



Exterieur van de bibliotheek van de Humboldtuniversiteit te Berlijn, Rijksmuseum, Public Domain

# Recommendations on Copyright and its role in the Digital Transformation of the Cultural Heritage Sector



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## Executive Summary

Europeana's [digital conference](#) 'The role of copyright in the digital transformation of the cultural heritage sector' explored the copyright challenges that arise as the cultural heritage sector embraces its digital transformation, the legislative solutions that are currently underway and the sector's need for capacity building in this area. As a result of the digital conference, this report proposes possible steps forward, both for the Europeana Initiative and for Member States, in order to support the sector, namely:

- Recommendations for the Europeana Initiative:
  - Cooperate with the EUIPO and relevant stakeholders on OOCWs for the success of the development of the portal and the availability and suitability of licenses for CHIs.
  - Monitor the 20th century blackhole to evaluate whether the CDSM Directive contributes to an increase of available digital cultural heritage from that period.
  - Create copyright training opportunities and support other copyright training.
  - Monitor copyright support provided by Member States.
- Recommendations for Member States:
  - Reiterate the importance of having a functional and interoperable portal for OOCWs.
  - Build copyright capacity in the cultural heritage sector to increase the knowledge and confidence when dealing with digital cultural heritage.
  - Encourage the use of standardised copyright tools to support the reuse of digital cultural heritage and the digital transformation of CHIs.
  - Adopt clear, simple and broad provisions transposing the CDSM Directive to ensure their effectiveness, in consultation with stakeholders.
  - Ensure that there is funding available for CHIs to, among other things, conclude licenses for OOCWs
  - Facilitate steady conversations, beyond the CDSM Directive, between all relevant stakeholders in copyright conversations.

The Europeana Conference was organised in collaboration with the Deutsche Nationalbibliothek and under the auspices of the German Presidency of the Council. It was part of the cultural programme for the German Presidency, thanks to the German Ministry of State for Culture and the Media.



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## Glossary

- **Collective management organisations** (CMOs) - entities that manage copyright on behalf of authors, performers, producers and other rights holders to simplify the management of those rights.
- **Copyright in the Digital Single Market Directive** (CDSM Directive) - [Directive](#) (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.)
- **Out of commerce works** (OOCWs) - works that are still protected by copyright but are no longer commercially available because the authors and publishers have decided neither to publish new editions nor to sell copies through the customary channels of commerce.
- **Text and data mining** (TDM) - The process of deriving information from machine-read material. It works by copying large quantities of material, extracting the data, and recombining it to identify patterns
- **20th century blackhole** - the largely inferior availability of digital cultural heritage from the 20th century with regards to the availability of works in periods before or after the 20th century, as a result of the effect that copyright has on making cultural heritage available online.

## Documentation

- [Web Conference recordings](#)
- [Pro post](#) about the outcomes of the German Presidency event
- [Short interviews](#) to cultural heritage professionals about the CDSM Directive
- [Europeana Copyright Strategy 2020-2025](#)



## About the Europeana Conference under the German Presidency 2020

Europeana's [digital conference](#) 'The role of copyright in the digital transformation of the cultural heritage sector' took place under the auspices of the German Presidency of the Council of the European Union and was co-organised by Europeana and the German National Library. It explored the role of copyright in the digital transformation of the cultural heritage sector and offered an opportunity to bring Member States representatives together and exchange views, successful approaches, and common challenges around this topic.

More than 30 DCHE and copyright practitioners and experts from 21 countries participated in the event, joining a series of break out sessions, roundtable discussions and panel presentations. As the first fully online Presidency event, there was an opportunity to open up some of the sessions to the public.

As Frank Scholze, Director General, Deutsche Nationalbibliothek said, 'It's our mission as institutions to actively embrace and shape the opportunities of digitalisation within our platforms and to make cultural heritage visible and accessible to a wider public in order to avoid the digital dark age. Due to these challenges the copyright system has to be adjusted and it's only possible if we find a proper balance of interests of all stakeholders, right holders and institutions'.

During the first day, we explored the background to digital transformation and copyright, where we stand, and what might come next. With that in mind, [Dorothea Zechman](#), [Anne Bergman](#) and [Paul Keller](#) shared their thoughts and strongly agreed on the need to collaborate across sectors to achieve the best possible copyright framework for the digital transformation of the cultural heritage sector.

During the second day, we explored tangible examples of how copyright is dealt with in the heritage sector. [Fred Saunderson](#) presented a risk management approach developed by the National Library of Scotland in partnership with the National Library of Wales, which has brought efficiency and consistency across the institutions. [Evelin Heidel](#) described how networks of practitioners can advance discussions and support open access. [Juozas Markauskas](#) and [Ariadna Matas](#) talked about efforts to develop copyright knowledge across the sector, and about the role of rights statements and Creative Commons licenses and tools in supporting digital cultural heritage further.

During group discussions, Member States exchanged approaches taken at the national level, and we explored tangible steps that can be taken to support the heritage sector deal with copyright nationally and across Europe. Participants coincided in the fact that more copyright training and support is necessary for cultural heritage institutions (CHIs) to take advantage of opportunities in the digital age. A strong emphasis was put on the importance of fostering collaboration between representatives of CHIs, collective management organisations (CMOs) and rights holders in the realm of copyright, in aspects such as out of commerce works (OOCWs).



## Problem Statement

CHIs work to preserve and disseminate our shared heritage, but this public interest mission is often challenged by copyright legislation. CHIs wish to embrace possibilities to, for instance, better connect their collections with their audiences, exchange knowledge across borders and use new technologies in digitisation processes, in particular as the focus moves from digitisation to digital transformation. However, a copyright framework that is not fit for the digital age might stand in the way of these possibilities, limiting also the potential benefits for education, research, innovation and creativity. Copyright protection has therefore a strong influence on the activities of CHIs, often seen as limiting the fulfillment of their mission.

The cultural heritage sector supports the objectives of the copyright system to encourage creativity and innovation, and understands the need for authors to be fairly remunerated and decide on the use of their works. However, a balance should be sought so that copyright protection does not lead to negative unintended consequences for the cultural heritage sector, and for society, such as locking down works that are not available or in commercial circulation anymore.

At the moment, a lot of expectations are being put on the implementation of the Copyright in the Digital Single Market (CDSM) Directive. Its success in mitigating the challenges mentioned above will strongly depend on how Member States transpose the Directive's provisions. The overall limited funding that CHIs can rely on raises several challenges and puts the obtention of licenses as mandated in the Directive among one of the many competing needs that a CHI has to cover, such as digitisation or expert capacity.

A lack of some necessary copyright knowledge across the heritage sector amplifies the challenges. Without this knowledge, it is difficult for CHIs to make informed decisions on the copyright implications of their activities, to measure and bear some inevitable risks, and to properly communicate rights information to their users.



# Recommendations

## Recommendations for the Europeana Initiative

In order to support the cultural heritage sector and the work of the DCHE, Europeana can consider pursuing the following steps, in line with the overall objectives indicated in its [copyright strategy 2020-2025](#):

1. **Cooperate with the EUIPO and relevant stakeholders on OOCWs.** Engage with the EUIPO to provide feedback and support as the out of commerce works portal is developed, both in the first phase and in subsequent phases. In addition, maintain a steady dialogue with CMOs and rightsholder representatives on the suitability of licenses available to the cultural heritage sector, particularly for OOCW.
2. **Monitor the 20th century blackhole.** Regularly evaluate progress in “closing” the 20th century blackhole on Europeana. In time, evaluate the impact and communicate the results to the DCHE regarding the increase of 20th century material available on Europeana.
3. **Copyright training.** Foster cooperation with relevant partners who can provide support in copyright training for the cultural heritage sector. Develop training materials and opportunities for institutions sharing data with Europeana and members of the Europeana Network Association.
4. **Monitor copyright support in Member States.** Monitor and maintain an up to date overview of progress made in every Member State regarding key factors that support the heritage sector in practice, namely the existence of networks, copyright training, affordable and available licenses, and use of standardised copyright information.

## Recommendations for Member States

We bring forward possible actions that Member States can undertake to continue to support the digital transformation of the cultural heritage sector, based on the input collected during the Presidency Event:

1. **Development of an interoperable OOCW portal.** Article 10 in the CDSM Directive requires the EUIPO to set a single online portal for OOCW. To make the best out of the possibilities of the OOCWs articles in the Directive, this portal should be able to adapt well to existing workflows and practices of its intended users, namely CHIs, CMOs and rightsholders, and support the processing of large amounts of data resulting from mass digitisation projects.

To this end, it is essential to ensure that the portal is technically capable to retrieve information from external information sources. The portal should be interoperable with existing data models in the sector, and support automated



(API based) input and output workflows that integrate with the necessary existing data sources. It is also important for the portal to have the ability to include data that allows identifying visual and audiovisual works, such as identifying information that goes beyond descriptive textual metadata.

While the design of the portal will not be decided by Member States, they are consulted by the EUIPO and have an opportunity to reiterate the importance of the abovementioned characteristics for the portal.

In addition, in order to minimise the administrative burden, we encourage Member States to avoid setting up national portals and rely exclusively on the EUIPO database.

- 2. Build copyright capacity.** CHIs wishing to digitise, make their collections available or allow their use are confronted with many questions around copyright, and regrettably often lack in-house copyright expertise. A lack of knowledge also leads to incorrect perceptions of legal risks, and as a consequence, less heritage is made available online.

Member States can support an increase of copyright knowledge in the sector by creating educational programmes and materials, for instance via their respective Intellectual Property Office and in partnership with the EUIPO. This should include awareness on how exceptions and limitations work, and focus on what CHIs can do rather than cannot do when relying on the copyright system. Member States can also provide funds for the sector to organise such activities and when necessary hire legal advice. When legal provisions are developed or updated, governments can support the heritage sector by adequately communicating these changes and their impact, and engaging with stakeholders in the development of guidelines or in the implementation of the provisions.

- 3. Encourage the use of standardised rights information.** As cultural heritage is shared more and more online, and users' interest in using it increases, CHIs need to be able to properly communicate the copyright status of their collections and any accompanying provisions that govern the use of their collections. This is fundamental for them to support uses in fields such as research or education and also to remain relevant in the digital environment. For this purpose, more and more institutions are making use of the tools provided by Creative Commons and Rights Statements.

Member States have an opportunity to encourage the adoption of such standards by CHIs and thus support their digital transformation. A successful approach taken so far by some Member States is to include a requirement to use this type of standard in their funding schemes for digitisation.

- 4. Clear, simple and broad provisions transposing the CDSM Directive.** In order for the positive aspects of the CDSM Directive to really have an impact in the cultural heritage sector and on how it supports innovation, research, creativity and education, the transposition should as much as possible pursue clarity,



simplicity and broadness, so that the provisions are intelligible by heritage professionals, their scope covers all necessary activities, they leave little margin for legal uncertainty and the sector feels confident applying them. The Orphan Works (OW) Directive lacked these three aspects to a large extent, which is probably one of the main reasons for its limited success.

The recommendations below relate to specific parts of the CDSM Directive and can be embraced during the transposition period or in later developments. They focus on the objective of providing clarity, simplicity and broadness for the heritage sector, while trying to maintain a balanced approach between the legitimate rights of authors and the needs of users.

- a. *Provide clarity on when content should not be data mined.* According to the Directive, “machine readable means” should be used to flag a reservation by rights holders of websites to disallow text and data mining under article 4 of the Directive. Clarity on what these “machine readable means” is necessary so that those engaging in this type of activity can easily identify when that is possible.
- b. *Recognise the role of CHIs in education.* The provisions on digital and cross-border teaching activities in the CDSM Directive apply mostly to educational institutions. Although the exception allows uses to take place outside the premises of educational establishments, e.g. in a museum, library or another cultural heritage institution, it does not cover the activities run by those institutions themselves. Considering the many educational activities taking place in CHIs, we would encourage Member States to explore the possibility of making libraries, archives and museums beneficiaries of the educational provisions in the CDSM Directive.
- c. *Define elements in the out of commerce works provisions.* According to the CDSM Directive, a work can be considered out of commerce when it has never been in commerce or when the work as a whole is no longer available through “customary channels of commerce”. This then breaks down in several concepts which are to some extent clarified in the recitals, for instance regarding how to consider whether adaptations and translations, variations and manifestations are in or out of commerce, how to interpret the limited availability of a work, and when to consider that a reasonable effort to determine that a work is out of commerce has taken place.

A lack of clear understanding of what is considered an OOCW can severely hamper the effectiveness of the provisions. We therefore recommend that Member States provide as much clarity as possible on the elements that can help identify whether a work is out of commerce. While it might not be possible to completely erase the grey areas, these should be taken to a minimum. In addition, the result should cover a large scope of content, and not be limited to only a few circumstances, so that the





provisions have a bigger impact. This should be defined by Member States in close collaboration with all relevant stakeholders.

- d. *Establish a cut off date for OOCW.* Member States are allowed to provide specific requirements to determine whether a work is out of commerce, such as a date before which everything is considered to be out of commerce (cut-off date). This needs to be determined at the national level in consultation with CHIs, rights holders and CMOs.

This is a very welcome possibility and we encourage Member States to make use of it. It is a very useful tool to provide the necessary clarity for all parties involved.

- e. *Clarify the applicability of the license and the exception for OOCW.* The licensing mechanism introduced in Article 8(1) enables sufficiently representative CMOs to grant licenses (on behalf of rights holders that have not necessarily given a mandate to the CMO) to CHIs for the purpose of making their collections of out of commerce works available online. The exception introduced in Article 8(2) of the Directive serves as a fallback mechanism that applies for the rights and type of work for which there is no sufficiently representative CMO.

It is important to avoid a situation in which CHIs do not know whether they should rely on the license or the exception for OOCW. For that, it has to be clear what is a sufficiently representative CMOs (which in turn entails clearly defining what rights and types of works they cover). In particular, Member States should specify which CMOs are representative for which types of works. They should also indicate which type of works are not represented by a CMO, so that CHIs know that no such representativity exists and can start making use of the exception. If this is not properly addressed, there can be situations where CHIs do not rely on any of the options.

- f. *Works of visual arts.* The provision on the public domain in article 14 in the CDSM Directive applies to works of visual arts. The Directive does not provide a definition of that concept, and it is therefore important that Member States provide some clarity, unless a definition is already in place, to avoid cases where the applicability of the article is questionable. Additionally, a clarification that its scope includes works in 3D would be welcome.
- g. *Application in time of article 14.* We encourage Member States to determine that the provision in article 14 applies both when 1) the act of reproduction takes place before and after the term of protection of the work of visual art has expired, and 2) when the material resulting from the act of reproduction was subject to copyright or related rights before the term of protection of the work of visual art has expired, unless such



material is original in the sense that it is the author's own intellectual creation.

- 5. Funding for licenses.** The OOCWs provisions and other provisions of the directive introduce the concept of extended collective licensing, giving a predominant role to licenses as a solution to clear rights. This is a system up until now unused by most European Member States that might require new important economic efforts from the part of the CHIs.

As CHIs willingly conclude these agreements with CMOs to have the legal clarity they need to fulfill their mission, they might encounter difficulties in meeting the budgetary requirements. There are several needs within an institution that compete for funding and without the necessary means dedicated to that, some CHIs may choose not to make use of the provisions, and negotiations with CMOs will be more difficult.

Member States can contribute to ensure that there is funding available for CHIs to conclude these licenses. They can do so by ensuring that funding for new digitization projects always includes support for rights clearing of OOCWs via CMOs (unless it clearly concerns types of works for which there is no representative CMO).

- 6. Stakeholder dialogues.** While the CDSM Directive foresees the need for Member States to support such dialogues as part of the OOCWs provisions. In order to make the best out of provisions in the CDSM Directive where a license agreement is needed, collaboration across CMOs, CHIs and rights holders will be fundamental.

These efforts are welcome beyond the framework of the CDSM Directive. Regular dialogues across these sectors can contribute to building confidence, identify common goals and define adequate solutions, benefitting all sides. It is therefore important that governments set up the space to have necessary conversations, encourage them, and ensure that all stakeholders are adequately and equally represented.



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