

Reaction of the COMMUNIA association to the proposal to amend Directive 2003/98/EC on re-use of public sector information

Brussels, 22 January 2012

The COMMUNIA association carries on the work of the COMMUNIA Thematic Network on the digital Public Domain (<http://www.communia-project.eu>), which was funded by the European Commission from September 2007 until February 2011. One of the issues that featured prominently in the work of COMMUNIA is access to and reuse of Public Sector Information (PSI)¹. In January 2011 COMMUNIA published 14 policy recommendations² that summarize the outcomes of the work of the Thematic Network. One of these policy recommendations specifically addresses the legal framework for access to and re-use of Public Sector information in the EU:

Recommendation #13: The PSI Directive needs to be broadened, by increasing its scope to include publicly funded memory organisations - such as museums or galleries - and strengthened by mandating that Public Sector Information will be made freely available for all to use and re-use without restriction.

Currently publicly funded memory organisations fall outside the scope of the PSI directive. In order to strengthen the position of these organisations they should be brought within the scope of the directive. The directive also needs to be strengthened by mandating that Public Sector Information will be made freely available for all to use and re use without restrictions. What has been paid for by the public must be available to the public regardless of the nature of the intended uses.

COMMUNIA is pleased to see that the proposal to amend Directive 2003/98/EC on re-use of public sector information, which has been presented by the Commission on the 12th of December 2012, is in line with our recommendation. The Commission's proposal significantly strengthens the position of organisations and individuals that wish to re-use Public Sector Information and – as a consequence – will contribute to

¹ On 27-29 March 2009 COMMUNIA organized a workshop on Accessing, Using, Reusing Public Sector Content and Data at the London School of Economics: <http://www.communia-project.eu/ws05>

² <http://www.communia-association.org/recommendations>

unlocking the economic, cultural and social potential of the information held by the European Public Sector.

As a result, COMMUNIA supports the proposal to amend Directive 2003/98/EC on re-use of public sector information and the underlying ambition to open up data held by Europe's public sector as outlined in the Commission's communication on Open Data that was published alongside the proposal to amend the PSI directive.

In this paper we want to draw attention to two issues where the proposal to amend the directive should be improved. The first one concerns the conditions for re-use of public sector information that falls within the scope of the directive and the second one deals with Public Domain content that is held by libraries, museums and archives.

Conditions for re-use of public sector information

From the perspective of COMMUNIA the way the amended directive addresses licensing of public sector content remains underdeveloped and as such has the potential to create diverging and potentially incompatible implementations among the Member states. Over the years COMMUNIA has gathered considerable expertise both in the fields of open content and open data licensing and in the field of marking content and data that is free from restrictions. We feel that the proposal to amend Directive 2003/98/EC on re-use of public sector information should be strengthened considerably by applying some of this expertise.

The article of the amended directive dealing with licensing, Article 8, reads as follows:

1. 'Public sector bodies may allow re-use without conditions or may impose conditions, such as indication of source, where appropriate through a licence. These conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.'
2. In Member States where licences are used, Member States shall ensure that standard licences for the re-use of public sector documents, which can be adapted to meet particular licence applications, are available in digital format and can be processed electronically. Member States shall encourage all public sector bodies to use the standard licenses.

From the perspective of COMMUNIA this article does not sufficiently clarify what should be considered to be a standard license. The unclear definition of a standard license is exacerbated by the relevant recital (recital 13) that states:

[...] Any licences for the re-use of public sector information should in any case place as few restrictions on re-use as possible. Open licences available online, which grant wider re-use rights without technological, financial or geographical limitations and relying on open data formats, may also play an important role in this respect. Therefore, Member States should encourage the use of open government licenses.

Given the overall objective of the proposed amendment to ‘prevent different rules in different Member States acting as a barrier for the cross-border offer of products and services, and to enable comparable public data sets to be re-usable for pan-European applications based on them’ (recital 7) an approach based on multiple open government licenses is at best undesirable and at worst counterproductive.

The compatibility between these open government licenses has become a major concern. While open government licenses appear to be compatible with each other at first glance (for instance, all of them allow the free re-use of data and content under the condition that it is properly attributed) they also introduce country-specific clauses dealing with ‘improper’ uses of the licensed material. For example, both the Open Government License (OGL)³ in the United Kingdom and the Licence Ouverte⁴ in France require re-use only in ways that does not mislead third parties or misrepresent the information.

Such standards are subjective and undefined. As such clauses tend to be based on existing national legislation, they have the potential to make large scale and/or automated reuse of licensed data from multiple jurisdictions more difficult by requiring careful examination of such non-standard clauses by humans. As a consequence, uncertainty is introduced for those wishing to re-use the information, and that uncertainty in turn can lead to reduced instances of re-use due to fear of conflicting with the provision. Promoting the adoption of similar yet slightly askew open government licenses has the potential for undermining the stated goal of cross-border information sharing. This problem is further complicated by the fact that such open government licenses are not available in all official languages of the EU.

Instead of encouraging member states to develop and use open government licenses such as those that are currently used by the governments of the United

³ <http://www.nationalarchives.gov.uk/doc/open-government-licence/>

⁴ <http://ddata.over-blog.com/xxxxyy/4/37/99/26/licence/Licence-Ouverte-Open-Licence-ENG.pdf>

Kingdom and France, the Commission should consider advocating the use of a single open license that can be applied across the entire European Union.

Such licenses do exist and are widely used by a broad spectrum of data and content providers. Suitable licensing solutions are provided by the Open Knowledge Foundation (the Open Data Commons licenses) and Creative Commons. Creative Commons licenses have been in use for many years and come with a rights description infrastructure (including machine readable metadata) that is supported by major search engines.

COMMUNIA therefore advises the Commission to consider using an existing open license that complies with the Definition of Free Cultural Works⁵ as a pan European standard license for Public Sector Information. Appropriate licenses include the Creative Commons Zero Universal Public Domain Dedication (CC0)⁶ or the widely used Creative Commons Attribution License (CC BY)⁷.

Using the former would be in line with the example set by Europeana, which will start using CC0 for all metadata that is made available through its portal by mid 2012. CC0 is also used by the Dutch government for all information published on the government information portal (www.rijksoverheid.nl) and by the regional governments of Piemonte and Emilia-Romagna in Italy. In cases where institutions require attribution for documents published by them a simple attribution license like CC BY provides an adequate alternative to CC0.

Moreover, even when Public Sector Documents are already free of any copyright restrictions, they should be clearly labeled as such, in a way that reduces transaction costs allowing easy (automated) discovery and eliminating uncertainty about the possibility of re-using them for any (lawful) purposes, including commercial ones. The Public Domain Mark⁸, developed by Creative Commons and already adopted by Europeana⁹, is the major example of a standard (and machine readable) tool for labeling Public Domain content and data.

In recital 18 of the proposed amendment the Commission indicates that it will:

⁵ <http://freedomdefined.org/Definition>

⁶ <http://creativecommons.org/publicdomain/zero/1.0/>

⁷ <http://creativecommons.org/licenses/by/3.0/>

⁸ <http://creativecommons.org/publicdomain/mark/1.0/>

⁹ http://www.europeana-libraries.eu/c/document_library/get_file?uuid=7714fba6-0619-42bd-b346-5bdc6f9d7868&groupId=10602

[...] assist the Member States in implementing the Directive in a consistent way by giving guidance [...] on recommended licensing conditions [...] after consulting interested parties.

In the light of the concerns expressed above COMMUNIA is certainly interested in further discussing recommended licensing conditions with the Commission and other interested parties.

Public Domain Content held by libraries, museums and archives

As noted above COMMUNIA fully supports the decision to include cultural heritage institutions (libraries, museums and archives) into the scope of the amended PSI directive. This decision will improve citizens access to our shared knowledge and culture and should increase the amount of digitized cultural heritage that is available online.

The amended directive makes it clear that documents held by cultural heritage institutions can only be made available when there are no third party intellectual property rights in such document (of course, this assumes that third party rightsholders do not wish to share documents, which may not be the case). However the exact formulation of the amended article dealing with the works held by cultural heritage institutions fails to properly include the biggest category of such works. Article 3.2 reads:

For documents for which libraries (including university libraries), museums and archives have intellectual property rights, Member States shall ensure that, where the re-use of documents is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV.

This formulation includes documents where the intellectual property rights rest with the institutions that have these documents in their collection, but it does not include all those documents that are not covered by intellectual property rights because they are in the public domain.

Compared to the amount of works in the Public Domain that are held by cultural heritage institutions, the amount of works for which these institutions have intellectual property rights is tiny. With this in mind, the first priority of the amended PSI directive should be to ensure that works that are in the Public Domain should be re-usable for both commercial and non-commercial purposes.

This would be in line with the position of the Commission with regard to Public Domain works as expressed in the Commission recommendation on the digitisation and online accessibility of cultural material and digital preservation from 28 October 2011. Recital 13 of the recommendation states that:

In order to allow wide access to and use of public domain content, it is necessary to ensure that public domain content remains in the public domain once digitised. The use of intrusive watermarks or other visual protection measures on copies of public domain material as a sign of ownership or provenance should be avoided.

Explicitly including Public Domain content (documents) held by libraries, museums and archives in the re-use obligation of the amended PSI directive will strengthen the Commission's position with regard to access and re-use of Public Domain content and is fully in line with the international obligations set out in recital 7 of the proposal to amend the directive¹⁰. COMMUNIA therefore proposes to add language to article 3.2 that clearly indicates that documents held by libraries (including university libraries), museums and archives that are in the Public Domain fall within the scope of the re-use obligation established by the amended directive:

For documents for which libraries (including university libraries), museums and archives have intellectual property rights, **or which are in the Public Domain**, Member States shall ensure that, where the re-use of documents is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV.

As mentioned above, in order to reduce uncertainty and encourage re-use, documents which are already part of the Public Domain should clearly be labeled as such, using standard tools such as the Public Domain Mark, and this should be reflected in guidelines and collections of best practices.

Further Harmonization required

In addition, the Commission should in the future harmonize rules for re-use of Public Sector Information with those ensuring Open Access - for instance to

¹⁰ Recital 7 explicitly acknowledges that fact that Public Domain content can be included within the scope of the directive without violating international obligations (emphasis ours): '... If a third party was the initial owner of a document held by libraries (including university libraries), museums and archives *that is still protected by intellectual property rights*, that document should, for the purpose of this Directive, be considered as a document for which third parties hold intellectual property rights.'



scientific works. Currently, works held by libraries, museums and archives that fall out of PSI re-use regulation due to intellectual property rights held by third parties in some cases will be made available under Open Access rules. A harmonization of the PSI re-use regime with copyright-based requirements for openness would extend the open standards proposed in the amendment to a greater range of public resources than just Public Sector Information, as it is currently defined.

For further information please contact the COMMUNIA Association's PSI working group at communia.association@gmail.com.