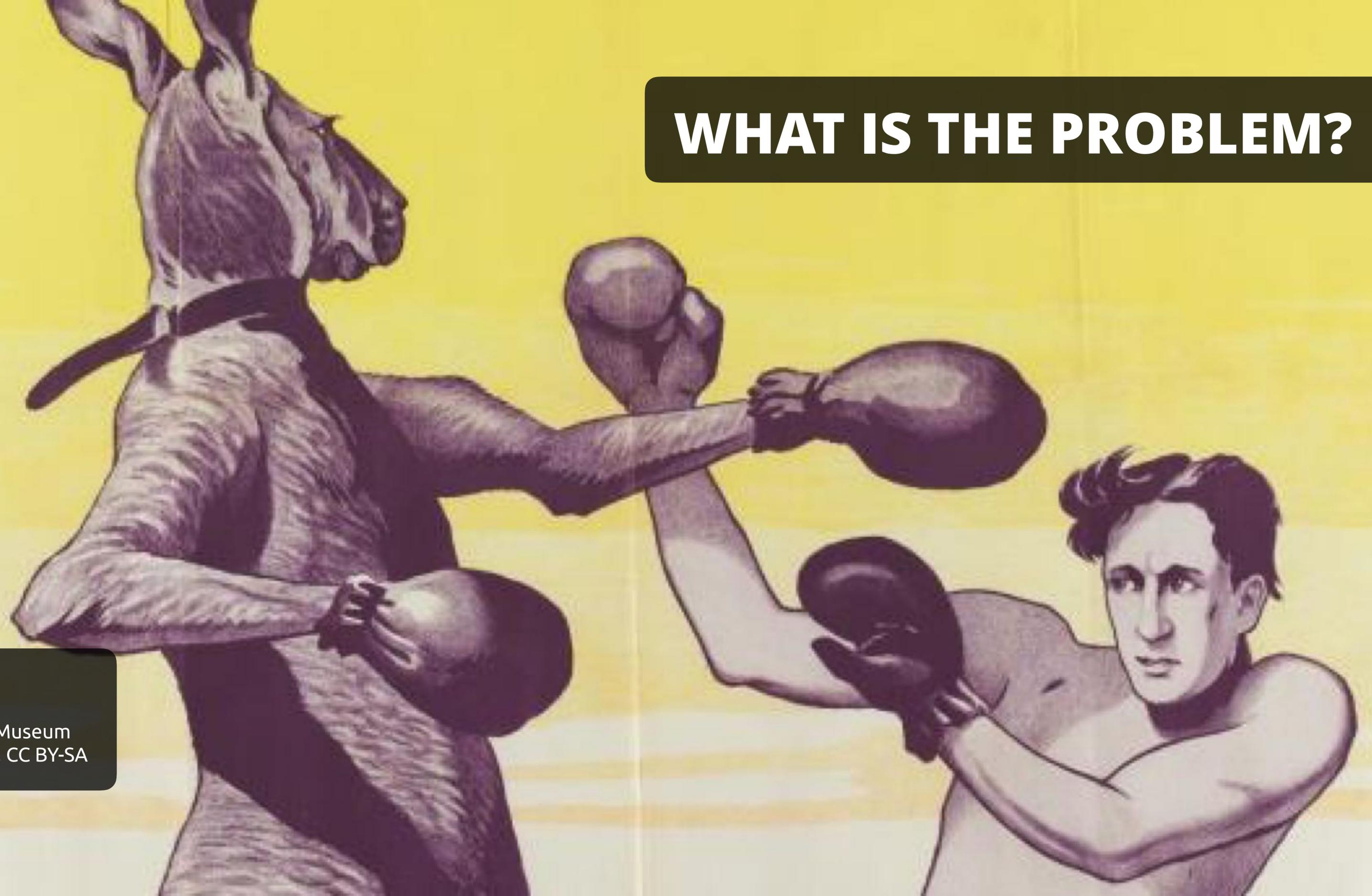
**A BETTER SOLUTION FOR
OUT OF COMMERCE WORKS**

Paul Keller | Brussels 11 January 2017



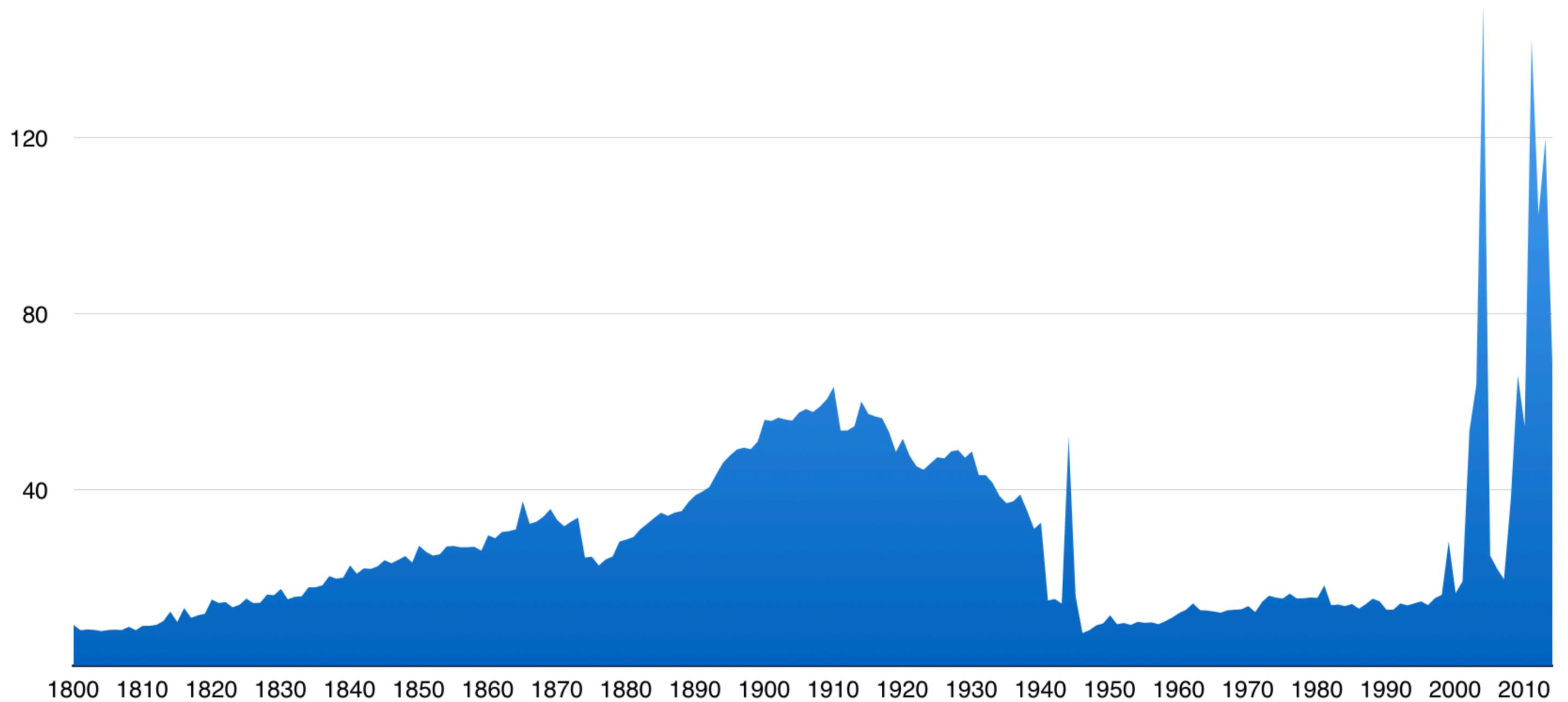
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WHAT IS THE PROBLEM?



Untitled
Anonymous
1930 Circus Museum
Netherlands, CC BY-SA

The problem:



Out of Commerce works

The Commission's proposal for a Copyright in the Digital Single Market Directive, proposes to address the 20th century black hole problem with a licensing mechanism for Out of Commerce Works.

This mechanism would work by requiring member states to introduce legislation, allowing collective management organisations to issue licenses that: "may be extended, or presumed to apply, to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation"

The Commission's proposal (1)

- The proposal is overly complicated and burdensome and as a result the measures proposed by the commission will not significantly lessen the efforts required to clear rights enough to have a real impact.
- Licensing will not work in all sectors and for all types of works. We need a solution that also works in sectors and types of works without a collective rights management practice.

The Commission's proposal (2)

- The role of the database to be maintained by EUIPO (and by extension the ability to opt out) seems underdeveloped in the Commission's proposal.
- The recent ruling in the Doke and Soulier case (CJEU C301/15) has cast significant doubt on the legal feasibility of the approach proposed by the Commission

2. the proposed directive intends to introduce legislation, allowing collective management organisations that: "may be extended, or presumed to apply, to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation"

3. (Extended) Collective Licensing is the most desirable approach for ensuring that cultural heritage institutions can obtain the necessary rights for making out of commerce works in their collections available online.

4. Cultural Heritage Institutions observe that a licensing based solution, such as the solution proposed by the commission, cannot however solve the issue in all sectors or for categories of works where there is no existing collective licensing practice.

5. From the perspective of many cultural heritage institutions it is desirable to find a comprehensive solution for the issue of "use of out-of-commerce works by cultural heritage institutions" that works for all sectors and for all types of works where:

a. any such solution is not intended to replace Extended Collective Licensing and similar solutions with another mechanism, but should provide a mechanism that can be used in sectors and for type of works where Extended Collective Licensing and similar solutions do not exist. (in the sense that they have not been put into place for the category of works)

b. any such solution would need to include the ability for rights holders, who do not want their out of commerce works used by cultural heritage institutions, to opt out of such uses.

Europeana proposes to jointly examine with all interested stakeholders if we can modify the Commission's proposal to provide such a comprehensive solution to the issue.

Preliminary proposal for discussion:

A comprehensive solution for the issue of "use of out-of-commerce works by cultural heritage institutions" for all types of works could be to add two elements





Untitled
Anonymous
1930 Circus Museum
Netherlands, CC BY-SA

WHAT CAN WE DO BETTER?

Ц И Р К А



Cirque de Moscou
Anonymous
1911 Circus Museum
Netherlands, CC BY-SA



A better solution for OOCW

We propose a more comprehensive solution for the Out of Commerce works problem that consists out of the following three elements:

1. Improving the licensing language proposed by the Commission
2. Adding a back-up exception and a non-applicability clause
3. Strengthening the opt-out mechanism

(1) Improved licensing

Maintain the existing articles 7-9 proposed by the Commission but modify them in order to ensure:

- that individual translations (and manifestations) can be considered to be OOCW on themselves.
- that collective management organisations are able to issue licenses for all works held by cultural heritage institutions in their country.
- that the requirements for representativeness are better defined

(1) Improved licensing

- These interventions are intended to ensure that the proposed licensing based approach will have practical utility for both cultural heritage institutions and collective management organisations.
- Without making these modifications will have to undertake significant efforts to establish the provenance of individual works in their collections before they can attempt obtain licenses

(2) A back-up exception

- Add a mandatory exception that allows CHIs to make available out-of-commerce works in their collections online for non commercial purposes.
- Add a clause similar to the Art 4.2 that requires Member states (in consultation with stakeholders) to ensure that the exception does not apply in sectors and for types of works, where licensing based solutions are available or can be expected to become available.
- the exception needs to uses the same definition of OOCW as the the licensing provision and is subject to the same publicity and opt out requirements as laid out in art 8.

(2) A back-up exception

Adding an exception serves two purposes:

- It ensures that Out of Commerce works in sectors without collective management practice can be made available by CHIs
- It should also ensure that the entire Out of Commerce works solution (including the licensing provisions) meet the requirements established by the CJEU in its *Doke en Soulier* ruling

(3) Stronger opt-out

We propose to strengthen the opt-out mechanism, by making it part of the EUIPO maintained portal referred to in art 8.2 of the proposal:

- Rights holders need to get the ability to register their opt-out on a per work and on a per-rightsholder basis.
- The portal needs to provide functionality to alert right holders based on search terms and to search for works via automated content recognition.

**Usable
Licenses**

**A back-up
Exception**

**A non-application
clause**

**Strong
opt-out**



Flowers
Anonymous
1700 - 1799, Rijksmuseum
Netherlands, Public Domain



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