



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, ensuring 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 two core 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. Ensuring that individual translations and manifestations of out of commerce works can be considered to be out of commerce and made available even if some translations or manifestations are still in commerce
 - b. Ensuring that Cultural Heritage Institutions can obtain licenses from CMOs that are representative for the Member State where the CHI is established.
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.

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Note: Some member organisations of the Europeana Network have opted not to subscribe to the position expressed in this document, partly or as a whole. The Bibliothèque Nationale de France and the Spanish Ministry of Education, Culture and Sport note that the document must not be read to reflect their position. The Federation of European Publishers and The International Federation of Reproduction Rights Organisations have noted that the the positions on Text and Data Mining, Use of works in teaching activities and on Use of Out-of-Commerce Works do not reflect their own position on these issues.