

# Re-use of public sector information in cultural heritage institutions

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**Summary:** If Member States are not careful, the implementation of the changes required by the new Directive could do more harm than good to cultural heritage institutions.

A decade ago the European Union established rules for the re-use of public sector information. [Directive 2003/98/EC on the re-use of public sector information](#) (Directive) went into effect on 31 December 2003. It was designed to encourage EU Member States to make information and resources that they produce and collect reusable to the greatest possible extent. Re-use rules have been devised as complementary to the citizens' rights of access to public sector information, which remains regulated by national law. And while access is often seen as a basic civil right, re-use is considered an economic right. Beyond fuelling the innovation and creativity that stimulate economic growth, open public sector information also empowers citizens, thereby enhancing participatory democracy and promoting transparent, accountable and more efficient government. From this perspective, public sector information, when re-used, becomes the basis for added economic, civic, and social value, as recognized by the same Commission.

The 2003 Directive included in its scope information held only by some public sector bodies such as ministries, states agencies, municipalities and organisations funded for the most part by, or under the control of, public authorities. It explicitly excluded cultural, scientific and educational institutions and their resources<sup>1</sup>.

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<sup>1</sup> See Article 2.1 (f) which states that 'this directive shall not apply to ... documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres'.

## Re-use of cultural heritage resources

In June 2013 the Directive was amended<sup>2</sup>. The new rules on re-use of public sector information place museums, libraries and archives within the scope of the Directive. However, information held by institutions such as orchestras, operas, ballets and theaters are not included in the scope of the Directive<sup>3</sup>, and the same holds true for Public Broadcasting Organisations even though they tend to have sizable archives.<sup>4</sup>

While some of the rules for cultural heritage institutions vary from the general PSI re-use rules, the rationale for including these institutions under the Directive is similar: cultural heritage resources are seen as objects on which added value can be built for commercial gain and the public benefit. **These new rules on re-use of heritage materials, treated as public sector information, attempt for the first time to define a general framework for sharing cultural heritage information all around Europe.**

The amended Directive introduces a number of new features, one of which is the important “re-useable by default” rule. This rule provides that all the information already accessible under national laws also will be considered re-usable.

Cultural heritage institutions may take advantage of a specific exception to the general rule<sup>5</sup> in that they may choose whether or not to make documents for which they hold intellectual property rights available for re-use. However, when these documents are generally accessible, they must be re-usable for commercial or non-commercial purposes in accordance with the conditions established by the Directive for other documents held by cultural heritage institutions.

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<sup>2</sup> By [Directive 2013/37/EU amending Directive 2003/98/EC on the re-use of public sector information](#)

<sup>3</sup> Article 2.1 (f) of [the consolidated directive](#) now states that 'this directive shall not apply to ... documents held by cultural establishments other than libraries, museums and archives'

<sup>4</sup> While the scope of cultural institutions covered by the new regulation seems quite clear, doubts arise in the case of institutions that are not explicitly referred to as a libraries, archives or museums, but that accumulate cultural resources. For example, the Polish National Filmotheque is a film archive, but formally not defined as such. Since the scope of the Directive is to increase the availability of heritage collections, it should be interpreted as to include those institutions that despite a different *nomen* carry out the same function.

<sup>5</sup> Article 3.2 of the consolidated Directive, the general principle is laid down in Article 3.1

Cultural heritage resources are already being shared by cultural heritage institutions in all EU Member States<sup>6</sup>. However, the practice depends on the policies, funds, resources and efforts of a given institution. In this regard, the implementation of the new Directive is not expected to cause any revolutionary changes. Yet, if implemented correctly, the Directive can lead to the establishment of Europe-wide standard rules for the availability of cultural resources, and increase the scale at which cultural heritage information is shared. On the other hand, an implementation contrary to the spirit of the Directive could lead to the creation of unnecessary hurdles to the re-use of public sector information, which would frustrate the very principle that inspired both the 2003 and updated 2013 Directives.

### **Charging for re-use**

The Directive establishes a number of conditions that apply to the re-use of documents falling within its scope, such as the principle of non-discrimination and rules related to charging for re-use of documents. In principle, the new Directive limits charging for re-use to cover only "marginal costs" – the costs necessary to make the resources available. However, some public institutions are "required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks or of the costs relating to the collection, production, reproduction and dissemination of certain documents made available for re-use," and thus are permitted to charge above the marginal cost.

The Directive states that libraries, museums and archives are explicitly allowed to charge above marginal cost, but charges "should not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment." In the past, the allowed level of such return on investment has been ambiguous. The EU legislator indicates that "the prices charged by the private sector for the re-use of identical or similar documents could be considered when calculating a reasonable return on investment". This means that the Directive allows cultural institutions to make profit by supplying and allowing re-use of their resources<sup>7</sup>.

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<sup>6</sup> [Europeana.eu](http://Europeana.eu) alone brings together more than 30 million objects from more than 2500 institutions from all 28 Member States.

<sup>7</sup> This is further explained in the recent "Commission notice — [Guidelines on recommended standard licences, datasets and charging for the re-use of documents](#)" it is pointed that return on investment can be understood as a percentage allowing for recovery of the cost of capital and inclusion of a real rate of return (profit). Guidelines refer also to comparing prices to commercial players in a comparable market and conclude that since public cultural institutions do not bear the business risk the way the private sector does,

## Third party intellectual property rights – limitations of the scope of the Directive

The Directive limits the type of information that falls within its scope of protection in relation to the existence of **third party** intellectual property rights. Documents for which third parties hold intellectual property rights such as copyright, as well as related or neighbouring rights and *sui generis* forms of protection, are explicitly excluded.<sup>8</sup>

Another case of exclusion is for documents protected by “industrial property rights”--defined as patents, registered designs and trademarks. In this case the exclusion is **absolute**, as it operates irrespective of the right holder. In other words, no obligation to allow re-use applies when a document is covered by an industrial property right --including those cases where the right holder is the same library or museum.

As the result of the abovementioned two cases of exclusion, documents held by cultural heritage institutions are included in the scope of the Directive only if they are in the public domain (because they were never protected by copyright or because copyright has expired) or if the cultural heritage institution is the (original or derivative) right holder of the intellectual property rights. For documents that are in the public domain the general rule applies (documents must be re-usable if they are generally accessible) whereas for documents for which the institution in question holds the copyright the derogatory rules of Art. 3(2) applies: the institution can decide if it wants to allow re-use or not. If re-use is allowed, it must follow the general requirements of transparency, non-discrimination, and the specific limits on the charging policy (see below).

Documents whose intellectual property rights belong to third parties, but of which a specific copy is held by a cultural heritage institution, are excluded from the Directive as established by Recital 22 and Art. 1(b), and accordingly there is no obligation to allow re-use.

Unfortunately, Recital 9 of the 2013 Directive introduces some uncertainty, as it could be interpreted to imply that any document held by a library but *originally* owned by a third party whose term of protection is not yet expired should be considered a document for which third

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a “reasonable” rate of return would be “slightly above the current cost of capital but well below the average rate of return for commercial players, which is likely to be much higher due to the higher level of risk incurred”.

<sup>8</sup> Rights covered include performers’ performances, sound recordings/phonograms, broadcasts of broadcasting organizations and first fixations of films, as well as the *sui generis* database right and other related rights created or allowed by the EU legal framework (such as scientific and critical editions, non original photographs, published editions, typographical arrangements, etc).

parties hold an intellectual property right, and therefore could be excluded from the scope of the Directive. This reading is contrary to the provisions established in Article 3 and contradicts the overall objectives and principles enshrined in the Directive (to open-up public knowledge for re-use). It would further create an unjustified limit to the re-use of public information in absence of any explicit merit or logic, and in clear contradiction with the legislative history and legal background of the Directive.<sup>9</sup>

Given this potential for confusion, it is important that Member States implement the 2013 Directive in line with the rules laid down in Article 3. This means that all documents for which the institution holds the relevant intellectual property rights are subject to the discretionary decision to allow re-use. If re-use is granted then the cultural heritage institution will be subject to the other conditions established by the Directive. This also applies to documents that have been acquired by public institutions for their collections from third parties, provided that the intellectual property rights have also been transferred to the institution (or other similar agreement to the same effect has been made).<sup>10</sup> Recital 9 should be interpreted as meaning that documents are outside of the scope of the directive when the cultural heritage institution holds a document for which they do

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<sup>9</sup> Recital 9 speaks of third party rights insisting on documents held (not owned) by university libraries, archives or museums. The reference is clearly to works protected by a copyright owned by a third party, and for which the library or museum has only acquired the physical ownership of a copy, or in any case a mere right to display or lend the document. Cases where the library does not hold the document but owns it - meaning they are the copyright right holder - are therefore clearly excluded by the scenario of Recital 9.

<sup>10</sup> This view is supported by the [legislative history of that provision](#). Nowhere in the different proposals, drafts and amendments that lead to the 2013 Directive is suggested a reading or interpretation that would significantly derogate from the overall scope of the Directive. In particular, previous versions of current Recital 9 of the 2013 Directive, were drafted in a lengthier and somehow redundant language, which nonetheless was clearer, as it set forth the principle of “strict necessity” which is the real, now hidden, function of the Recital. Recital 7 of the Explanatory Memorandum (which corresponds to Recital 9 of the 2013 Directive) had an opening text which we report for the convenience of the reader: “Directive 2003/98/EC should therefore lay down a clear obligation for Member States to make all generally available documents re-usable. As it constitutes a limitation to the intellectual property rights held by the authors of the documents, the scope of such a link between the right of access and the right of use should be narrowed to what is strictly necessary to reach the objectives pursued by its introduction. In this respect, taking into account the Union legislation and Member States' and Union's international obligations, notably under the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), documents on which third parties ...”.

It must also be observed that any different reading would clearly envisage a contradiction between Recital 9 of the 2013 Directive and Art. 3. Suffice to recall here that Recitals “cannot be relied on as a ground for derogating from the actual provisions of the act in question”.

not simultaneously hold the intellectual property rights, including the situation where a third party rightholder is unknown.<sup>11</sup>

### **Public domain and public sector information**

Overall, the Directive is in line with the current trends in regard to digitization of cultural resources held by public institutions. Oftentimes these digitization projects focus on works in the public domain and works for which institutions own the relevant intellectual property rights. For both financial and practical reasons, cultural institutions have been mainly digitizing out-of-copyright works. While the Directive will not change this situation, it could produce a negative effect on the availability of public domain works to the general public.

The current best practice with regard to digitization of public domain materials by cultural heritage institutions is to make these materials available for free and without restrictions on re-use<sup>12</sup>. The digitization of public domain works has been an important driver for the nascent open data movement in the cultural heritage sector.

From a copyright perspective, cultural heritage institutions that decide to make public domain works available under conditions that limit or regulate their re-use would frustrate the inner balance between public and private interests supposedly created by copyright law. Again, the Directive does not, and cannot, change this inner balance of copyright law. Yet a superficial extension of the Directive to works held by cultural heritage institutions would produce the unwanted effect of introducing new barriers--mainly financial ones. Charging will affect the re-use of public domain works and consequently damage the balance established by the temporal nature of copyright.

As outlined above, the Directive provides cultural heritage institutions with the ability to charge for the re-use of works that they make available for re-use. While this may be a useful strategy for some institutions to recover a portion of their costs, there are many cases where charging for re-use will limit access to and re-use of the resources in question<sup>13</sup>.

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<sup>11</sup> Orphan works are therefore excluded from the general re-use rule. Orphan works are now object of the specific provisions contained in Directive 2012/28/EC on certain permitted uses of orphan works.

<sup>12</sup> See [Europeana's Public Domain Charter](#) or the [image re-use policy of the Rijksmuseum](#)

<sup>13</sup> See for example the '[Yellow Milkmaid](#)' [white paper](#) published by Europeana in 2011 or the above mentioned image re-use policy of the Rijksmuseum.

## No charging requirements

Accordingly, national legislatures implementing the Directive should be careful not to encourage or require institutions to charge for the re-use of works that they make available for re-use<sup>14</sup>. Adding charging requirements (or encouraging them) could undermine the public domain, limit online access to and re-use of cultural heritage resources, and damage the nascent open culture data ecosystem.<sup>15</sup>

When applied to cultural heritage resources that have entered into the public domain such requirements would have the effect of prolonging the access limitation created by the duration of copyright protection--already considered to be too long by many stakeholders. These charging requirements, if implemented improperly, have the potential to undermine the overall objective of the Directive (increasing re-use of resources held by public institutions).

Works made available for re-use by cultural heritage institutions should be available freely, as any fee for re-use, even a fee to cover marginal costs, will severely limit the scale of re-use. And such fees are very unlikely to ever provide a substantial contribution to institutional budgets.

## Licensing

The recitals of the 2013 Directive and a recently published "[Guidelines on recommended standard licences, datasets and charging for re-use of documents](#)" put a lot of emphasis on the use of standard open licenses. Open licenses, such as the Creative Commons licenses, build on copyright and as a result their attachment to works that are out of copyright produces no effects. As a result open licenses are not usually enforceable when applied to material that is in the public domain, the arguments in favor of standard licenses<sup>16</sup> apply equally to standard tools

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<sup>14</sup> An existing example of Public Sector Information legislation that encourages institutions to charge for re-use of public domain works that they make available is the [French law on access and reuse of public sector information](#), which has the effect that public domain works available via portals like Gallica [cannot be used for commercial purposes without obtaining a license](#).

<sup>15</sup> It should be noted that the Directive defines maximum level of charges and that the first implementations of the amended Directive into national laws often define lower limits.

<sup>16</sup> According to the Commission's Guidelines, "open standard licences, for example the most recent Creative Commons (CC) licences (version 4.0), could allow the re-use of PSI without the need to develop and update custom-made licences at national or sub-national level. Of these, the CC0 Public Domain Dedication is of particular interest. As a legal tool that allows waiving copyright and database rights on PSI, it ensures full flexibility for re-users and reduces the complications associated with handling numerous licences, with possibly conflicting provisions."

for marking public domain works, such as the [Public Domain Mark](#) and the [CC0 Public Domain Dedication](#).

Open licenses (especially those that comply with the [Open Definition](#)) should be used when making available metadata and documents for which the copyright lies with the cultural heritage institution in question. In addition to the Guidelines published by the Commission, Member States are well advised to stress the importance of these standard legal tools when implementing the Directive.

### **Non-discrimination**

The Directive requires that all conditions attached to the re-use of documents shall be non-discriminatory for comparable categories of re-use and that the re-use shall be open to all potential actors in the market. To fully release the potential of open data and to stimulate the development of new services, re-use should be open to all on equal footing. This means that institutions cannot grant access to certain categories of users but refuse it to others, or enter into exclusive agreements with selected partners. However, the Directive contains one important exception that allows exclusive contracts for cultural heritage institutions engaging in digitization projects. The Directive specifies that such agreements should be limited in time and as short as possible, with a maximum duration of 10 years<sup>17</sup>.

### **Recommendations for Implementation by Member States**

As we have explained above, the the ongoing implementation process in the Member States poses a number of potential pitfalls. If Member States are not careful, the implementation of the updated Directive could do more harm than good to the availability of cultural resources held by Europe's cultural heritage institutions. Member States implementing the Directive must pay attention to the the following three issues:

1. Member States should implement the Directive in line with the principles established by Article 3 and ensure that all documents that are not currently covered by third party intellectual property rights fall within the scope of the Directive.

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<sup>17</sup> There is however an exception to this rule: "In the case when the period exceeds 10 years, its duration shall be subject to review during the 11th year and, if applicable, every seven years thereafter." wich theoretically allows for exclusive contracts with an indefinite duration.



2. Member States must not implement the Directive in such a way that encourages or requires institutions to charge for the re-use of works that they make available for re-use. The decision to charge for re-use must be up to the individual institutions. If this is not the case the Directive will limit access and re-use of the public domain.
3. For documents that are still protected by intellectual property rights but where these rights are held by the cultural heritage institutions that have these works in their collections, Member States should encourage the use of Open Definition-compliant licenses, such as the Creative Commons licenses or the Creative Commons Zero mechanism. This applies in particular to metadata produced by cultural heritage institutions, in the limited cases where these metadata can attract copyright (such as long form descriptions of cultural heritage objects).<sup>18</sup>

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<sup>18</sup> Metadata usually represent factual information such as titles, names, and dates. The standard for copyrightability in the entire European Union for any category of works is the “author’s own intellectual creation” which is present when the author makes free and creative choices and puts his or her personal stamp in the work. When an output is constrained by technical and factual rules, there is little to no space for free and creative choices, reducing the possibility of protected works only to those metadata that can show personal, free and creative choices. See also Dr. Till Kreutzer, ['Validity of the Creative Commons Zero 1.0 Universal Public Domain Dedication and its usability for bibliographic metadata from the perspective of German Copyright Law'](#), (2011) for a discussion about the protectability of metadata published by cultural heritage institutions