inDICEs

Measuring the Impact of Digital Culture

Deliverable 2.1 & 2.2

Intellectual Property Rights for CHIs in the Digital Single Market - a comparative analysis - Summary

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Intellectual Property Rights for CHIs in the Digital Single Market - a comparative analysis

A Summary of Deliverables 2.1 and 2.2 / WP2: Comparative cross-national legal analysis (IP-centric)
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Our goals within the inDICEs project are, first of all, to provide an in-depth overview of the IP legal framework which is relevant for the activities of CHIs. Secondly, we aim at delivering a comprehensive assessment of the current and upcoming framework for CHIs. Third, our ultimate goal is to evaluate whether the current framework impedes or enhances the CHIs' activities in the Digital Single Market while providing recommendations to policy and law-makers.

Our two first deliverables focused on providing an overview - D2.1 '*Mapping of the relevant European IP legal framework*' – and a comparative analysis in selected Member States - D2.2 '*Legal comparative analysis for multi-level relationship involving CHIs*', of the current relevant IP rules that impact CHIs' activities in the Digital Single Market. Both deliverables are embedded in *Task 2.1: Comparative analysis of the applicable European IP legal framework to CHIs in the DSM*. In these deliverables we review the IP provisions relevant for the activities of CHIs at the EU level and within the following jurisdictions: Belgium, France, Lithuania, Poland, Spain and Sweden. Special attention has been given to the recently adopted CDSM Directive, provisions of which are being currently implemented by EU Member States.

CHIs and the online environment: an IP perspective

We start our analysis from assessing the relevance of intellectual property rights ('IPRs') for the cultural heritage sector. In particular, in the deliverables special attention is devoted to the core CHIs' activities such as the preservation of works that CHIs (e.g. museums, libraries or archives) hold in their collections, as well as the access to those works and their further dissemination.

On the general level, international conventions provide IP protection for original works and safeguard moral and economic interests of authors of those creations. IP protection may however, restrict the distribution of works which may be in conflict with the public interest of

sharing and getting access to culture or science. This goal of promoting access to culture and cultural heritage is at the core of the mandate given to public CHIs in national legislations

The **development of new technologies** have significantly transformed the traditional activities of cultural industries. In particular, they have facilitated the dissemination and re-use of cultural content through the internet but also the creation of new works. These new works could be created in a tangible format and then uploaded on the internet but could also be just born in digital format. The latter works could also be based on pre-existing works that may be protected by copyright owned by a third party. This matter is of particular relevance for CHIs. In order to operate in the digital environment, CHIs need to engage in the digitization of works in order to share their works across borders. The need to give access to works in digital format has posed multiple challenges for CHIs.

Furthermore, the digital revolution has brought new challenges for the creators of the works. The access to and dissemination of cultural content became much easier in the online environment. Digital works are more vulnerable and the risk that works are stolen, lost or damaged is also higher.

Whereas all these named opportunities and challenges are not new, many of the IP challenges they raise remain unresolved or uncertain at EU level, notwithstanding attempts of harmonization, such as the most recent Copyright in the Digital Single Market Directive[1] ('CDSM'). Such legal uncertainty may hamper the CHIs' missions in the Digital Single Market.

Intellectual Property Rights for CHIs

Trademarks and designs - While copyright remains undoubtedly the most relevant IPR for CHIs, other IPRs such as trademarks or designs are becoming increasingly important for cultural institutions. CHIs often create 'brands' in the form of logos, signs or names that could be monetized. For instance, the sales of products incorporating those 'brands' (including stationery, clothes or other fashion accessories) give the possibility for CHIs to generate extra income. Furthermore, trademarks and designs allow CHIs to obtain an extra layer of protection for works that are falling in the public domain. In addition, some CHIs have in their collection works that are protected by trademark or design rights e.g. clothes or fashion accessories.

Traditional Cultural Expressions - Some attention should also be given to works that qualify as 'Traditional Cultural Expressions' (TCEs). While remaining outside of the scope of IPR protection and, strictly speaking, being in the public domain, there are strong international debates claiming for a certain level of protection, especially for TCEs that originate from indigenous communities. Some authors consider that protection of this intangible cultural heritage could be made through its digitization within the collections of cultural institutions. In fact, some CHIs are

[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019.

in charge of the study, safeguarding and promotion of those artefacts, sound recordings, photographs or manuscripts, among others, which document the cultural expressions of particular communities. These recordings or photographs may also be protected by copyright or related right.

Patents - Finally, even though patenting CHI-related technologies (such as innovative processes and techniques for preservation or collections management) are gaining interest among large cultural institutions, overall it remains rather exceptional. For this reason, patent law has not been analysed in this study.

Copyright as the essential IPR for CHIs

Based on our research findings, it is evident that copyright protection plays an important role in the protection and dissemination of cultural heritage and cultural content. This is due to mainly two aspects:

- The scope of copyright protection has expanded considerably since its international acceptance in the Berne Convention, protecting a broad variety of works that ranges from written or visual arts works to digital works such as website designs or YouTube files.

- Copyright has become the main IPR that governs the new technologies and the internet and hence, copyright law plays a crucial role in the dissemination of content within the Digital Single Market.

Legal and comparative analysis: an overview

Since copyright has been identified as the main IPR impacting CHIs' activities, the core of our two reports centered around mapping and analyzing the CHI-relevant copyright-related provisions addressing or impacting the cultural heritage sector. The EU legal provisions are addressed in D2.1, whereas D 2.2 is dedicated to a comparative analysis of national laws of six selected Member States.

General copyright features. In our first report, we first draw attention to the copyright law system from an international perspective i.e. the Berne Convention[2]. We start by analyzing the core copyright concepts and features which, by nature, may complicate the operations of CHIs.

Copyright is an **unregistered right** and the Berne Convention outlaws any formal requirement for granting copyright protection. Hence, the lack of formal requirements makes it very difficult

[2] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, 1971 25 U.S.T. 1341; 1161 U.N.T.S. 3 (the Berne Convention).

for CHIs to clear all the necessary rights of the works in their collections as there is no copyright registry, contrary to other IPRs, such as patents or trademarks. This is particularly problematical in relation to orphan works or out-of-commerce works where locating the rightholder may be especially complex.

Another feature that further complicates online and cross-border exploitation models is the **territorial nature** of copyright. We should not forget that copyright protection is regulated at the national level and, hence, such protection (and its enforcement) is restricted to the boundaries of each national jurisdiction.

Furthermore**, the term of copyright protection**, which in the EU, is (in principle) granted for the life of the author and 70 years after his death. The term of protection of neighbouring rights amounts to 50 years after the date of performance, fixation (performers) or first transmission (broadcasters)[3].

Questions around **ownership and authorship** of the exclusive rights (economic and moral rights) may also render the 'clearance of rights' difficult for CHIs. CHIs need to have the rightholder's authorization in order to make use of a third party in-copyright work within their collections (unless they can rely on an exception and limitation). Obtaining the authorization may be difficult, especially when it is not evident who the author of the works or the copyright owner is. This is an area which is far from being harmonised and requires a country-by-country analysis.

Exceptions and limitations. The introduction of exceptions and limitations within the copyright law system is intended to serve as a mechanism to balance between copyright protection and other fundamental rights or public-interest missions. Since museums, libraries and archives are considered as 'the guardians' of our cultural heritage, the protection of authors needs to be balanced with the CHI's public mission of preservation and dissemination of culture and knowledge.

Exceptions and limitations are particularly relevant for CHIs given that, on the one hand, their mandate is at the core of the public interest and, on the other hand, the clearance of all necessary rights may be costly and time-consuming. At the EU level, the Infosoc Directive[4] constitutes the main legal instrument in the EU acquis as it provides one mandatory exception and a closed list of optional exceptions and limitations. Yet, other exceptions can be found in other EU legal acts and in the new CDSM Directive.

[3] There are exceptions for music performers and music producers, Directive 2011/77 has prolonged this term by 20 years.

[4] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Our studies discuss in depth the most relevant exceptions for CHIs at the EU level and provide a comparative analysis on whether/how the following exceptions and limitations have been implemented in the assessed national jurisdictions:

- The *preservation exception*[5] allows to make copies of works in collections of CHIs. While this exception has been implemented in all the studied Member States, there are still several divergences in the implementation of the exception, especially with regard to beneficiaries. The differences in the implementation has been acknowledged by the EU legislator since the CDSM Directive provides for a mandatory exception aimed at CHIs with a broader scope for preservation purposes.

- The *research and private study standing in dedicated terminals*[6] *exception* permits the communication of works for the named purposes in the premises of CHIs. This exception, with a rather narrow scope, has not been implemented in all assessed Member States. Our research also reveals the lack of harmonization in the implementation of this exception, in relation to the scope, purposes and the beneficiaries.

- The *advertising the public exhibition or sale of artistic works exception*[7] allows certain institutions to reproduce and communicate to the public certain works only for the purpose of advertising public exhibitions or sales of the works. It results from our research that not all the analyzed Member States have implemented this exception. Moreover, there is a lack of clarification of the scope of this exception which may decrease its effectiveness. Not to mention that some Member States further restrict the application of this (already) narrow exception.

- The *text and data mining ('TDM') exceptions*, included in the new CDSM Directive, allow CHIs and research institutions to make reproductions and extraction of works for the purposes of scientific research. The CDSM Directive also introduces another exception without limiting the beneficiaries and the purposes and, hence, allowing commercial purposes. Yet, there is an opt-out mechanisms for rightholders that may limit the latter exception. While this exception needs to still be implemented at the national level, it results from our analysis that France had already introduced a much narrower TDM exception in their copyright system, although its application in practice remains uncertain.

[5] See Art. 5(2)(c) of the Infosoc Directive.
[6] See Art. 5(3)(n) of the Infosoc Directive.
[7] See Art. 5(3)(j) of the Infosoc Directive.

Technical Protection Measures - Furthermore, we also included in our first report an analysis of the **Technical Protection Measures**' ('TPMs') regime, which, while were first introduced in international conventions[8], are included in the *EU acquis* through the Infosoc Directive. TPMs may play an important role in the dissemination and access to cultural content given that the use of TPMs may compromise the possibility for CHIs to make use of the exceptions and limitations (at this stage TPMs are not so developed that can differentiate whether a particular use of a work is allowed by an exception). TPMs may be very heterogeneous as they could entail techniques for blocking the possibility of coping the work(s) or for preventing access to the works, such as encryption or other access controls, allowing only the legitimate person with a certain key or code to obtain access to the protected works.

Types of works. In both reports we have also analyzed the legal regimes in relation to specific types of works which are found in CHIs' collections. We focus our attention on the types which are especially problematic from IPRs-perspective. It results from our research that difficulties to clear the rights in respect of orphan works – the copyright holders of which cannot be found or located - and out-of-commerce works have always been a major concern for CHIs. Those challenges arise mainly due to the impossibility of carrying out mass-digitization projects given the vast amount of such works that CHIs hold in their collections. Orphan works and out-of-commerce works have been the subject of EU initiatives until the most recent CDSM Directive. In addition, we have also assessed the protection regime for databases since CHIs normally produce a number of catalogues of works and, the protection of photographs given its importance for the protection of digital surrogates.

- In an attempt to solve the problem for the uses of **orphan works** held in CHIs' collections, the EU legislator, in 2012, adopted the Orphan Works Directive which aimed at providing a solution for the uses of such works. Our comparative research shows that the this Directive has been implemented very closely in each of the jurisdictions assessed. However, the specified requirements that have to be complied with to declare a work as 'orphan', appear to be too burdensome and costly for CHIs, as a diligent search has to be carried out of each work.

- The problem for the **uses of out-of-commerce works** has not been tackled with until recently**.** The 2019 CDSM Directive has finally addressed this matter. In particular, the EU legislator has opted for a two-tier system consisting in: first, CHIs will be able to enter into licensing agreements with collective management organizations. Second, in case these licenses would not be available from the collective management organizations, CHIs will be allowed to use the out-of-commerce works by relying in an exception. This new regime

[8] TPMs were first introduced on the international level. See World Intellectual Property Organization Copyright Treaty (1996 December 20); World Intellectual Property Organization Performances and Phonograms Treaty (1996 December 20).

seems very promising for CHIs. However, these provisions still need to be implemented at the national level. Based on the comparative analysis, we observe that only two countries – Poland and France – had introduced a specific regime for the uses of out-of-commerce works. Nevertheless, these regimes have a much narrower scope since Poland only covers written works and France only addresses books. The use of an extended collective licensing system, included under the Swedish Copyright Act, has also been proven a successful solution for the uses of such works.

- In addition, we have also covered in our studies other types of works. For instance, we addressed the specific regime for **databases**. In the EU, databases are regulated under the Database Directive[9], which confers copyright protection to those databases that have a sufficient degree of originality, and a *sui-generis right* for those databases that do not merit copyright protection but are granted a lower level of protection as long as certain requirements are met. We observe from our comparative analysis that all the Member States assessed have implemented the Directive very closely, except Sweden, which had a longer tradition of protection for 'catalogues'.

- Due to the high interest around the protection of **digital surrogates**, we have also carefully analyzed the protection of non-original photographs. Non-original photographs are such photographs that do not meet the threshold of 'originality' and are, thus, not susceptible to copyright protection-. At the EU level, the Term Directive allows Member States to provide other kind of protection for such photographs.[10] This lack of harmonization leads to substantial differences in the scope and duration of protection of such photographs in the Member States. It results from our research that two of the jurisdictions assessed – Spain and Sweden- do provide a neighboring right for such works. Yet, even in these two countries there are differences in both the scope and duration of the protection of such exclusive right. Within the same context, the studies also look into the new provision introduced by the CDSM Directive in relation to **works in the public domain**.[11] While it only covers works of visual arts, this provision clarifies the protection of the reproductions of works in the public domain. Hence, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work cannot be subject to any exclusive right unless the material resulting from that act of reproduction is original and merits copyright protection. This provision still needs to be implemented at the national level.

[9] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[10] See Art.6 of the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
[11] See Art.14 of the CDSM Directive.

Non-harmonized areas of copyright law. The last relevant topics for CHIs that our reports address are the moral rights, the public lending derogation and the adaptation right. All these areas remain unharmonized at the EU level. While they were already important in the analogue world, our research demonstrates their relevance in the digital world. The reasons why they gain importance nowadays can be explained by two main factors. First, the works in a digital world are more vulnerable and, hence, the risk of being altered is higher than in the offline environment. Second, the broader re-use of cultural content in the internet increases the uses of in-copyright works and hence the number of authorizations needed.

- With regards to the **moral rights**, we observe that all Member States introduced the right of attribution and the right integrity in their legislation as a result of the international conventions. However, there is a broad variety of the types moral rights that can be granted within the jurisdictions assessed, i.e. the right of disclosure or the right of retraction. Further, not only there is a high heterogeneity among the moral rights but also great divergences in the scope, the interpretation and the term of protection of the moral rights.

- The **public lending derogation** was introduced in the *EU acquis* through the Rental and Lending Directive[12]. This derogation mainly precludes the authors from the exclusive right of lending in favor of libraries as long as the authors receive a compensation for the loan of their works. The Directive also permits the Member States to exempt certain establishments from the obligation to compensate the rightholders. Our comparative research demonstrates the lack of harmonization in this area given that Member States are free to determine the practical aspects of this provision. There are also great divergences in the compensation systems, the establishments benefiting from this derogation or the establishments that Member States exempt from the remuneration to the rightholders.

- Another area that is far from being harmonized at the EU level is the economic **right of adaptation.** In some Member States this right is included in a broad concept of the right of reproduction, while other Member States (namely Spain and Lithuania) address it as an independent right. Yet, the underlying principles governing this right are similar in all jurisdictions. First, the author of the derivative work always needs the consent of the author of the pre-existing work. Second, the derivative work may benefit from copyright protection as long as it meets the originality requirements.

Finally, in our comparative analysis we have identified certain **national copyright provisions** that may depart from the standard copyright laws and that may impact the uses of such works

[12] See Art.6(1) of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

made by the CHIs. For instance, there are rules that extend the term of protection of certain works such as posthumous works or the case of works created between the WWI and the WWII in France. There are also rules that grant the State a quasi-moral right once the author is dead. In particular, in France there is a provision preventing the abuse of the moral right of disclosure from the heirs of the author. Another example is found in Sweden where the State could request the Court to stop the reproductions of a work if it undermines the cultural interest.

The new CDSM Directive. Besides the already noted aspects, our research also revolves around other provisions of the CDSM Directive. For instance, we analyzed whether CHIs could be considered '**online content-sharing service providers'** and, hence, fall within the new liability regime. In our research we conclude that CHIs will not fall under the new regime. In addition, the new provision on **extended collective licenses** was also assessed since the application of this type of licenses may facilitate the uses of certain works for CHIs. Nevertheless, considering its optional character, Member States are given the liberty to decide to whether to introduce it in their copyright systems or not.

The Open Data Directive. Our research also focused on specific provisions of the Open Data Directive[13] given their relevance for the CHIs' activities. This Directive aims at promoting the use of open data and stimulating innovation in products and services. It also introduces minimum rules for the re-use of documents held by public sector bodies and research data subject to certain conditions. Among others, the Directive presents an interesting **rule on the re-use of works in the public domain.** Accordingly, the new Directive deviates from the general rule of non-granting exclusive rights for the re-use of documents to third parties when digitization of CHI's cultural resources is concerned. In particular, when CHIs digitize their cultural content through agreements with private partners, the Directive grants a certain exclusivity period during which the exclusive rights are granted to the private partners involved in relation to the digitization of cultural resources[14]. The Directive is still under the implementation process at national level.

Preliminary conclusions

- Our research demonstrates the existing fragmentation in copyright laws both at the EU and national levels. This fragmentation is not only due to the lack of harmonization of EU copyright law. We also observe great divergences among the Member States in relation

[13] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.
[14] See Art.12 of the Open Data Directive.

to the transposition of the copyright Directives in the (partially) harmonized areas. This lack of harmonization constitutes a significant hurdle for CHIs interested in fully benefiting from the Digital Single Market.

- This situation is particularly problematic in the field of the exceptions and limitations that CHIs can rely on. We observe a great disparity in the Member States in the choice of exceptions that are included within their copyright acts. Furthermore, even when the same exception is introduced in several Member States, the actual implementation of such an exception may significantly vary. This contributes to the problem of legal uncertainty for CHIs that can hamper exploitation of works in their collections, especially in the DSM.

- Yet, the EU legislator adopted the new CDSM Directive, as an attempt to remedy certain bottlenecks that copyright-related provision are causing to the access and the dissemination of cultural content and information. This Directive, a priori, seems to improve the legal framework by adding (or updating) certain exceptions for the benefit of CHIs.

- Besides exceptions and limitations, the uses of particular types of works such as orphan works or out-commerce works remain a concern for CHIs. Again, the new CDSM Directive seems to considerably improve the situation for the uses of out-of-commerce works. Its efficiency is yet to be tested.

- Another identified grey area is the protection of digital surrogates. While the protection of reproductions of works in relation to works of art in the public domain has been partially solved by the CDSM Directive, this area remains unharmonized, which complicates the situation of CHIs to provide access to their works in the digital environment.

- Finally, our research shows the high disparity in non-harmonized areas of copyright law and the problems they cause while transitioning to the online environment. Special focus has been given to the moral rights of the authors which may be perpetual in some jurisdictions. CHIs, therefore, must pay notable attention to the moral rights that may still prevail in the works in their collections.