



# MASS DIGITISATION OF PUBLISHED & UNPUBLISHED OUT-OF-COMMERCE WORKS

Articles 8-11 of the Digital Single Market Directive introduce a ‘hybrid exception’ to copyright. It allows libraries and other cultural heritage institutions to digitise and place their published and unpublished out-of-commerce (OOC) works online — once these works have been ‘advertised’ for at least six months on the EU Intellectual Property Office’s website, in order to check their commercial availability. Rightsholders may block the use of their works at any time.

The exception only applies when no collecting society — also known as a Collective Management Organisation (CMO) — exists which is sufficiently representative of creators in the sector of the works intended for digitisation. Even if CMOs do exist and are representative of creators in the sector, they must have the rights to allow cultural heritage organisations to make OOC works available across the open web. If they do not, the exception can still be used.

## Key Points

### *Exception for Mass Digitisation*

The exception can be used if:

- There is no CMO representing the type of work intended for digitisation; or
- The CMO is not viewed by government as being representative of the type of work intended for digitisation; or
- They are representative of the works but are unable to offer a library a licence which allows them to put their OOC works on the open web.

If the collecting society can legally offer a licence to a library for this purpose but decides not to do so, the exception cannot be used.

### *Checks for Commercial Availability of Published and Unpublished Works*

This should be reasonable and proportionate, depending on the information at hand. Item-by-item checks are not needed, unless it would be reasonable to carry them out. Sampling may be acceptable. The possibility of a work being licensed at some theoretical point in the future or it being available in another language does not mean it is an in-commerce work.

### *Works Beyond the European Union (EU)*

In-copyright works from countries outside the EU can be digitised if made by film or music companies with headquarters in the EU. For other types of collections, these rules apply when a ‘predominant’ share of works are from the EU. It is not necessary to be certain that all works are by EU nationals.

### *Online Access Across the EEA*

The exception allows lawful access across the EU. If a licence is extended by a CMO, the geographic scope will depend on what the licence states.



### *Remuneration*

The licence will usually be subject to payment but the directive is silent on remuneration under the exception.

### *Whole Physical Work*

The whole physical work being digitised must be out-of-commerce. It does not matter if works embedded within the physical work being digitised are still commercially available.

## **Recommendations For Discussion With National Legislatures**

National governments have considerable leeway in introducing the Directive. Libraries should engage in this process. This provision in particular envisages stakeholder dialogue with rightsholders. We recommend that libraries emphasise the following issues:

### *Clarity Over When to Use the Licence*

Libraries should repeatedly underline that the exception applies when the CMO a) is not representative **and** b) does not have the rights to offer cultural heritage institutions a licence to put commercially-unavailable materials on the open web. Unless both of these conditions are fulfilled, the exception applies. The majority of CMOs are currently unlikely to have both of these rights.

### *Timely Licences*

It is anticipated that CMOs will want to offer licences for OOC works where they can. The legislature should set a specific period of time within which a licence must become available once the CMO says it will offer a licence. Such an intention by a CMO should be formalised in writing for all concerned parties. A period of 12 months from a written statement should be sufficient for a licence to be put in place. If no licence is in place by the end of this period, then the exception should apply.

### *Reasonable Commercial Checks*

Only easily-accessible sources should be consulted to determine the OOC nature of a work. It is important to avoid the complexity in the rules around defining Orphan Works, as this complexity means that those provisions of the Directive are little used.

### *Licence Content*

If a licence is used for mass digitisation, the licence should cover a) a fully comprehensive indemnity for the library and b) a commitment **not** to override library exceptions relating to reproduction, preservation and the dedicated terminals exception. These uses should still be permissible if the licence is withdrawn.

### *Retrospective and Prospective Remuneration*

If an exception is used and a licence subsequently issued, the legislature should make it clear that retrospectively no remuneration is payable. In addition, a period of 12 months free should be granted from when the licence is available so that the library can decide whether to use the licence, remove the works or to clear licences directly with rightsholders — allowing some (if not all) of the digitised works to remain online.