



inDICES

# Measuring the Impact of Digital Culture

## Deliverable 3.5

A white paper with legal recommendations



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## D3.5 – A white paper with legal recommendations

Version 1.0

not containing the final recommendations for the entire project

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<b>Project co-ordinator name, Title and Organisation:</b>	<b>Simonetta Buttò, Director of the Central Institute for the Union Catalogue of the Italian Libraries (ICCU)</b>
<b>Tel:</b>	<b>+39 06 49210425</b>
<b>E-mail:</b>	<b>simonetta.butto@beniculturali.it</b>
<b>Project website address:</b>	<b><a href="http://indices-culture.eu/">http://indices-culture.eu/</a></b>

Authors: **dr Konrad Gliściński LL.M., Centrum Cyfrowe, Uniwersytet Jagielloński** (Assumptions for legal recommendations, Legal recommendations based on value chains analysis)

**Francisco Lima - KU Leuven** (Legal recommendations based on a comparative cross-national legal analysis)

Contributing partners: **Maria Drabczyk, Centrum Cyfrowe**  
**Ariadna Matas, Europeana Foundation**  
**Kristina Petrasova, NISV**  
**dr Alek Tarkowski, Centrum Cyfrowe**

Reviewers: **prof. Fred Truyen, KU Leuven**  
**dr Maria Tartari, IULM**

## Document History

- 20.12.2021 – Draft Version 0.1
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## Disclaimers

This version 1.0. of the White Paper is the version created on the basis of the results of work in the project to date. The views and recommendations presented therein are therefore of a temporary nature, and may change in the further course of the project. The final version 2.0. of the recommendation will be prepared at the end of the project, after collecting the final results of the research work in all the work packages. In particular, the final version 2.0. of the recommendation will be supplemented with the results of empirical research carried out under WP1 on re-use and analytical work on the legal evaluation of the applicable regulations carried out under WP2.

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# 1 Executive Summary

This deliverable - White Paper with legal recommendations - summarises legal recommendations resulting from the analysis conducted in the inDICEs project addressing the European Commission and other policy makers active in the field of cultural heritage. The White Paper consists of three main parts: assumptions for legal recommendations, legal recommendations based on the work performed through a comparative cross-national legal analysis (WP2), legal recommendations based on value chains analysis - an outcome of the policy analysis. The basis for the development of these recommendations was the analytical work carried out as part of the inDICEs project. An important point of reference for the recommendations presented here was the understanding of the socio-economic values generated in the area of digital cultural heritage following the Culture 3.0 paradigm, which blurs the boundaries between producers and users, and thus makes it necessary to redefine the role of copyright itself and its normative shape in the new realm. To this end, the White Paper is based on three assumptions. It indicates, against the background of the traditional understanding of the role of copyright, the need to treat works not as property, but as heritage. Furthermore it relies on the culture cycle UNESCO approach providing the public mission carried out by cultural heritage institutions (CHIs) as of particular importance. Finally, the recommendations place the proposed changes in the copyright system in the context of the right to culture notion.

Taking all these analytical dimensions into account, a proposal was developed to change the copyright system at the European level, consisting in an introduction of a regulation **European instrument for ensuring access and (re)use of cultural heritage resources** ("The Instrument"). It should enable CHIs' right to fulfill their mission and be linked to the right to remuneration for authors. It also should allow for uses of works which are serving freedom of expression, information, social, political and cultural objectives.

The proposed Instrument consists of three levels. The first level (Possibility to enjoy) enables CHIs reproduction, communication to the public and making available to the public works that are in their collections. The second level (Possibility of non-commercial (re)use) allows for a non-commercial use of the works, on the terms analogous to the rules set out in the current version of the Creative Commons license: Attribution-NonCommercial International (CC BY-NC). The third level (Possibility of commercial (re)use) allows for commercial use of the works, on the terms analogous to the rules set out in the current version of the Creative Commons license: Attribution International (CC BY).

## 2 Introduction and Objectives

The analytical work performed under the inDICES project was the basis for the preparation of a set of legal recommendations aimed at improving the capacity of the CH sector to generate social and economic value through facilitation of production and dissemination of, and access to, digital or digitised cultural and creative contents. At the same time the recommendations essay to improve the conditions for the onset and permanence of a general social and technological environment that is favorable to digitally mediated cultural production and participation. Consequently, the task was to work out legal and IPR related recommendations based on the legal analysis on what changes should be implemented on European level to foster openness in CHIs in order to stimulate digital cultural content (re)use. The White Paper with legal recommendations summarises all the legal recommendations resulting from the analysis addressed to the European Commission and other relevant policy makers.

The White Paper consists of three main parts: assumptions for legal recommendations, legal recommendations based on the work performed through a comparative cross-national legal analysis (WP2), legal recommendations based on value chains analysis -an outcome of the policy analysis (WP3).

The work on the White Paper with legal recommendations was carried out since February 2021 following a collaborative methodology. In the first phase, a draft discussion material was prepared and sent to the representatives of the project consortium members. Subsequently, after a series of direct discussions with the consortium members and collecting their comments on the discussion material, the material was made available to selected people outside of the consortium. At this stage, comments on the discussion material were gathered from representatives of various organisations interested in social and economic development through culture (inc. Communia, Creatives Commons). With regard to the current version of the document, the part concerning the recommendations based on the results of the legal analysis work to date was prepared independently by the WP2 team. As indicated in the disclaimer above, views and recommendations presented in the current version of the White Paper are of a temporary nature, and may change in the further course of the project. The final version of the recommendation will be prepared at the end of the project, after collecting the final results of the research work in all work packages.

### 3 Assumptions for legal recommendations

The aim of the inDICEs project is, inter alia, “preparation of a set of policy recommendations aimed at improving the capacity of the cultural heritage (CH) sector to generate social and economic value through facilitation of production and dissemination of, and access to, digital or digitised cultural and creative contents, while at the same time improving the conditions for the onset and permanence of a general social and technological environment that is favorable to digitally mediated cultural production and participation”<sup>1</sup>.

In its recommendation on a common European data space for cultural heritage the European Commission states “cultural heritage is not only a key element in building a European identity that relies on common values but also an important contributor to the European economy, fostering innovation, creativity and economic growth”<sup>2</sup>. Therefore, following this approach, in the inDICEs project we indicate, among others, that cultural heritage field is ideal for experimenting with innovative solutions and testing of bottlenecks in practices of digital production, dissemination and access and reuse due to their limited market exposure, thus experimenting with possibilities that may be further adapted by more market-oriented sectors<sup>3</sup>. From that **perspective access to heritage** leads to new creative products and/or services. That is why any new recommendations should go in the direction of strengthening the value chain between cultural heritage institutions (CHIs) and the cultural sector. Apart from the direct economic impact of CHIs, their indirect impact on society is also important. As indicated in the literature “(...) there is a strong complementarity between direct economic impacts and indirect ones, as they concur to increase individual participation and access to cultural opportunities, and stimulate further culturally-related capability building”<sup>4</sup>. The way to conceptualise such influence is eight-tier classification of the indirect developmental effects by Pier Luigi Sacco. In this perspective, attention is paid to the influence of culture on: innovation, welfare, sustainability, social cohesion, entrepreneurship, development of a learning society, soft power and identity. This eight-tier classification finds its full sense within a Culture 3.0 regime also coined by Pier Luigi Sacco “where active cultural access and participation becomes the social norm and the natural orientation of knowledge economies and societies”<sup>5</sup>. However, ensuring the real possibility of such participation requires, inter alia, appropriate legal regulations, including those related to intellectual property rights, which will **enable the (re)use of cultural heritage**.

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<sup>1</sup> Proposal, p. 17.

<sup>2</sup> COMMISSION RECOMMENDATION of 10.11.2021 on a common European data space for cultural heritage, Brussels, 10.11.2021, C(2021) 7953 final, p. 1.

<sup>3</sup> Proposal, p. 10.

<sup>4</sup> Sacco P.L., Ferilli G. Blessi G. From Culture 1.0 to Culture 3.0: Three Socio-Technical Regimes of Social and Economic Value Creation through Culture, and Their Impact on European Cohesion Policies, October 2018, Sustainability 10(11):3923, p. 14.

<sup>5</sup> Sacco P.L., Ferilli G. Blessi G. From Culture 1.0 to Culture 3.0: Three Socio-Technical Regimes of Social and Economic Value Creation through Culture, and Their Impact on European Cohesion Policies, October 2018, Sustainability 10(11):3923, p. 14.

### 3.1 Cultural heritage as property - the perspective of traditional copyright

Copyright, as an element of the intellectual property (IP) law system, is considered a "key tool to stimulate creativity"<sup>6</sup>. Sometimes it is declared that the purposes of copyright and CHI's mission may be complementary to each other. At the same time, it is emphasised<sup>7</sup> (e.g. in the above-mentioned EC Recommendation) that the activities of CHIs, in particular in the field of digitisation and dissemination, should be carried out in accordance with the applicable copyright law. This perspective derives from treating the IPR as the predominant framework for regulating the generation, dissemination, and use of knowledge. "[If] cultural heritage is looked at first through the lens of copyright law, then culture becomes commodified. In other words culture becomes bound up in notions of private property, ownership and control"<sup>8</sup>.

The copyright system based on exclusive rights has developed in Europe from the 16th century. Its origins date back to the mechanism of printing privileges. Its functioning is based on the assumption that covering intangible goods with exclusive rights and granting them to their creators is a mechanism stimulating creativity<sup>9</sup>. This is because authors can obtain remuneration by transferring these rights to other entities or granting them a license to use them. As a model, this market exchange mechanism assumes that authors will receive adequate remuneration. As a rule, entities interested in using works must have an appropriate permit from authorised entities. If the works are used without authorisation, the user is liable for infringement of copyright. Such liability is, as a rule, absolute liability, as it is not dependent on fault. The role of the copyright system is therefore to force entities interested in using works to obtain an appropriate permit and, assumingly, to pay remuneration on this account. While in the case of tangible goods such a mechanism seems simple to implement, in the case of intangible goods such as works it generates additional difficulties and (relatively high) transaction costs<sup>10</sup>.

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<sup>6</sup> Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, recital 11.

<sup>7</sup> Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, recital 11.

<sup>8</sup> C. Waelde, C. Cummings, RICHES, Deliverable 2.2, Digital Copyrights Framework, p. 7.

<sup>9</sup> Rose M., *Authors and Owners. The Invention of Copyright*, London 1994, Deazley R., Kretschmer M., Bently L., [red.], *Privilege and Property. Essays on the History of Copyright*, Open Book Publishers 2010, Gliński K., *Wszystkie prawa zastrzeżone. Historia sporów o autorskie prawa majątkowe, 1469–1928*, Warszawa 2016.

<sup>10</sup> Stiglitz J.E., *Economic Foundations of Intellectual Property Law*, „Duke Law Journal” 57, 6/2008, Elkin-Koren N., Salzberger E.M., *The Law and Economics of Intellectual Property in the Digital Age: The limits of analysis*, New York 2013, p. 99 and ff.



## 3.2 Cultural heritage as heritage

However, conceptualising cultural heritage as property protected by copyright is not the only way. It is more and more often mentioned in the literature that copyright is a significant barrier to the functioning of CHIs in accordance with their assumed public mission. The conclusions of the RICHES project<sup>11</sup> indicate that the treatment of cultural heritage from the perspective of human rights, in particular the right to culture, is gaining importance. When cultural heritage is looked through the lens of human rights, then emphasis is placed on public goods, access and cultural communication.

*This is an approach that is as much concerned with the process of something becoming part of our cultural heritage as with the product, and values information and knowledge as public goods; one which strives to recognise the collaborative nature of CH; and one that is rooted in community and identity. When such an approach is taken, copyright (and other IP rights) is important, but not as an end in itself; rather it becomes a means for the realisation of the goals of cultural rights and of the right to culture<sup>12</sup>.*

For these reasons the resources collected and shared by CHI should not be considered as property but as heritage. “Cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time”<sup>13</sup>. Therefore, the cultural heritage is not only a matter of the past and its material artifacts, but a “process of engagement, an act of communication and an act of making meaning in and for the present”<sup>14</sup>. Understanding cultural heritage as a process further facilitates the understanding that works, contrary to the traditional assumption of the romantic genius<sup>15</sup>, do not constitute the achievement of a single author, but are cumulative. For the purposes of copyright, it is assumed that the creator is the one who made an original contribution to the creation of the work, but in practice such an assumption does not apply to the creative process. Therefore, for the purposes of the system, an artificial division is made between the creative (original) and non-creative elements of the work, only to be able to finally assign a given result to specific authors or co-authors. As a consequence, the entire social contribution to the work is omitted.

**The culture cycle** UNESCO approach provides us instead with a different way of conceptualising cultural heritage. “The culture cycle shows how cultural production has its origins in the social realm

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<sup>11</sup> Project has received funding from the European Union’s Seventh Framework Programme for research, technological development and demonstration under grant agreement no 612789.

<sup>12</sup> C. Waelde, C. Cummings, RICHES, Deliverable 2.2, Digital Copyrights Framework, p. 8.

<sup>13</sup> art. 2 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199).

<sup>14</sup> Smith L., *Uses of Heritage*, London 2006, p. 1.

<sup>15</sup> Woodmansee M., *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author*, „Eighteenth-Century Studies”, Special Issue: „The Printed Word in the Eighteenth Century”, 1984, vol. 17, nr. 4, Arewa O., *From J. C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*. „Case Legal Studies Research Paper”, nr 04–21, „North Carolina Law Review”, 2006, Vol. 84, Jaszi P., *Toward a Theory of Copyright: The Metamorphoses of „Authorship”*, „Duke Law Journal”, 1991.

<sup>16</sup>. Cyclical nature of the cultural production process means that actors can have roles at different stages of the cycle. Most importantly, users are not limited to the role of consumers and can be engaged in earlier phases, especially if the process is cyclical and assumes several cyclical rounds of reuse<sup>17</sup>.

*The term culture cycle is helpful as it suggests the inter-connections across these activities, including the feedback processes by which activities (consumption) inspire the creation of new cultural products and artefacts<sup>18</sup>.*

As indicated in inDICEs *Policy analysis of value chains for CHIs in the Digital Single Market*<sup>19</sup> (D3.1) this perspective leads to a value creation model that is much more complex in comparison with traditional models that assume linear creation of added value through the metaphorical “chain” of connected actors and productive processes. Introducing this kind of complexity is of crucial importance to present a theory of how social, as well as economic, value and impact is constructed within the process of re-using digital cultural resources. The UNESCO model shows that value creation in the field of culture is rarely linear in the way it happens. Instead, value creation happens in networks that are complex and include varied, heterogeneous actors. These networks often span different sectors of the society and include both commercial, public and civic or grassroots entities<sup>20</sup>. Such an approach also allows taking into account various groups of stakeholders and their interests in the process of creating social value. Also Sacco puts various stakeholder groups and their interests in the core of the approach pointing out to its social value.

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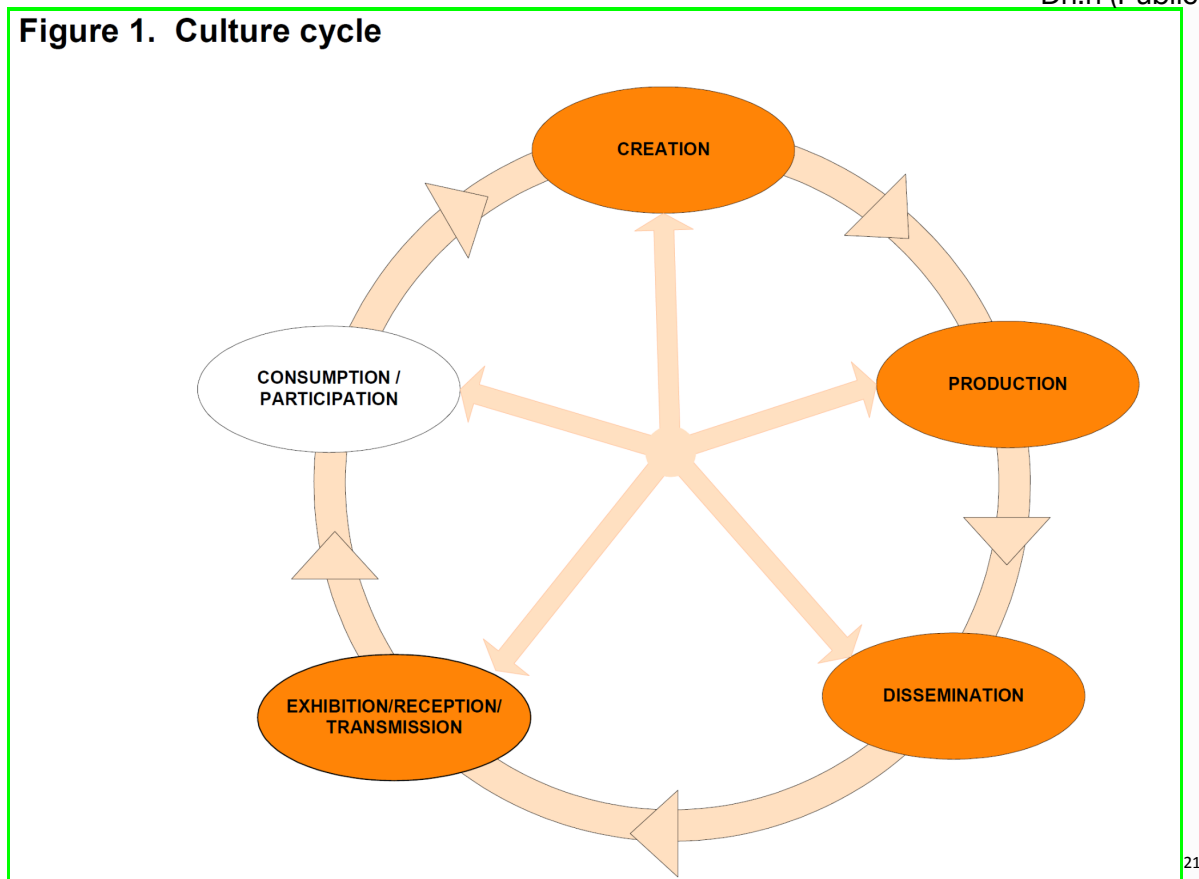
<sup>16</sup> UNESCO (2009), The 2009 UNESCO Framework For Cultural Statistics (FCS) , URL: [http://uis.unesco.org/sites/default/files/documents/unesco-framework-for-cultural-statistics-2009-en\\_0.pdf](http://uis.unesco.org/sites/default/files/documents/unesco-framework-for-cultural-statistics-2009-en_0.pdf), p. 21.

<sup>17</sup> Drabczyk M, Janus A., Strycharz J., Tarkowski A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICEs, 2020, p. 7.

<sup>18</sup> UNESCO (2009), The 2009 UNESCO Framework For Cultural Statistics (FCS), [http://uis.unesco.org/sites/default/files/documents/unesco-framework-for-cultural-statistics-2009-en\\_0.pdf](http://uis.unesco.org/sites/default/files/documents/unesco-framework-for-cultural-statistics-2009-en_0.pdf), p. 20.

<sup>19</sup>Drabczyk M, Janus A., Strycharz J., Tarkowski A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICEs, 2020, <https://www.zenodo.org/record/5140001#.YbGludnMKEt>

<sup>20</sup> Drabczyk M, Janus A., Strycharz J., Tarkowski A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICEs, 2020, <https://www.zenodo.org/record/5140001#.YbGludnMKEt>, p. 95.

**Figure 1. Culture cycle**

So far, the copyright regulation system has been adjusted to the value recognised and generated under the regime of the Culture 1.0 (which is based on a patronage system) and Culture 2.0 model (with mass production of cultural products that is controlled by entrance barriers of access to technologies and resources). The current system of copyright regulation at the European level focuses on direct economic and market impact. Recognition of the value generated by Culture 3.0<sup>22</sup>, which blurs the boundaries between producers and users, makes it necessary to redefine the role of copyright itself and its normative shape. From the perspective of the cultural heritage sector, the “use of content has cultural and social effects as well as an indirect spillover effect that is essential for the economy”<sup>23</sup>. The rationale for the new regulatory approach is, inter alia, understanding the role of the direct and indirect impact of socio-economic value creation through culture. In this context, the legal system should guarantee users the possibility of open participation and collective co-creative processes, i.e. the (re)use of cultural heritage.

<sup>21</sup> UNESCO (2009), The 2009 UNESCO Framework For Cultural Statistics (FCS), [http://uis.unesco.org/sites/default/files/documents/unesco-framework-for-cultural-statistics-2009-en\\_0.pdf](http://uis.unesco.org/sites/default/files/documents/unesco-framework-for-cultural-statistics-2009-en_0.pdf), p. 20.

<sup>22</sup> Sacco P.L., Ferilli G. Blessi G. From Culture 1.0 to Culture 3.0: Three Socio-Technical Regimes of Social and Economic Value Creation through Culture, and Their Impact on European Cohesion Policies, October 2018, Sustainability 10(11):3923.

<sup>23</sup> Drabczyk M, Janus A., Strycharz J., Tarkowski A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICES, 2020, <https://www.zenodo.org/record/5140001#.YbGludnMKEt>, p. 7.

The digital dimension of a CHI, when reflecting the 3.0 models<sup>24</sup> of co-production, is a potentially powerful incubator for new forms of entrepreneurship, and the rapid growth of online content industries is paving the way to a new entrepreneurial culture, with strong generational identification. The Millennials, Generation Z and Generation C as native digital users are naturally familiar with co-creation practices and there is great demand for new digital innovation-driven business models that will embrace the new types of activities. These new socio-cognitive trends hold great promise for the future business development of cultural and creative production. Of course, industry priorities must be considered in the business model regeneration process, but users' active participation in product-related content creation is essential in the current phase of strategic restructuring of digitally-driven content industries. It is necessary for the CHIs to better enable people to actively participate in meaningful sense-making processes, to exploit the possibilities that the digital platforms can offer in terms of co-creation processes, digital community empowerment, development of new soft skills, and shared knowledge resources. CHIs must undertake their role of digital enablers by promoting the learning of technological tools for cultural access, participation and production, such as AI, Virtual Reality, Augmented Reality, Blockchain, Internet of Things, NTF etc.

### 3.3 Right to culture

The new approach should also enable practical implementation of the **Right to Culture** notion. None of the international legal instruments provides a definition of a "right to culture" or "cultural rights". For this reason, the literature identifies various rights that are collectively referred to as rights to culture. In general, they can be defined as part of the human rights system that includes the "right of access to, participation in and enjoyment of culture"<sup>25</sup>.

*Such rights include rights that explicitly refer to culture, such as the right to take part in cultural life and the right of members of minorities to enjoy their own culture; and rights that have a direct link with culture, such as the right to self-determination; the rights to freedom of religion, freedom of expression, and freedom of assembly and association; and the right to education*<sup>26</sup>.

Also, European Union law does not refer directly to the concept of "cultural rights". "However, the EU value of 'respect for human rights' (including 'the rights of persons belonging to minorities'), affirmed in Article 2 TEU (Treaty on European Union), arguably encompasses respect for all different categories of rights, including cultural rights. The ECHR (European Convention on Human Rights), whose norms amount to general principles of EU law, contains several provisions which can be

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<sup>24</sup> Sacco P.L., Ferilli G., Blessi G., Culture 3.0: A new perspective for the EU active citizenship and social and economic cohesion policy, (in:) The cultural component of citizenship: An inventory of challenges, 2012. Sacco P.L., Tet E., Cultura 3.0: un nuovo paradigma di creazione del valore, Economia & Management 1(2017).

<sup>25</sup>[http://www.unesco.org/culture/culture-sector-knowledge-management-tools/10\\_Info%20Sheet\\_Right%20to%20Culture.pdf](http://www.unesco.org/culture/culture-sector-knowledge-management-tools/10_Info%20Sheet_Right%20to%20Culture.pdf)

<sup>26</sup> Donders Y, Cultural human rights and the UNESCO Convention: More than meets the eye? [in] De Beukelaer Ch., Pyykkönen M., Singh J.P., (eds), Globalization, Culture, and Development: The UNESCO Convention on Cultural Diversity, New York 2016, p. 117.

construed from a cultural rights perspective (...)”<sup>27</sup>. In this context, it is increasingly often argued that intellectual property rights, including copyright, are systematically incompatible with “the right to science and culture”<sup>28</sup>. At the same time “digitisation has the capacity to strengthen the right to participate in cultural life”<sup>29</sup>. Among other things, by providing access to cultural resources independently from any place, regardless of the physical limitations of the user or the resource itself; by accelerating a broader involvement in culture, regardless of the wealth of the user; or finally by increasing user participation. For this reason, the perspective developed in the RICHES project deserves special attention. According to it, “Intellectual Property should be used as a tool to support the right of ‘everyone... freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefit’”<sup>30</sup>.

### 3.4 Mission-oriented approach

The way of shaping copyright in the area of CHIs activity should be in line with the public mission of these institutions. “In this context, ‘public’ does not mean that government is the sole actor creating value, but rather that value is collectively created by different actors and for the community as a whole, in the public interest”<sup>31</sup>. For this reason, recommendations should be based on a **mission-oriented policy concept**. Mariana Mazzucato defines mission-oriented policies as “systemic public policies that draw on frontier knowledge to attain specific goals (...). Missions provide a solution, an opportunity, and an approach to address the numerous challenges that people face in their daily lives”<sup>32</sup>. One of such public missions is digital transformation of cultural heritage institutions. It is not solely a technological or a legal decision - it is a mission-driven decision<sup>33</sup> taken by an institution operating with a very specific purpose. In this context, the regulatory reference should be the desired state of CHIs in the digital environment. Copyright, along with other legal regulations, should be treated as a means of achieving it. Copyright regulations should support the CHIs mission to better enable people to actively participate in meaningful sense-making processes, to exploit the possibilities that the digital platforms can offer in terms of co-creation processes, digital community empowerment, development of new soft skills, and shared knowledge resources. In order to guarantee the possibility of participation in the process of co-created with the resources of cultural heritage, the legal system should recognise the right of citizens to (re)use such resources.

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<sup>27</sup> Psychogiopoulou E., Cultural rights, cultural diversity and the EU’s copyright regime: the battlefield of exceptions and limitations to protected content, [in] Pollicino o., Riccio G. M., Bassini M. (eds), *Copyright and Fundamental Rights in the Digital Age A Comparative Analysis in Search of a Common Constitutional Ground*, Cheltenham 2020, p. 128.

<sup>28</sup> Shaver L., The right to science and culture, 2010(1) *Wisconsin Law Review* 121 (2011), p. 124.

<sup>29</sup> Coad S., *Digitisation, Copyright and the GLAM Sector: Constructing a Fit-For-Purpose Safe Harbour Regime*, Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 13/2019, p. 9.

<sup>30</sup>C. Waelde, C. Cummings, RICHES, Deliverable 2.2, *Digital Copyrights Framework*, p. 25.

<sup>31</sup> M. Mazzucato, *Mission-Oriented Research & Innovation in the European Union. A problem-solving approach to fuel innovation-led growth*, 2018, p. 169.

<sup>32</sup> M. Mazzucato, *Mission-Oriented Research & Innovation in the European Union. A problem-solving approach to fuel innovation-led growth*, 2018, p. 4.

<sup>33</sup> Kelly, K. (2013), *Images of Works of Art in Museum Collections: The Experience of Open Access*, <https://www.clir.org/pubs/reports/pub157/>, p. 26.

For the above-mentioned reasons, the use of cultural heritage and the activities of CHIs, insofar as they are not carried out for profit, should not be subject to the same rules as the commercial exploitation of works.

**Firstly**, CHIs carry out a public mission, which is expressed (inter alia) in the preservation and sharing of collections constituting a resource of cultural heritage. Including copyrighted works. CHI's public mission understood in this way is sometimes also defined in a similar way at the level of the laws of the Member States<sup>34</sup>. From a human rights perspective, the activities of CHIs enable the realisation of the right to culture. The goals of CHIs defined in this way are in conflict with the copyright mechanism. This right, by creating an artificial scarcity of intangible goods (by covering them with exclusive rights), limits the general availability of such goods, i.e. works. As part of a democratic process, it must be determined which of the two conflicting values deserves priority and to what extent.

*Sharing cultural events and participation in them via the Internet, as well as changing the form of communication from the broadcaster-receiver model to the model of mutual cooperation and interaction, introduce a change into the paradigm of cultural relations. New tools for the transmission of cultural content mean that anyone who has access to them can get acquainted with the incredibly rich offer of cultural content at a convenient time and place, the offer incomparably wider than before. It therefore changes the nature and content of the right of access to cultural life. New forms of communication and, at the same time, an incalculable increase in the exposition of cultural goods make the barriers to access to culture and certain forms of artistic creation more and more visible, the importance of copyright (IP) increases and the conflict between freedom of access and copyright is becoming more and more tangible<sup>35</sup>.*

**Secondly**, copyright is a means to achieve certain social goals and should not be considered an end in itself. Statements included, for example, in the InfoSoc directive<sup>36</sup>, indicating the need to ensure the "highest level of protection", are rhetorical. At the same time, they influence the shape of the copyright system and constitute the basis for the formulation of interpretative directives used by the jurisprudence. Therefore, it should be concluded that the level of copyright protection should not be "the highest" but adequate to the intended purpose<sup>37</sup>. Consequently, in the scope of this activity that is not carried out by CHIs for profit, there is no justification for imposing the same rules on such institutions as are imposed on market economy operators. In general, it is more and more often indicated in the literature that the system of covering intangible goods with exclusive rights leads to a situation of over-protection and should be changed. One of the proposed solutions is to increase the

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<sup>34</sup> e.g. Article 1 (1) of the Act ON ORGANIZING AND CONDUCTING CULTURAL ACTIVITIES of 25 October 1991, indicates that: *Within the meaning of this Act, cultural activity consists in the creation, dissemination and protection of culture.*

<sup>35</sup> Młynarska-Sobaczewska A., *Right to Culture*, Warsaw 2018, p. 142.

<sup>36</sup> 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.

<sup>37</sup> See further on the development of legal policy, including civil law policy, in: Wróblewski J., *Teoria racjonalnego tworzenia prawa*, Wrocław 1985, Wróblewski J., *Zasady tworzenia prawa*, Warszawa 1989, Petrażycki L., *Wstęp do nauki polityki prawa*, Warszawa 1968

role of non-exclusive rights, including a situation where the use of intangible goods depends on the payment of (appropriate) remuneration<sup>38</sup>.

*IPR in the first place have been created to “do a job” – namely to foster creativity and innovation. This means that exclusivity should be the dominant regulatory model only where and to the extent that other, non-exclusive schemes cannot achieve the same or even better results, and/or generate more beneficial effects for society as a whole. This does not necessarily mean that access or use must be free whenever exclusivity entails suboptimal effects. Instead, the proprietary element may persist in the sense that the user is obliged to pay for the privilege of unrestricted access. In economic terms this means that the exclusivity paradigm is transformed into a liability rule<sup>39</sup>.*

**Thirdly** there is the detriment of the “digital skew”<sup>40</sup>. Copyright law has a significant influence on the choice of what CHIs publish. In many cases, the decision to publish or not to publish is based not on content-related (curatorial) decisions or the needs of the end users, but on whether it is easy to carry out the process of clearing rights<sup>41</sup>. Trying to avoid legal ramifications, they are forced to close off their collections or choose not to digitise them, leaving many history pages blank until the copyright restrictions expire. What is more, the same constraints apply to resources that are being created today which halts research and active societal engagement with the contemporary cultural artefacts and the ability to study them contemporaneously and connect them with historical resources<sup>42</sup>.

*The digital skew distorts the culture to which society is exposed. Online databases do not accurately represent humanity's cultural progression or contemporary values and beliefs. Participation in cultural life includes the right to access the cultural values underpinning society, the right to enjoy the benefits of culture and the right to play a role in cultural development and progression. The digital skew prevents the realisation of these rights. Overrepresentation of historic works creates a profound time lag<sup>43</sup>.*

For example Europeana has identified a massive gap in the datasets from the 20th century which notably hinder exploration. A recent survey carried out across the Europeana dataset demonstrates a

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<sup>38</sup> Frosio G., A History of Aesthetics from Homer to Digital Mash-ups: Cumulative Creativity and the Demise of Copyright Exclusivity, „Law and Humanities” 9, 2/2015, 2015, Ricolfi M., The new paradigm of creativity and innovation and its corollaries for the law of obligations, w: P. Drahoš i in., Kritika: Essays on Intellectual Property, Vol. 1, Cheltenham, 2015, Gliściński K., Digitalization vs. assumptions of the theory of incentives. Towards a change of the paradigm from exclusive rights to non-exclusive rights as part of the regulation of intangible goods, 2018, 6th International Conference of PhD Students and Young Researchers Digitalization in Law, Conference papers, 2018.

<sup>39</sup> Kur A., Schovsbo J., Expropriation or Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm, „Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper” 09-14/2009, p. 2.

<sup>40</sup> McCausland S., Getting Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use, Media Arts Law Review, Vol. 14, 2009.

<sup>41</sup> The missing decades: the 20th century black hole in Europeana (2015).

<https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana> (05.12.2021).

<sup>42</sup> Proposal p. 23.

<sup>43</sup> Coad S., Digitisation, Copyright and the GLAM Sector: Constructing a Fit-For-Purpose Safe Harbour Regime, Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 13/2019, p. 11.

massive drop in the number of resources available from the 1950s onwards<sup>44</sup>. The gap is certainly caused by the legal complexity of the newest archival collections.

## 4 Legal recommendations based on a comparative cross-national legal analysis

At this point, it is already established that the copyright framework is generally regarded as complex and difficult to navigate. Misconceptions about the applicable rights or license modalities foster risk-averse legal knowledge and habits, and lack of capacity-building efforts further reinforce and amplify these misconstructions. However, some uncertainties are not necessarily an outcome of a lack of copyright capacity, training, skills, or knowledge. The copyright framework itself is extremely diverse (fragmented, even), which may cause some legal uncertainty and the crystallization of the above mentioned risk-averse legal habits.

The objective of this section is therefore not to further antagonise authorial rights and the current copyright framework, but to critically approach its goals and flaws, while still attempting to provide applied solutions to correct and optimise the system without rejecting it. As such, to avoid repetition, and as an attempt to present a set of recommendations in a direct and pragmatic manner, the remaining text will revolve around particular issues contained in specific copyright regimes, providing a systematic overview of possible solutions in order to optimise these rights and limitations to foster cultural re-use.

1. Within the EU copyright landscape, **lack of harmonization** is often pointed out as one of the main culprits of current copyright fragmentation. In fact, most non-harmonised subject matter is crucial for an open cultural reuse environment. The right of adaptation remains unaddressed, a fact which can create a chilling effect on more stringent jurisdictions that may choose to disregard its relevance for the current cultural panorama. The objectives of the surfacing of co-creative and collaborative cultural landscape (Culture 3.0) can collide with these inflexible jurisdictions - after all, a policy is only as strong as its weakest implementation. Furthermore, while some effort was put in place to refurbish some old non-mandatory exceptions and elevate them to mandatory status, plenty of crucial copyright provisions remain subject to national implementation and systematization. This legal fragmentation creates a feedback loop, reinforcing misconceptions about the validity and effectiveness of provisions and exceptions.
2. As previously mentioned, the new Directive on Copyright in the Digital Single Market (Directive 2019/210) elevated a few exceptions to mandatory status, while introducing a few other novel mandatory exceptions. One of these novel provisions is Article 3, which introduces a mandatory exception aimed at research organizations and cultural heritage

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<sup>44</sup> The missing decades: the 20th century black hole in Europeana (2015).

<https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana> (05.12.2021).



institutions wishing to perform data mining operation on works protected by third party copyright. The text and data mining exception allows researchers to undertake mass-scale data analytics from materials present in the web and cultural collections without requiring permission from rightsholders. In order to make the system useful, complaint and removal mechanisms against unlawful DRM protection should be put in place in order to facilitate data mining activity. Furthermore, the concepts of commerciality and lawfulness of access remain undefined. Clarification on these concepts is crucial to attain legal certainty on the uses permitted under this exception, as well as to avoid litigious or bad-faith intervention in legitimate data mining processes. Finally, secure storage obligations should not be externally enforced, and the choice of which methods and systems to use should be left to the institutions that already manage countless valuable assets on a daily basis.

3. Cultural heritage institutions should at least be included in the debate around **cross-border education**. Article 5 introduces a new mandatory exception allowing teachers and students at educational establishments to use works protected by copyright in digital and cross-border teaching and learning. This exception allows for onsite usage (classroom devices or cloud-connected devices), as well as for distanced learning set through a secure environment. The list of beneficiaries is limited to teachers, students, or pupils of primary, secondary, vocational, or higher education. However, and taking into account the sheer quantity of content available for “illustration” purposes made available by cultural heritage institutions, as well as the constant promotion of educational action, it is only fair to conclude that CHIs are vested with added value for educational purposes. Culture and education go hand in hand - any educational pattern gets its guidance from cultural patterns. Access to culture is access to education and vice-versa - CHIs should not be excluded from the scope of an exception aimed at providing access to education. For optimal implementation of the current mandatory exception, it is recommended that the scope of beneficiaries of this exception be enlarged to encompass cultural heritage institutions and other non-profit entities running educational activities. Additionally the three non-mandatory carve-outs offered by the CDSM Directive (optional compensation, educational quota and licensing priority) be rejected, as to not go against the inherent proportionality of a public interest exception.
4. The inclusion of a **mandatory preservation exception** for cultural heritages enables some, but not all relevant uses. Article 6 covers all works “permanently in the collection of a cultural heritage institution”. Considering how CHIs usually operate, the terminology deployed seems insufficient. Works that are lent in an open-ended basis, as well as works that the institution has acquired access to through licensing are not included in a stricter interpretation of this text. As such, and to avoid restrictive approaches altogether, the criterion should have a focus on the institution’s longevity of access to the work and not on its permanence in a collection. To optimise an exception that provides safeguards to what would otherwise be considered non-harmful usage, it is recommended that these cover any

work present in an institution's collection on an open-ended basis, as well as all accessory internal purposes and not only those restricted to essential preservation.

5. Article 8 provides two different solutions: a licensing mechanism, and an exception. The exception for out-of-commerce works applies to rights and types of works for which no CMO can issue a license – this encompasses both scenarios in which a CMO does not have sufficient representativity, and in which a sufficiently representative CMO cannot grant a license for a specific work or use, which is therefore subject to the exception. As such, the first recommendation would be to provide clarity on the definition of out-of-commerce works. This definition should include never-in-commerce and unpublished works, as well as out-of-commerce translations of an in-commerce work. Similarly, a clear and flexible definition of “reasonable effort” should also be provided. Recital 37 of the CDSM clarifies that reasonable efforts do not need to be continually renewed, nor done individually in a mass-digitization scenario – these guidelines should also be respected in the national implementation of the provision. Furthermore, relying on an exception or engaging in negotiations in an effort to obtain a license are two very distinct situations. The criteria on how to establish a CMO as sufficiently representative to trigger the licensing mechanism need to be detailed and well-defined, so that CHIs have legal certainty regarding what falls outside of this license and is therefore covered by the exception. Therefore, the second recommendation is to strive for a clear and concrete definition of the types of works and rights mentioned in the criteria for CMO representativity.
  
6. Article 12 of the CDSM creates a “collective licensing with extended effect” scheme. This licensing scheme applies to all kinds of works, subject matter and uses, irrespective of whether rightholders have authorised the CMO to do so. CMO's are allowed to license works when acquiring authorizations from rightholders on an individual basis is deemed onerous and impractical. This is one of the issues that needs to be addressed. The threshold for “typically onerous and impractical” needs to be set, or at least be provided with some guidance, as to make extended collective licensing schemes workable. Furthermore, and just like with the other extended licensing scheme foreseen in the Directive and explained above, the criteria for representativity need to be clearer and more well-defined.
  
7. Works of visual arts in the **public domain should remain in the public domain**. While the new normative approach to this principle is welcome, further legal certainty is required. The letter of the article establishes that faithful reproductions of public domain works of visual art are not protected by copyright. The utilization of “visual art” points towards the idea the intended target of the provision are two-dimensional works of graphic art. Appropriation of the public domain does not exclusively affect two-dimensional visual art, but rather all categories of works. There is no higher reason for the exception to apply this principle to a limited subset of copyrighted or out of copyright works. Optimised implementation can be

achieved by defining the scope of the provision (on a base level, by providing a definition for the current subject matter covered, and on an advanced level, by expanding its scope to all types of subject matter and reproduction technologies deployed, including three-dimensional reproductions).

8. The importance of **rights statements and copyright capacity building** has been highlighted and reinforced by the European bodies. The new EU recommendations on an open cultural data space further expand on this priority by setting up a cultural re-use infrastructure to be managed by Europeana and recommending that Member-States create capacity building initiatives to help. This is, of course, an optimal way to tackle inconsistencies, lack of capacity and defeat misconceptions without major reforms or burden on Member-States. As such, the correct path should be the most travelled: it is recommended that similar initiatives be fostered regarding the correct utilization of rights statements and metadata management.
  
9. Most if not all these objectives can only be attained through dedicated **stakeholder engagement**. On a European policy level, the current framework is not prone to further alteration, but only reform. Such a reform can be managed early on through public dialogue, capacity building and making all interested parties involved. On a national implementation level, digital rights organizations, consumer associations, cultural heritage institutions, intellectual property experts and the general public should build relationships and strive to have an active voice in the democratic discourse as to allow for a functional but above all fair and balanced implementation and gradual optimization of a promising, albeit imperfect framework.

## 5 Legal recommendations based on value chains analysis

### 5.1 Public mission approach to regulation

In the last decade rather policy makers on national and European levels have created new institutions and infrastructures for digital cultural heritage (Europeana), new mechanisms for cultural heritage institutions (Orphan Works Directive, regulation of out-of-commerce works in the CDSM Directive) or new frameworks for (re)use of digital heritage (the Open Data Directive). Nevertheless, these recent reforms, while beneficial for the CHIs, focus on providing access and less on supporting reuse of collections. **This means that barriers to deployment of the Culture 3.0 activities remain unaddressed.** We believe that the current policy perspective can and should be broadened to include policies that determine the characteristics of the online ecosystem as such<sup>45</sup>. That is why the proposed recommendations are based on three pillars:

#### 1. THE IMPLEMENTATION OF THE PUBLIC MISSION REQUIRES PUBLIC ORGANISATION AND FINANCING

It should be acknowledged that CHIs perform a public mission and that as such entities they should not be burdened with regulations typical of market relations. Furthermore, it should be recognised that the success of digital transformation in this cultural heritage area depends on ensuring public support, both on the organisational and financial level. This approach is in line with the contemporary understanding of the right to culture notion.

*The right to culture in contemporary countries, in particular in countries where the culture of state patronage is traditionally dominant, requires not only that public authorities ensure that they refrain from interference in the sphere of artistic expression and access to artistic culture, but also that they fulfil a number of positive obligations, in particular regarding fair and universal access to financing of artistic life<sup>46</sup>*

This means that CHIs should be provided with public funding for the implementation of their mission related to the preservation and sharing of cultural heritage, including its digitisation. Recognition of the meaning of social and economic value, generated in a medium to long-term perspective, within Culture 3.0. “should be accompanied by a new policy perspective and structural funds programming that takes into account the Culture 3.0 framework”<sup>47</sup>.

It should be emphasised that certain business models related to the monetisation of access to cultural heritage “may be inconsistent with an institution’s public and cultural goals and may hamper

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<sup>45</sup> Drabczyk M, Janus A., Strycharz J., Tarkowski A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICEs, 2020, <https://www.zenodo.org/record/5140001#.YbGludnMKEt>, p. 47-48.

<sup>46</sup> Młynarska-Sobaczewska A., Right to Culture, Warsaw 2018, p. 208.

<sup>47</sup> Drabczyk M, Janus A., Strycharz J., Tarkowski A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICEs, 2020, <https://www.zenodo.org/record/5140001#.YbGludnMKEt>, p. 8.

the broad accessibility of digital collections<sup>48</sup>. In particular, these are models based on paid access and situations in which resources of lower technical quality are made available. Public funding of such activities should, therefore, relieve CHIs of the pressure to provide funding for activities carrying out the public mission from other sources.

## **2. THE IMPLEMENTATION OF A PUBLIC MISSION REQUIRES THE CREATION OF RIGHTS FOR CULTURAL HERITAGE INSTITUTIONS**

CHIs increasingly are expected to take on the role of copyright protector, in a way the role of an agent for the rightsholder, which is in conflict with the public mission of giving access to and preserving the cultural heritage of humanity. Recognising that CHIs pursue a public mission, distinct from that of profit-oriented enterprises, separate powers should be provided for such institutions to enable them to fulfill that mission. In particular, they should enjoy certain rights which enable them to actually carry out their specific public mission. The public mission of CHIs does not only consist of activities related to the preservation and professional curation of the accumulated heritage. Heritage does not exist as such. Works become heritage when a community recognises and cherishes its value. For these reasons, CHIs mission is to enable and support this process, not just the collection and preservation of tangible cultural heritage objects. This is why the public mission of CHIs also requires the involvement of these institutions in the process of co-creation and co-curation, commons empowerment and dissemination of heritage. CHIs rights should constitute a mechanism for implementing the rights to culture in practice.

## **3. THE IMPLEMENTATION OF A PUBLIC MISSION REQUIRES PUBLIC RESPONSIBILITY**

The implementation of the public mission should, as far as possible, take into account individual interests. In simplified terms, it can be said that, copyright regulations tend to create tension between creators who want to receive fair remuneration for their efforts and CHIs who would want to share the content without restrictions to fulfill their mission. For this reason, CHIs' use of copyrighted works may, in some cases, be eligible for fair compensation. The right to culture justifies public funding with remuneration for authors of the functioning of the new mechanism of access to their works, understood as part of the cultural heritage. At the same time, when dealing with the issue of remuneration we must consider that when cultural heritage institutions acquire a work they not only are disseminating the work but in the first place commit to preserving that work. The cost that comes along with this activity must not be forgotten. Not only acquisition costs, but all the resources that are needed to digitise, restore, research, and manage have to be considered. When asking to remunerate rightsholders for the use of works, we have to shift the attention to a different value, that a cultural heritage institution adds to the work in the longer time perspective. The value that these institutions add by doing their preservation and conservation job, research and educational programs, must not be underestimated. By providing (gifting, lending, selling) CHIs with works for the collections rightsholders must be aware that the cost and value of preservation of their work is in itself a form of remuneration. In this approach, we finally can step away from the disruptive leading idea of calculating the value of work and its use in money.

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<sup>48</sup> Evens T., Hauttekeete L., Challenges of digital preservation for cultural heritage institutions, *Journal of Librarianship and Information Science* 1– 9 (2011), p. 4.

## 5.2 European instrument for ensuring access and (re)use of cultural heritage resources.

1. To balance the legitimate interests of rights holders with CHI's public mission and the right to culture that all people enjoy as a human right, a specific European instrument for ensuring access and (re)use of cultural heritage resources (hereinafter: "The Instrument") should be introduced. It should enable CHIs' right to fulfill their mission and be linked to the right to remuneration for authors. Moreover, understanding the values generated within the framework of 3.0 Culture, while respecting the right to culture, means that for some parts of the works in such collections, the Instrument should allow for their (re)use by third parties. Digital technology "creates more possibilities for reusing cultural assets for innovative and creative services and products in various sectors, such as other cultural and creative sectors, as well as tourism"<sup>49</sup>. The proposed Instrument could provide a legal basis for the actual realisation of these *possibilities*.
2. **Proposed structure of European instrument for ensuring access and (re)use of cultural heritage resources:**

Level	Scope of the exception for CHIs	Possibility of re-use	Opt-out clause	Remuneration
<b>(1) possibility to enjoy</b>	reproduction, communication to the public and making available to the public	uses serving freedom of expression, information, social, political and cultural objectives to the extent justified by the purpose of the use.	none - the primary purpose of the exception is to secure the right of access to culture by enabling CHIs to fulfill their public mission.	yes - 1) on a non-commercial basis, established by the Independent Body 2) only for the title of reproduction, communication to the public and making available to the public, in the event that the authors did not receive the applicable remuneration at the time of purchasing the works by CHIs
<b>(2) possibility of non-commercial (re)use</b>	enables use on the terms specified in the CC-NC license		yes - using it means switching to level (1)	yes - on a non-commercial basis, established by the Independent Body
<b>(3) possibility of commercial (re)use</b>	enables use under the terms of the CC-BY license		yes - use means switching to level (1) or (2) depending on the decision of the right holder	yes - on commercial terms, set out in the contract with the competent CMO

<sup>49</sup> COMMISSION RECOMMENDATION of 10.11.2021 on a common European data space for cultural heritage, Brussels, 10.11.2021, C(2021) 7953 final, p. 1.

3. Since the proposed Instrument should be financed with public funds, then, pursuant to point 18 of the European Commission Recommendation on a common European data space for cultural heritage, cultural heritage resources covered by it should be in sync the FAIR principle, and in particular suitable for *reuse*<sup>50</sup>.
4. The proposed Instrument should consist of three levels.
  - a. **Possibility to enjoy** - the first level should enable CHIs reproduction, communication to the public and making available to the public works that are in their collections.
  - b. **Possibility of non-commercial (re)use** - the second level of the Instrument should allow for non-commercial use of the works, on the terms analogous to the rules set out in the current version of the Creative Commons license: Attribution-NonCommercial International (CC BY-NC).
  - c. **Possibility of commercial (re)use** - the third level should allow for commercial use of the works, on the terms analogous to the rules set out in the current version of the Creative Commons license: Attribution International (CC BY).
5. The Instrument, on all three levels, should permit uses proposed in the International Instrument on Permitted Uses in Copyright Law<sup>51</sup> and serving:
  - a. freedom of expression and information to the extent justified by the purpose of the use. Such uses shall include those for purposes such as:
    - i. quotation of works which have been lawfully made available to the public;
    - ii. reporting of news and other matters of public interest;
    - iii. criticism, review, parody and caricature;
    - iv. search, organisation and analysis of data;
    - v. any utilisation of legislative, administrative and judicial works, including international treaties, as well as official translation of such works.»
  - b. social, political and cultural objectives to the extent justified by their purpose. Such uses shall include those for purposes such as:
    - i. private utilisation;
    - ii. benefiting persons with disabilities;
    - iii. education;
    - iv. research;
    - v. preservation or restoration of works, by libraries, museums and archives;
    - vi. reproducing and making available to the public of orphan works by libraries, museums and archives;
    - vii. ensuring public security and the proper performance of administrative, parliamentary or judicial proceedings.

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<sup>50</sup> “a result of their policies, data resulting from publicly funded digitisation projects become and stay findable, accessible, interoperable and reusable (‘FAIR principles’) through digital infrastructures (including the data space) to accelerate data sharing”. COMMISSION RECOMMENDATION of 10.11.2021 on a common European data space for cultural heritage, Brussels, 10.11.2021, C(2021) 7953 final, p. 9.

<sup>51</sup> Hilty, R.M., Köklü, K., Moscon, V. et al. International Instrument on Permitted Uses in Copyright Law. IIC 52, 62–67 (2021). <https://doi.org/10.1007/s40319-020-00999-8>.

6. The Instrument should allow CHIs to keep a virtual collection of their collections throughout the EU - so it should be introduced by the regulation. Only through such a unified solution it is possible to ensure a systematic change that will strengthen the potential of CHIs in the digital single market. Moreover, this solution enables all Europeans to see and benefit from the cultural heritage accumulated by CHIs.
7. CHIs benefiting from the Instrument should not be allowed to restrict access to their collections.
8. The categories of works that should be covered by the Instrument should be based not on their treatment as copyrighted property objects, but as elements of cultural heritage. The Instrument should cover specific categories of works, in particular works of visual arts, and metadata. Certain categories of works should not fall under this exception (e.g., commercially available books or films).
9. The instrument should not restrict use, including use without remuneration, on the basis of already existing exceptions (eg. orphan works, out-of-commerce works). In addition, works in the Public Domain are not covered by the Instrument.
10. The Instrument should be based on the opt-out mechanism. The essence of this approach should be that it is not CHIs, as entities carrying out a public mission, but those who want to withdraw their individual items from the CHIs virtual collection, that should take steps to achieve this and bear the related risk. The Instrument should therefore allow the entire collection held by a given CHIs to be included in the virtual collection, with the proviso that the right holder may submit a declaration of withdrawal of a specific work from a specific collection within a specified period (e.g. via a dedicated website). To ensure the implementation of the Right to Culture and to properly balance CHIs public mission with the rights of creators withdrawal from the Instrument should only concern the withdrawal from the option of (re)use by third parties of works in the collection of CHIs, i.e. level (2) - possibility of non-commercial (re)use and level (3) - possibility of commercial (re)use). In other words, the Instrument to the extent that it allows for access to a virtual collection should not be limited by the opt-out option, i.e. level (1) - possibility to enjoy.
11. The Instrument should be linked to the authors' remuneration mechanism (rights holder). CHIs, unlike countries with sovereign currencies, have budgetary constraints. "A sovereign, currency-issuing government faces no intrinsic financial constraints, and can at any time purchase whatever is for sale in the currency that it issues. Its capacity to do so is not influenced by its past spending and revenue patterns"<sup>52</sup>. For this reason financing of remuneration and the digitisation process should be based on public funds facilitated on the European Union level. Two public funds should be created for the implementation of the CHIs mission: (1) the European Fund for the remuneration of creators (rights holders), (2) the

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<sup>52</sup> Mitchell W., Wray R., Watts M., *Macroeconomics*, London 2019, p. 100. See further: Wray R., *Modern Money Theory. A Primer on Macroeconomics for Sovereign Monetary Systems*, 2nd Edition, 2015, Kelton S., *The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy*, 2020.



European Fund for the digitisation, acquisition and dissemination of cultural heritage<sup>53</sup>. The remuneration for the Instrument should be paid by a designated local collective copyright management organisation, under contract with the European Fund for the remuneration of creators.

12. As the remuneration for the Instrument for CHIs for its public service mission is not of a market nature, the general principles for determining it should be set out in the regulation. They should take into account the differences in the rights to use the works at the different levels of the Instrument. In particular, when determining the amount of the remuneration for the first tier, it should be taken into account that the published works are in the collections of public institutions that have collected them (including purchased them) and then publish them in order to fulfill their public mission. Recognising that the public mission of CHIs is, inter alia, acquiring objects for a collection in order to make them available later, such remuneration should only be due when the authors of such works have not received appropriate monetary compensation, e.g. in the form of payment at the time of purchase of the object for the collection by CHIs. At the same time, when determining the remuneration at level 1, it should be taken into account that the use of these works in the scope indicated therein as falling within the scope of freedom of expression, information, and implementing social, political and cultural objectives is not be covered by the right to remuneration. The remuneration could be specified (and indexed) by an Independent Body, consisting of, inter alia, authorised representatives (e.g. CMO representatives), representatives of excepted institutions, representatives of non-commercial users of works, representatives of commercial users and representatives of the European Commission.
13. Since the proposed Instrument should be financed with public funds, then, pursuant to point 15 of the Recommendation on a common European data space for cultural heritage, the cultural heritage resources covered by it should be *available in Europeana and the data space*<sup>54</sup>.
14. This Instrument should apply *mutatis mutandis* to related rights and *sui generis* database rights.
15. Any contractual provision contrary to the proposed Instrument should be unenforceable. Legal protection and effective legal remedies against the circumvention of effective technology should not hinder the use of the cultural heritage covered by the Instrument.

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<sup>53</sup>Currently, public financing in this area at the European level is decentralised. COMMISSION RECOMMENDATION of 10.11.2021 on a common European data space for cultural heritage, Brussels, 10.11.2021, C(2021) 7953 final, p. 3.

<sup>54</sup> COMMISSION RECOMMENDATION of 10.11.2021 on a common European data space for cultural heritage, Brussels, 10.11.2021, C(2021) 7953 final, p. 9.

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