SOME CONTEXT

IN A NUTSHELL

Cultural Heritage Institutions will be able to digitise, distribute and make available to the public works in their collections that are out of commerce.

Through an extended collective license or an exception.
Breaking down articles 8-11
Out of commerce works

DEFINITION

- No longer in commerce, or never in commerce
- Any type of content
- Notes about translations, versions, limited number of copies...
- Collections predominantly consisting of works by EU nationals
- Cut-off date possible
Out of commerce works

OWNED OR PERMANENTLY HELD BY THE CHI

- In a cultural heritage institutions
- Result of a transfer of ownership or a license agreement
- As part of its legal deposit obligations or permanent custody arrangements
- etc.
Out of commerce works

REASONABLE EFFORT

- To determine whether the work is in or out of commerce
- By CHI, or other (to be defined at MS level)
- "Low" effort
- No need to happen repeatedly over time
- Does not require a work-by-work assessment
- Does not require search to be conducted in other MS, unless reasonable
- Should take account of easily accessible evidence of upcoming availability of the work
Permitted uses under license/exception

- Reproduce, distribute, publish online OOCW (with some particularities in the case of the exception)
- In non-commercial platforms
- For non-commercial purposes
- Cross-border applicability
- No further re-use
License vs Exception

Extended collective license through a CMO

Unless no sufficiently representative CMO exists for the rights and type of work

Exception or limitation to copyright
License vs Exception

SUFFICIENTLY REPRESENTATIVE CMO

- Up to each member state, but based on...
- ...significant number of rightholders...
- ...in the type of works ...
- ... having given a mandate allowing the licensing of the relevant type of use
# License vs Exception

**SUFFICIENTLY REPRESENTATIVE CMO**

<table>
<thead>
<tr>
<th>Type of work</th>
<th>CMO representative for...</th>
<th>Sufficiently representative for...?</th>
<th>Sufficiently representative for...?</th>
<th>Sufficiently representative for...?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Books, journals, newspapers</td>
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<td>🔴</td>
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<tr>
<td>Reproduction &amp; distribution</td>
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<tr>
<td></td>
<td>Newspaper ✓</td>
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<td></td>
<td>Distribute &amp; posting online ✗</td>
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</tbody>
</table>

**Type of work**
- Books, journals, newspapers
- Personal letters and postcards
- Newspaper

**Types of use**
- Reproduction & distribution
- Distribution
- Distribute & posting online
License vs Exception

Is it a collection of OOCWs?

yes → Is there an representative CMO for the type of works that can issue a license?

no → The collection cannot be made available online

no → The collection can be made available online relying on the exception

yes → The collection can be made available in accordance with the terms of the license

The intention to make the collection available needs to be published in the single public online portal. Rightholders have 6 months to object / opt-out.
Other provisions

SECTOR-SPECIFIC STAKEHOLDER DIALOGUES

- Between CHIs, CMOs and rights holders
- Sector-specific
- To consult them on conditions according to which a work shall be considered OOC
- To foster the relevance and usability of the licensing mechanisms
Other provisions

OPT-OUT BY RIGHTSHOLDERS

- To exclude their works from the uses being made under the license or the exception
- CHIs should stop distributing and communicating to the public the work

PUBLIC SINGLE ONLINE PORTAL

- To gather information on OOCW
- Information posted 6 months before work is used
- Ready by June 2021
How to implement articles 8-11
Best implementation of the Directive

WORKABLE, CLEAR AND BROAD DEFINITION OF OOCW

- Participate in the stakeholder dialogues
- Cut-off date
- “Low” reasonable effort
- Keep the positives
  - If availability of translations, OOC
  - Limited availability, OOC
  - Sets that predominantly consist of works of non-EU countries, not OOC

- Go beyond
  - Permanently in the collection to include long-term loan
  - If availability of versions, editions, manifestations, not OOC
  - Determination of the OOC should not depend on availability of works embedded in the main work
Best implementation of the Directive

CLARITY ON LICENSE vs EXCEPTION

- How to consider a CMO sufficiently representative
- Definition of the “type of works” that a CMO covers
Best implementation of the Directive

STAKEHOLDER DIALOGUES

- Key discussions around the definition of OOC and licenses
- Good understanding of opportunities in the Directive & the collective management landscape
- Broad representation of all types of CHIs
- Participate constructively
- Advocate for transparency and good practice by CMOs
Approaches at the national level
THE NETHERLANDS

- GLAMs consulted by the government
- No definition of out of commerce beyond the Directive’s definition (tbd through secondary law), of sufficient representativity or of type of works
- CMO act also amended to include OOCWs licenses in the scope of the supervisory authority for CMOs
BELGIUM

- GLAMs consulted by the government
- The exception does not include the distribution right, the license does
- No definition of out of commerce beyond the Directive’s definition
- CMO appointed to be representative of other CMOs [through secondary law]
- Possibility that secondary law defines additional publicity measures other than the EUIPO single online portal
CROATIA

- Clear reference to never in commerce works
- Clear possibility to use sampling or similar proportional mechanism to determine OOC status
- Opt-out through an explicit written statement
“Reasonable effort” to be conducted by the CHI

Establishes cut-off date for “literary works published on or before 31 August 1999” and an “in commerce” presumption for “literary works less than five years after their publication”