

ReCreating Europe



FINAL POLICY RECOMMENDATIONS FOR EU LAWMAKERS

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Deliverable Title	D5.7 Final policy recommendations for EU lawmakers
Deliverable Lead:	SSSA
Partner(s) involved:	UNITN
Related Work Package:	WP5 - GLAM
Related Task/Subtask:	T5.3 / Valuing and engaging in Openness with GLAM
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Dissemination Level:	Public
Due Delivery Date:	31.12.2022
Actual Delivery:	10.01.2023
Project ID	870626
Instrument:	H2020-SC6-GOVERNANCE-2019
Start Date of Project:	01.01.2020
Duration:	39 months

Version history table			
Version	Date	Modification reason	Modifier(s)
v.01	10.08.2022	First draft	GD, MA
v.02	19.09.2022	Revised draft to present during the interim workshop with EC	GD, MA, RC, PG
v.03	30.12.2022	Final version	GD, RC, PG



EXECUTIVE SUMMARY

The research goals of reCreating Europe are far-reaching and challenging. The project pays unique attention to a large and diverse set of stakeholders, each one with distinct idiosyncrasies and specific needs. Its working package GLAM (WP5) substantiates such consideration, following a bottom-up methodology on all tasks and subtasks.

Constantly engaging with cultural heritage institutions (CHIs) and other stakeholders revolving around cultural heritage, it delivers research outputs that are based also on empirical observation of CHIs' and their practices, and it often tests such deliverables through them. This special approach has allowed us to signal and underline several points of ineffectiveness of the law, especially but not limited to copyright, vis-à-vis digitisation in the cultural heritage sector. WP5 shows strengths and weaknesses of the current copyright framework from the perspective of cultural heritage and CHIs, focusing on the effects of EU copyright harmonization and on the complex interplay of norms of copyright, cultural heritage, and data protection.

While acknowledging that policy makers, especially at the EU level, are showing greater thoughtfulness with respect to the new and relentlessly changing needs of CHIs in the digital environment, which is for instance revealed in the latest Directive (EU) 2019/790 providing promising means for digital progress in cultural heritage, WP5 research reveals a few critical issues, particularly in the national implementation of EU provisions, that support a far-reaching copyright reform to tackle legal uncertainty and effectively allow the “digital mission” of CHIs to flourish. The research also discusses the lack of awareness by Galleries, Libraries, Archives, Museums (GLAM) stakeholders of copyright rules, which they struggle to apply in their digitisation practices, and also their scarce knowledge of open policies, including open access, thus missing the opportunity to leverage on them to balance the typical strictness of copyright exclusivity.

The following policy recommendations build on such findings, while they also leave room for further research and analysis. These recommendations are essentially grouped into six main knots:

- 1. REFORM THE EU COPYRIGHT FRAMEWORK SYSTEMATICALLY**
- 2. CLARIFY AND SIMPLIFY THE EU COPYRIGHT FRAMEWORK FOR CULTURAL HERITAGE**
- 3. EXPAND AND SAFEGUARD THE PUBLIC DOMAIN**
- 4. BOOST THE EU ROLE IN CULTURAL HERITAGE**



5. SAFEGUARD THE PUBLIC VALUE OF CULTURAL HERITAGE THROUGH EU INITIATIVES

6. EDUCATE AND ENGAGE WITH GLAM STAKEHOLDERS TO ENSURE FAIR BALANCE OF COPYRIGHT INTERESTS



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LIST OF ABBREVIATIONS

CDSMD	Copyright in the Digital Single Market Directive
CHIs	Cultural Heritage Institutions
E&Ls	Exceptions and Limitations
FAQs	Frequently Asked Questions
FoP	Freedom of Panorama
GLAM	Galleries, Libraries, Archives, Museum
GM	Galleries and Museums
LA	Libraries and Archives
MS	Member State
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WP	Work Package

INTRODUCTION

Since its conception, reCreating Europe has aimed at delivering innovative and multidisciplinary contributions for a modern European copyright, ultimately to promote a culturally diverse production of and inclusive access to cultural content across Europe. Its WP5, dedicated to the cultural heritage sector and entitled Galleries, Libraries, Archives and Museums (GLAM) undertakes interdisciplinary research constantly engaging with Cultural Heritage Institutions (CHIs), creative industries and individual stakeholders. In its ambitious workplan, following a mixed methodology that comprises theoretical and empirical (quantitative and qualitative) research, the deliverables include reports of the current copyright regulatory framework, guidelines and Frequently Asked Questions (FAQs) for stakeholders, policy recommendations and scientific contributions, stemming from four main tasks.

Task 5.1 investigates the state of the art of the European regulatory framework through an up-to-date, comprehensive, and systematic mapping of EU and national public sources of law, policies and private ordering tools across Europe affecting access, preservation, and promotion of cultural goods and cultural heritage.

Task 5.2 confronts the above considerations to develop a cross-national case study that features a constant interaction with stakeholders, who were asked through an online questionnaire and semi-structured interviews – the latter addressing specific and controversial issues – to describe their practical approach to copyright regulation, and especially exceptions and limitations (E&Ls). The results of the survey fed into an interim draft of guidelines and FAQs that were circulated to CHIs to test their aptitude to help dealing with the legal issues arising from digitisation.

T5.3 assesses the achievement of the preceding goal by testing such tools to determine, for instance, whether different or clearer rules (in terms of laws and policies) could facilitate digitisation practices but also access and re-use of data. Activities include specific milestones that were a series of two workshops on legal aspects related to digitisation, and dissemination activities, such as two GLAM events organized at the WP5 partners, and a final event to be organised at the premises of an EU institution, targeting GLAM stakeholders, policymakers, and researchers in the field.

Task 5.4 deepens the research analysis on the city, investigating the patterns of digitisation strategies, and the circulation of digitised creativity, to promote access to culture and foster social identities within places.



All combined these tasks delivered an overview of EU and national copyright showing several points of ineffectiveness of the law. In pursuing its objectives, WP5 explores strengths and weaknesses of current copyright, focusing purposely on the effects of EU copyright harmonization in the cultural heritage field. It is indisputable that policy makers at the EU level are showing a higher degree of sensitivity towards the new and fluctuating needs of CHIs in the digital environment. However, the points of convergence and divergence observed in the national implementation of EU provisions uphold the tender for a more comprehensive copyright reform that could more effectively tackle the legal uncertainties that make the “digital mission” of CHIs hard to pursue. The research also depicts a unique picture of GLAM stakeholders that are not fully aware of copyright rules, or struggle to apply them in their digitisation practices, which cannot be ignored when drafting the relevant policy recommendations.



FINDINGS

The outcomes that WP5 research has already produced have contributed to the state of the art revealing a critical but constructive approach aimed at designing a set of policy proposals, which if implemented could be a turning point for the advancement of digitisation in the GLAM sector.

Within the T5.1 activities, two preliminary deliverables were produced: D5.1 - Report on the existing legal framework for Galleries and Museums (GM) in EU and D5.2 - Report on the existing legal framework for Libraries and Archives (LA) in EU. Both drafted for the purposes of Task 5.1, they portray and discuss EU and national copyright provisions that affect digitisation practices by GLAMs. The choice to split the deliverable in two (one for GM and one for LA) acknowledges similarities and differences among the single entities that are brought under the umbrella notion of GLAMs.

The findings of the mapping and assessment of the regulatory framework impacting the access, preservation, and promotion of cultural heritage across Europe, served as the basis for the further analysis undertaken in D5.3 – Guidelines & FAQs (GM) – Interim version and D5.4 - Guidelines & FAQs (LA) – Interim version, which contributed to investigate the degree of harmonization of copyright rules applicable to the cultural heritage sector. The deliverables will be also instrumental to the further contribution to the public debate on copyright regulation in the GLAM sector. Both D5.3 and D5.4 are designed to serve as basis for further discussion with stakeholders, under T5.3 - Valuing and engaging in openness with GLAM. The outcomes of such a process will flow into the final version of the twin Guidelines & FAQs, with a bottom-up methodology and with the wider goal to support digitalisation in the framework of a rebalanced copyright law.

It is worth mentioning that WP5 activities and deliverables are construed in strict synergy with other reCreating Europe’s WPs and through a constant dialogue with cultural heritage stakeholders, especially built thanks to dedicated participatory events, including under the Milestone M11. These have sensibly enriched the analysis and brought forward important perspectives and points of discussion that otherwise would have been missed.

These outcomes have been now complemented by more recently delivered outputs, beginning with D5.5 and D5.6 turning into D5.3 and D5.4 as final versions, but also D5.10 - Academic journal article on IPRs and place. They will be also soon followed by D5.8 - Academic journal articles on the finding of research and D5.9 - Policy report to disseminate to interested stakeholders.



D5.1 REPORT ON THE EXISTING LEGAL FRAMEWORK FOR GALLERIES AND MUSEUMS (GM) IN EU

The findings of the report centring on Galleries and Museums confirm the growing relevance of sector-specific copyright E&Ls at EU level. The analysis dwells on specific provisions, some of them only recently introduced by Directive (EU) 2019/790 (CDSMD), but the collection and analysis of data has been structured around selected macro-categories of legal provisions, which were deemed fit to describe the approach of GM towards copyright regulation and, in particular, towards copyright E&Ls, and namely rules on the preservation of works of cultural heritage, education, teaching and research, text and data mining, freedom of panorama (FoP), reproduction of works in the public domain, public speech and reporting of news, quotation, criticism, review and parody, caricature, pastiche, as well as rules on out-of-commerce works and orphan works. The analysis considers the implementation of the described EU rules in seven selected countries (Denmark, Estonia, Germany, Hungary, Ireland, Italy, The Netherlands) and one former Member State (the United Kingdom), but it should be noted that at the time of writing, the CDSMD was not implemented by the majority of Member State (MS).

Looking at national law, D5.1 acknowledges that the national regulatory landscape presents convergences for a few provisions that address uses and practices in the cultural heritage sector. Examples include the exceptions for quotation for illustration, education and research, the preservation of cultural heritage, including the treatment of orphan works, and text and data mining. Still, the adopted solutions also present several minor differences with each other for details and structure. This seems mainly due to the optional nature of some of the related copyright E&Ls, which exacerbates the risk of creating legal uncertainty and could be confirmed as the main threat to cross-border transactions.

More specifically, the analysis reveals that many of the national legal frameworks already present provisions that attempt to address the emerging needs of GLAM, especially with regards to the digital ecosystem. Namely, the report underlines the presence of national provisions for online teaching and distance learning, text and data mining and the preservation of cultural heritage. Importantly, the report argues that this may reflect an increased sensitivity across the MSs analysed towards the importance of the digital dimension of cultural heritage.

In addition, the work also briefly considers terminological differences for GLAM at the national level as well as rules on the re-use of public sector information for GLAM, under the implementation of Directive (EU) 2019/1024, and it acknowledges other initiatives for the



digitalization of cultural heritage and the enhancement of digital fruition of cultural heritage, also prompted by the recent pandemic of Covid SARS-19. Even though this subject matter is not fully explored in the D5.1, the deliverable underlines these topics should be considered vital for future research.

Overall, D5.1 analysis withstands the proposal for a structured and holistic copyright reform that would better address the challenges of the digital age and confirms the need to enhance the regulatory effort towards the harmonization.

D5.2 REPORT ON THE EXISTING LEGAL FRAMEWORK FOR LIBRARIES AND ARCHIVES (LA) IN EU

Similar accounts illustrated in D5.1 are brought forward by the report focusing on libraries and archives D5.2, which in addition opens interesting perspectives on access to culture by vulnerable users, such as persons with visual, sensory, physical, or intellectual disabilities, emphasizing the link with the research activities conducted by WP2 on end-users. The methodology embraced for the cross-national legal mapping in the deliverable combines systematic and qualitative analysis of relevant legal sources. Both methodological approaches are based on desk research and review of the existing literature.

In its first part, the deliverable engages with the legal mapping and systematic analysis of EU legal sources relating to copyright provisions, especially E&Ls, in the LA sector. The analysis sheds light on several key provisions enshrined in the EU copyright Directives and overall reflects to a considerable extent the main features of the whole EU copyright legal framework.

Three distinctive characteristics are discussed in this respect. First, the report considers the sectorial nature of the EU E&Ls and concludes that if, on one hand, this provides legal certainty to the specific uses addressed, on the other side, it could hinder a more flexible interpretation in similar real-life scenarios. Second, the optional nature of some E&Ls is recognized to bear a risk of regulatory fragmentation, while the presence of mandatory copyright exceptions regarding uses of cultural heritage remains considerable. Third, next to the presence of outdated assumptions, corroborating the need for a sound process of copyright modernization at the EU level, there seems to be also an initiated change towards a broader exploitation of the potential of technology. Finally, the analysis confirms the evolutions of LA-related EU copyright provisions, that appears of primarily legislative nature.

The second part of D5.2 covers the collection, systematization, and analysis of national legal sources (23 MSs covered out of 27). Their overview is structured around the following macro-



categories: 1. Public lending; 2. Private study and private research; 3. Preservation of cultural heritage; 4. Uses of orphan works; 5. Uses of out-of-commerce works; 6. Other uses by LA. It should however be underlined that the researchers involved value the synergic cooperation with the team working on reCreating Europe's WP2 - End-users and intend to complete and update the legal mapping for a prospective focus on GLAM-related copyright legislation in the public database.

Overall, this part of the deliverable acknowledges an advanced stage of harmonization, and that despite the optional nature of some of the copyright E&Ls, the national regulatory landscape concerning public lending, use for private study and research, and preservation of cultural heritage appears convergent. The report also detects that there are no significant distinctions between libraries and archives (except in the case of the public lending exception) and extensive indications regarding the public or private nature of LA are absent, but for a few mentions of public LA. Finally, the work provides a positive outlook with regards to the room for copyright provisions addressing uses and practices, considering both EU and national provisions, and it detects a pattern of extensive interpretation of the notion of "use" and of "cultural heritage", only rarely limited by strict constraints that add to the three-step-test.

In conclusion, D5.2 acknowledges the sensitivity towards the importance of cultural uses, and, in particular, the access, promotion, preservation, and restoration of cultural heritage as distinctive feature of both EU and national provisions.

D5.3 GUIDELINES & FAQs (GM) INDUSTRIES – INTERIM VERSION

The deliverable includes a descriptive analysis of the legal framework, a set of FAQs and Guidelines.

The deliverable finds its foundation in the survey analysis conducted under T5.2 Implementation of legal requirements and criteria for openness, while it also shares the same backdrop of D5.4, the interim version of Guidelines & FAQs (LA) industries on exploring legal compliance and fulfilment with standards for Openness, application of technological measures, and implementation of specific policies and informal practices. However, it differs from D5.4 for its more specific emphasis on the three mentioned main topics. The focus of the work is indeed on digital preservation, use of orphan works and use of out-of-commerce works. These topics have been selected due to their relevance for GM and have been dedicated further analysis because of their ambiguous scope and difficulties from an applied perspective.



Building upon preceding deliverables D5.1 and D5.2, the goal of the work is to produce easy-to-read information to help GLAMs deal with selected aspects vis-à-vis digitalisation. Since the finalization of the interim version, WP5 has pursued the objective to circulate D5.3 during the workshops organized under WP5, as the GLAM@Home event in Trento and Rovereto, to discuss the FAQs and to apply the guidelines to suggest (a) whether different and/or clearer rules (i.e., considering laws and policies) may facilitate the process of dealing with the identified controversial issues, and (b) whether the current legal framework is too strict to comply with, and thus possibly hindering GLAMs mission of democratising culture. The deliverable supports the idea that GLAM professionals will help to adjust the FAQs that appear too technical or comprehensible only to an expert audience.

D5.4 GUIDELINES & FAQs (LA) INDUSTRIES – INTERIM VERSION

Next to sharing the same backdrop of D5.3, this deliverable also finds its foundation in the preliminary analysis of the WP5 - Galleries, Libraries, Archives, Museums (GLAM) survey results on the impact of copyright law and open policies in relation to digitisation in the GLAM sector, the deliverable D5.2 - Report on the existing legal framework for Libraries and Archives (LA) industries in EU and, finally, the methodology and information related to the data to be collected in the framework of WP2 - End users on access to content by people with disabilities.

The deliverable sustains that the findings of the research and review of related documentation stemming from reCreating Europe’s activities and research conducted so far show that there is room for improvement, alignment and adaptations of LA entities with regards to a) legal compliance with EU and national legislation, and compliance with standards for Openness, b) implementation of technological measures, c) adoption of social norms and common practices, particularly if in conflict with formal legal norms and more aligned to Open Knowledge principles, and d) access to digital cultural content by people with disabilities.

The interim FAQs and Guidelines are therefore intended to serve as preliminary information for supporting compliance, alignment, implementation, and improvement of operations pertaining to digital cultural content. As for D5.3, FAQs and Guidelines of D5.4 will also be used as the basis for further consultation with representatives of the LA industry and will be enriched by further research and analysis of the reCreating Europe project in order to prepare the final version. More specifically, the deliverable acknowledges that following different types of consultation (e.g., webinars, workshops, discussion within structures of the target stakeholder group) the methodology of the final version of the FAQs and Guidelines will be modified based on the needs of the communities it addresses.



RECOMMENDATIONS FOR FUTURE POLICY ACTIONS

The research and its deliverables corroborate five important premises.

First, it should be acknowledged the noteworthy and auspicious contribution that the newest EU Directive 2019/790 has conveyed, especially regarding the provisions on text and data mining for the purposes of scientific research (Article 3 CDSMD), preservation of cultural heritage (Article 6 CDSMD), the use of out-of-commerce works and other subject matter by cultural heritage institutions (Article 8-11 CDSMD), the reproduction of public domain works of visual art (Article 14 CDSMD). Still, the EU copyright framework as it currently stands is not yet fit for the digital future of cultural heritage, featuring a disjointed and complex landscape of multiple norms without a far-reaching clause that would allow free uses of copyright resources in the cultural heritage sector. Additionally, the national implementation of these provisions shows a high degree of fragmentation that conflicts with the need for legal certainty, as well as the EU institutional efforts of harmonization and the effectiveness of copyright fair balance.

Second, EU copyright law provisions such as those on E&Ls, due to their partial lack of clarity, determine uncertainty of the copyright regulatory framework and ambiguity in their interpretation and application to cultural heritage. Additionally, the possibility of derogating from copyright E&Ls through contract and technological measures reduces their strength.

Third, the key role of public domain for cultural heritage is in some way at stake, either for the unlawful application of exclusive rights or because the use of cultural heritage resources is constrained or even nullified based on other legal grounds, such as cultural heritage law and data protection.

Fourth, placing on equal footing CHIs and private entities operating in the cultural sector and not attributing the necessary emphasis to the fundamental public value of CHIs serving a public mission, in the regulation of cultural heritage, increases the risk of privatising culture. This is especially revealed in the context of copyright E&Ls, where the difference between private and public CHIs remains unclear, but also in the rules regarding data from CHIs.

Fifth, the lack of clear guidance for interpreters, including in national courts, makes it difficult to construe and apply provisions for cultural heritage in a fair balanced way. This is especially true when considering the recurrent tensions between copyright law and cultural heritage law. This issue is also consistent with the more general consideration that that with regards to the subject matter of culture the EU is not attributed an exclusive competence, but it supports, coordinates or supplements actions of the MSs, essentially through soft law.



These premises correspond to the following six essential recommendations that, deliberately and in line with reCreating Europe's efforts to work closely with stakeholders, recall and uphold the policy recommendations referring to or otherwise affecting digital cultural heritage, including those drafted by COMMUNIA, Creative Commons, NEMO and ICOM. They also expressly link to the other reCreating Europe's Policy Recommendations, and the meaningful research work undertaken by the fellow project inDICES.

1. REFORM THE EU COPYRIGHT FRAMEWORK SYSTEMATICALLY

Undertake a systematised and holistic reform of copyright regulatory framework to reduce risks of fragmentation that clash with the purpose of EU copyright harmonization, by means of a Regulation or a dedicated Directive, where the implementation of all E&Ls is mandatory, to be applied in all jurisdictions, and including the clause that E&Ls cannot be overridden by contract or technological measures.

Especially consider the introduction of purpose-oriented provisions that would support the legislative implementation of the CJEU's fair balance doctrine and other doctrines such as the principle of effectiveness of E&Ls and the understanding of E&Ls linked to fundamental rights, in line with what is suggested in the WP2 recommendations.

With this backdrop, consider also adding the introduction of an open-ended norm that would establish broad conditions to fulfil and protect the universal right to culture.

2. CLARIFY AND SIMPLIFY THE EU COPYRIGHT FRAMEWORK FOR CULTURAL HERITAGE

Harmonise all norms on copyright E&Ls concerning the cultural heritage currently in force and make them as expansive as possible to cover free uses for the cultural heritage sector.

Examples include amendment of Article 5(3)(d) InfoSoc to turn the quotation exception into a maximum harmonization norm from which all stakeholders, including CHIs, can benefit, conversion of a mandatory EU "Freedom of Panorama" (FoP) exemption to cover works belonging to cultural heritage, and amendment of Article 6 CDSMD to make the preservation exception for CHIs more encompassing and less discretionary.

Modify norms that are vague in their language, present optional traits and features that depend on technology, market, and society. Likewise, reduce the number of norms, and always opt for a language that is technological, social and market neutral (also referring to horizontal provisions, as suggested by WP2 recommendations). In addition, make all E&Ls mandatory, carefully evaluate the option of extending the country-of-origin principle to



overcome territoriality problems, and ensure E&Ls are not overridable by contract or technological measures.

Should these wider changes not be feasible, consider introducing mandatory purpose-oriented provisions allowing free uses for the cultural heritage sector, including but not limited to CHIs.

Such proposals focusing on the cultural heritage sector more broadly line up with the WP2 recommendations to align EU copyright law to policies on Open Access and Open Science.

3. EXPAND AND SAFEGUARD THE PUBLIC DOMAIN

Reduce the term of copyright protection for works and consider bringing it back to 50 years after the death of the author.

Taking into consideration the setting of EU competences (cf. point 4 of the present recommendations), introduce an encompassing norm that would uphold public or free domain against any potential detriment of copyright E&Ls or exclusive rights, based on a broader and stronger notion of public domain that would support free uses for the cultural heritage sector and be fit for the digital age.

To this end, reinforce current provisions like article 14 CDSMD, to avoid situations where the use of public domain works could be excluded based on other legal grounds, like cultural heritage law, and ensure a fair balance of fundamental rights and interests at stake.

Define and harmonise the boundaries of public domain in the EU copyright framework, by further specifying the notion of protected works, as suggested by WP2 recommendations, also by applying more strictly the idea/expression dichotomy principle.

4. BOOST THE EU ROLE IN CULTURAL HERITAGE

Clarify the relationship between private copyright norms and public cultural heritage norms to avoid the override of copyright E&Ls and thus settle the conflicts that may rise when cultural heritage law imposes new limitations impeding free uses in the cultural heritage sector.

To this extent, explore the option of interpreting and modifying the EU Treaties, i.e., Article 3(3) of the Treaty on European Union (TEU), and Article 6 and 167 of the Treaty on the Functioning of the European Union (TFEU), to boost the EU role in cultural heritage policy and law making.



5. SAFEGUARD THE PUBLIC VALUE OF CULTURAL HERITAGE THROUGH EU INITIATIVES

Acknowledge and safeguard the public mission of CHIs, which have a crucial role in the advancement of knowledge, cultural participation, and creation of culture. Highlight and further protect the public value of cultural heritage, particularly when addressing regulation of copyright (cf. point 3 of the present recommendations) and data from CHIs, whose public dimension should be fully recognized and enhanced.

Mandatory obligations to make all CHIs data and metadata open by default should be introduced, accompanied by initiatives to support the related efforts of CHIs to do so. To this end, Open Data legislation should be amended to include CHIs not currently considered and mitigate existing derogations in place for CHIs and ensure that all the materials resulting from publicly funded digitisation projects are open and accessible by everyone.

Clarify norms on cultural heritage and data, including Public Sector Information law (Open Data Directive, Directive EU 2019/1024) and the Recommendation on a Common European Data space for cultural heritage (C(2021) 7953 final), to avoid conflict emerging from different legal provisions.

6. EDUCATE AND ENGAGE WITH GLAM STAKEHOLDERS TO ENSURE A FAIR BALANCE OF COPYRIGHT INTERESTS

On top of the previous recommendations, guide all legal actors and stakeholders to interpret norms ensuring a fair balance of fundamental rights and interests at stake in the cultural heritage sector. Especially provide guidance for the most effective use of the promising but very complex provisions concerning use of out-of-commerce works and other subject matter by CHIs.

Guarantee that regulatory instruments applicable to cultural heritage are crafted with a bottom-up and not top-down approach, ensuring public participation, to pursue the amplest enjoyment of cultural heritage by everyone.

Endorse and facilitate actions promoting life-long education and training that can help CHIs fill the gaps of limited copyright and data regulation knowledge, also highlighting the opportunities offered by open access and open science policies. This might be reached by facilitating legal advice for CHIs on copyright, data protection and cultural heritage law.



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The ReCreating Europe project aims at bringing a groundbreaking contribution to the understanding and management of copyright in the DSM, and at advancing the discussion on how IPRs can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. The focus of such an exercise is on, inter alia, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the EU cultural and copyright industries, and the emerging role of artificial intelligence (AI) in the creative process.



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626