
Set up to show the richness and diversity of European cultural heritage, Europeana 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.

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.

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
so burdensome for CHI's 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 3 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. establishing a work as potentially out of commerce does not require a multi-step search effort for each and every work,
   c. 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 CHI's 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.

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 @europeana.eu