Measuring the Impact of Digital Culture

Deliverable 3.5

A white paper with legal recommendations - v. 2

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Executive Summary

The white paper presents legal recommendations from research conducted in the inDICEs project addressing policymakers in the cultural heritage field on European and national levels. The recommendations rely on recognising the socio-economic values generated in digital cultural heritage following the Culture 3.0 paradigm by Pier Luigi Sacco. This paradigm blurs the boundaries between producers and users. “Cultural producers and users are enabled to interchange roles in a wide range of possibilities”[1]. It thus makes it necessary to redefine the role of copyright itself and its normative shape in the new realm of the heritage sector. Traditionally, the regulatory approach places the artwork understood as an object of ownership in the centre of attention, together with the market mechanisms of its production and distribution, and treats CHI's activity as a marginal element of the system. In contrast, the white paper approach places the artwork as part of the cultural heritage at the centre and CHI's activity as an essential aspect to extract from this heritage the socio-economic values. The traditional approach deprives society of these benefits by insufficient consideration of these values.

The white paper is divided into three main parts. The first part is devoted to the assumptions that must be considered when shaping the regulatory environment of CHIs’ operations. The second part presents legal recommendations related to the European Directive on Copyright in the Digital Single Market (DSM). The third part discusses the need for further changes in this regulatory area. All of the above parts aim to show the need for further regulatory amendments in the short and long term, aimed at implementing the adopted assumptions enabling CHIs to exploit the socio-economic values related to cultural heritage fully. Consequently, the white paper supports the need for further reform of the CHIs regulatory environment.

Assumptions for legal recommendations

The theoretical basis for the assumptions adopted in these recommendations is the result of analyses conducted in the inDICEs project. The critical element of this analysis is an indication that the activity of cultural heritage institutions (CHIs) generates direct and indirect socio-economic impact identified in the eight-tier classification by Pier Luigi Sacco**.** Recognition of these values and their importance to society justifies the need for a different approach to regulating CHIs’ activities. Traditionally, it is assumed that the central values generated in connection with the creation and dissemination of works are realised in the context of their market use. Such an assumption justifies the regulations of the traditional approach under copyright law, aimed at protecting the interests of authors and rights holders. Such a traditional model is related to treating works simply as objects of property. In this perspective, however, the socio-economic values that are generated in connection with the (re)use of works understood as cultural heritage are overlooked. As part of the white paper,

[1] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 6.

three different assumptions are developed, which are the basis for formulating recommendations aimed at enabling CHI's implementation of these socio-economic values:

1. The inDICEs recommendations, contrary to the traditional understanding of copyright, do not treat works as property but as heritage. They rely on the culture cycle approach coined by UNESCO providing the public mission carried out by cultural heritage institutions as of particular importance.
2. The recommendations place the proposed changes in the copyright system in the context of the right to culture notion.
3. The overall framework on which the recommendations are built has its roots in a belief in a mission-oriented role of the heritage sector.

The analysis carried out as part of the inDICEs project indicates that the recent policy actions taken under regulations concerning the functioning of CHIs in the European legal landscape are gradually empowering[2] heritage institutions to fulfil their role in providing democratic access and allow for fair use and reuse of heritage collections. The research, however, proves that the existing regulations need to be revised to enable heritage institutions to entirely bring to fruition the socio-economic values inherent in them and therefore, they ought to be further improved.

Legal recommendations based on evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector

The impact of the European Directive on Copyright in the Digital Single Market on the activities of CHIs was a subject of a detailed analysis in the project's Work Package 2, gathered in the *Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (D2.4).* Fifteen recommendations to be considered by policy makers for future harmonisation efforts are put forward in order to enhance legal certainty, the protection of culture, promotion of cultural reuse and the correct valuation of artistic efforts in the European internal market. The recommendations are devised around fifteen specific areas:

1. **Copyright Harmonization:** promote concrete discussion on non-harmonized subject matter as an effort to reduce the fragmented copyright landscape in future harmonisation efforts.
2. **Towards open legal concept of Cultural Heritage Institutions:** adapt the definition of “cultural heritage institution” to allow actors outside of the limited scope of the definition currently in place to contribute to the public mission.
3. **Commercial Nature:** allow commercial actors to benefit from provisions destined to not-for-profit institutions, as long as the pursuit of a public interest of mission is evident from the nature and scope of their activities.
4. **Scope of text and data mining:** devise exceptions and limitations realistically and contemplate all necessary permissions for complimentary activities that follow its objectives.
5. **Public-Private partnerships:** encourage the collaboration between cultural heritage institutions and specialised private enterprises, by enlarging the scope of exceptions to all parties involved.

[2] European Directive on Copyright in the Digital Single Market

6. **Cultural heritage institutions in education:** enlarge the scope of beneficiaries of cross-border educational exceptions to encompass cultural heritage institutions and other non-profit entities running educational activities.
7. **Cultural preservation:** enforce restrictions on exceptions and limitations that respect the innate traits of the digital environment, without creating undue burden for beneficiaries.
8. **Technological protection measures:** implement effective mechanisms to limit the impact of disproportionate technical protection measures on the lawful uses of the beneficiaries of exceptions and limitations
9. **Out of commerce works:** establish mediation or complaint and redress mechanism to assure good-faith negotiations and reasonable licensing terms between Collective Management Organisations and CHIs to avoid licensing lockout.
10. **Works of art in the public domain:** protect the public domain by expanding current safeguards to all types of works with an expired copyright term, and establishing mechanisms to effectively restrict unlawful exploitation of such works.
11. **Appropriate remuneration:** define and harmonise concepts related to appropriate and proportional remuneration of authors and performers, to avoid uncertainty and a fragmentary approach and unreliable framework.
12. **Transparency obligation:** provide support to information duties through overseeing bodies or operational complaint mechanisms, allowing authors and performers to request periodical information on revenue from licensees and sublicensees effectively.
13. **Contract adjustment:** clarify how contract adjustment mechanisms operate in the case of a licensee whose business model does not allow to directly assign revenue to the exploitation of a given work.
14. **Revocation right:** engage in discussion on further expansions of revocation rights, not only to achieve a return to exploitation, but potentially early termination of the copyright status of an inaccessible, unpreserved cultural good, by virtue of the public interest.
15. **Refinement of legal framework of rights statements and open licences**: further refine the legal framework of rights statements and open licences, clarifying their relationship with the EU copyright framework, and providing legal certainty.

Legal recommendations based on value chains analysis

The last part of the white paper encapsulates policy recommendations for further legal changes to enable CHIs to embrace their socio-economic values fully. The mission-oriented approach, constituted as a core value for the heritage sector, led to distinguishing three fundamental pillars on which further changes in the law should be based. Firstly, the fulfilment of the public mission of CHIs requires public organisation and funding. Secondly, CHIs should be given specific prerogatives enabling them to fulfil this mission. Thirdly, the implementation of the approach requires public responsibility. This part of the white paper expands the notion outlined in the inDICEs *Policy Brief: Towards community-focused cultural heritage institutions in the digital realm (D3.6),* stating that CHIs guided by a public mission should be equipped with appropriate legal instruments to support and empower its communities. It also argues that the current shape of intellectual property law, including copyright, requires remodelling. This argument is supported by a review of different, recently published policy documents referring to the public mission of heritage organisations, which are

consistent with the assumptions adopted by inDICEs. They all call for a continuous dialogue on further policy reform leading to better access, sharing, use, and reuse of cultural heritage - one of the critical elements for creating and maintaining a resilient, democratic and sustainable society.

The document concludes with presenting a further-reaching solution, one of possible scenarios that could enable CHIs to embrace their full socio-economic value and generate profound societal impact. The solution assumes an introduction of a ***European instrument for ensuring access and (re)use of cultural heritage resources*** ("The Instrument") regulation. The Instrument could empower CHIs to fulfil their mission and be linked to the right to remuneration for authors. It also could allow for better uses of works which serve freedom of expression, information and social, political and cultural objectives. The proposed solution is an example, based on the assumption that in order to fully enable the embrace of the values and the implementation of the impact generated by European CHIs, the mechanism should be operational at the European level.

The Instrument is based on enabling CHIs to use the works gathered in its collections on three levels, which are linked to remuneration for creators (rights holders). The first level (Possibility to enjoy) enables CHIs reproduction, communication to the public and making works available to the public. The second level (Possibility of non-commercial (re)use) allows for a non-commercial use of works on the terms analogous to the rules set out in the current version of the Creative Commons licence: Attribution-NonCommercial International (CC BY-NC). The third level (Possibility of commercial (re)use) allows for commercial use of works on the terms analogous to the rules set out in the current version of the Creative Commons licence: Attribution International (CC BY). The Instrument should contain two types of funding schemes (financed from the budget of the European Union): (1) the European Fund for the remuneration of creators (rights holders) - Creator Remuneration Fund, (2) the European Fund for the digitisation, acquisition and dissemination of cultural heritage. CHIs wishing to use works under the Instrument should submit their collections to the Creator Remuneration Fund. Creators (right holders) should receive remuneration for the use of works either directly from the Creator Remuneration Fund or through a relevant CMO. Moreover, creators (rights holders) should be entitled to an opt-out clause from level 2 or 3 of the Instrument. However, level 1 should be mandatory, as the goal of the Instrument is to enable CHIs to at least create and make accessible virtual collections of its entire collection. An Independent Body should set the rules for determining remuneration. All claims for the use of works under the Instrument should be addressed directly to the Creator Remuneration Fund. The instrument should act as a safe harbour for CHIs providing them with legal certainty and financial security for the use of works.

The establishment of such an Instrument undoubtedly requires further investigation. If implemented, it would demand an introduction of several legal changes and adoption of a new approach to the role of copyright in the heritage sector, recognition of the unique role of CHIs in generating social values, and the right balance between the various interests and human rights that support them.

1. Introduction and Objectives

The aim of the inDICEs project is *to empower the Cultural and Creative Industries and policy-makers to fully understand the social and economic impact of digitisation and innovate the reuse of cultural assets.* The analytical work performed under the inDICEs project was the basis for preparing a set of legal recommendations aimed at improving the capacity of the CH sector to generate social and economic value through the 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 favourable 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 in policies on the European level to foster openness in CHIs to stimulate digital cultural content (re)use. The white paper with legal recommendations summarises the legal recommendations resulting from the analysis addressed to the European Commission and other relevant policymakers.

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, legal recommendations based on value chains analysis -an outcome of the policy analysis and a review of different, recently published recommendations referring to legal regulations and public mission of heritage organisations.

The work on the white paper began in February 2021 following a collaborative methodology. In the first phase, 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 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). In March 2022, an in-person consultation and feedback session was held in Rome with consortium members to identify the final document's scope.

The work on the white paper was based on analyses carried out as part of the entire inDICES project. In particular, the following analyses carried out within the framework of individual Work Packages of the project were significant for the constitution of the white paper:

Name of the document	Number	Date	Authors/Contributing partners:
Policy analysis of value chains for CHIs in the Digital Single Market	D3.1	31.01.2020	**Authors** Aleksandra Janus Alek Tarkowski Jan Strycharz Maria Drabczyk Centrum Cyfrowe **Contributing partners (et al.)** Rasa Bočytė, Beeld en Geluid Claudia Cacovean, Cluj Cultural Centre Csenge Kosztolanyi, PIN SCRL Roxanne Lagardere, Capital High Tech
Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector.	D2.4.	22.11.2022	**Authors:** Francisco Duque Lima, KU Leuven Centre for IT&IP Law **Contributing partners:** Professor Marie-Christine Janssens (Supervisor, P.I.) Dr. Arina Gorbatyuk (Co-Supervisor) KU Leuven Centre for IT&IP Law Ariadna Matas, Europeana Foundation Konrad Gliściński, Centrum Cyfrowe /Jagiellonian University
Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage	D1.7	27.12.2022	**Authors** Maria Tartari, FBK-IULM Pier Luigi Sacco, FBK-UNICH Francesca Manfredini, EFHA Federico Pilati, IULM **Contributing Partners** Riccardo Gallotti, FBK Antoine Houssard, FBK Oriol Artime, FBK

Figure 1: Relevant deliverables of the inDICEs project forming research basis for the white paper

Together with the *Policy Brief: Towards community-focused cultural heritage institutions in the digital realm (D3.6),* the white paper creates a set of inDICEs policy recommendations compiled to offer a groundwork for a continuing European policy debate on the heritage sector.

2. Assumptions for legal recommendations

The aim of the inDICEs project is, among other things, "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 favourable to digitally mediated cultural production and participation"[3]. Simultaneously "[t]he main scope is to inform inDICEs stakeholders of the possibility for a radical psycho-social change that their activities can trigger, if they take on a new role"[4]. This new role involves a change of approach at the level of the activities of CHI itself, as well as the approach of legislators at both EU and national levels. For these reasons, three basic assumptions have been developed as part of the white paper which should form the basis for shaping the regulatory environment for CHIs' operations[5].

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"[6]. Therefore, in the inDICEs project, we indicate that the cultural heritage field is ideal for experimenting with innovative solutions and testing bottlenecks in digital production practices, dissemination and access and reuse due to their limited market exposure. Therefore, experimenting with possibilities that more market-oriented sectors may further adapt[7]. From that perspective, access to heritage leads to new creative products or services. That is why any new recommendations should strengthen the value chain between cultural heritage institutions and the cultural sector. Besides the direct economic impact of CHIs, their indirect impact on society is also essential. 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"[8]. One of the crucial suggestions from inDICEs is to point out that: ***the economic value generated by a cultural project/activity need no longer be identified with incremental revenues but rather with the induced effects generated by the project***[9]***.***

[3] inDICEs Grant Agreement, p. 17.
[4] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 19.
[5] see point 2.2 below: Assumptions for legal recommendations developed as part of the inDICEs project.
[6] 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.
[7] inDICEs Grant Agreement, p. 10.
[8] 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.
[9] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-,p. 24.

The way to conceptualise such influence is the eight-tier classification of the indirect developmental effects by Pier Luigi Sacco. In this perspective, culture influences[10] innovation and knowledge, welfare and wellbeing, sustainability and environment, social cohesion, new forms of entrepreneurship, learning society, collective identity and soft power.

Figure 2: Eight-tier classification by Pier Luigi Sacco

This eight-tier classification finds its complete 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"[11]. Active digital cultural participation could generate several positive impacts in these eight areas[12]. "High levels of active cultural participation can change perceptions and behaviours or influence them toward more pro-social lifestyles, and this dynamic can provide economic benefits at the national level. Positive externalities generated by partaking actively to cultural activities, in person and online, could help the Public Sector save public money, which can then be re-allocated for funding cultural institutions and projects"[13]. For instance, since cultural active participation can make elderly people feel better, they are more likely to take fewer medicines, or to avoid stays in hospital, and consequently financial savings can be made by

[10] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 25.

[11] 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.

[12] The inDICEs project identified how active participation in culture, including the use of it in the digitized sphere, translates into these 8 dimensions. Cf. in:Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 25-52.

[13] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 24.

public health authorities[14]. However, ensuring the real possibility of such participation requires, among other things, appropriate legal regulations, including those related to intellectual property rights, which will enable the (re)use of cultural heritage. Only the simultaneous provision of access and re-use of cultural heritage assets can contribute to their actual generation of social values recognized under the eight-tier classification.

However, this means the need to remodel the relationship between copyright and other rights on intangible assets and the activities of CHIs. The recommendations presented in the white paper form the basic framework of such remodelling. Below, therefore, the traditional approach of copyright law, which treats cultural heritage simply as an object of ownership, will be confronted with the approach that treats it as heritage of broader significance for society. In this context, the right to culture is presented as a lens through which it gives a new dimension to the regulation of copyright. In the last part, the concept of a mission-based approach is introduced, which as a theoretical framework is a valid incentive to change the regulatory approach in the field of cultural heritage.

2.1. 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"[15]. Sometimes it is declared that the purposes of copyright and CHIs' mission may be complementary to each other. At the same time, it is emphasised[16] that the activities of CHIs, particularly in the field of digitisation and dissemination, should be carried out following 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"[17].

The copyright system based on exclusive rights has developed in Europe since 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 stimulates creativity[18]. This is because authors can obtain remuneration by transferring these rights to other entities or granting them a licence to use them. As a model, this market exchange mechanism assumes that authors will receive adequate remuneration. As a rule, entities interested in using

[14] See more examples in: Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 24.
[15] Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, recital 11.
[16] Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, recital 11.
[17] C. Waelde, C. Cummings, RICHES, Deliverable 2.2, Digital Copyrights Framework, p. 7.
[18] 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, Gliściński K., Wszystkie prawa zastrzeżone. Historia sporów o autorskie prawa majątkowe, 1469–1928, Warszawa 2016.

works must have an appropriate permit from authorised entities. If the works are used without authorisation, the user is liable for copyright infringement. As a rule, such liability is absolute, as it is not dependent on fault. The copyright system's role is 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, intangible goods such as works generate additional difficulties and (relatively high) transaction costs[19]. Most importantly, however, such a way of regulating intangible goods, in particular cultural heritage, does not reflect the complexity of this phenomenon from the perspective of its social significance.

2.2. Assumptions for legal recommendations developed as part of the inDICEs project

The traditional regulatory approach assumes that the right to exclusive use of intangible goods (such as works) is a rule from which (in strictly defined cases) exceptions or limitations are introduced. This approach translates into treating CHI's activities as unique from the point of view of the market model of creating and delivering works. However, the approach proposed in the white paper aims to propose a regulatory approach whose aim is to enable the implementation of the socio-economic values inherent in cultural heritage. From this perspective, the focus shifts to an attempt to address how to regulate CHI's activities so that - while fulfilling their public mission - they can fully implement these values. Such an approach requires looking at cultural heritage objects not as simple objects of market exchange but as goods with a more comprehensive social meaning. Treating cultural heritage as heritage takes into account, among others, treating it in the context of the UNESCO cultural cycle and socio-economic values identified in the Sacco model. The proposed change of perspective is also justified by the need to implement the right to culture and the mission-based approach to regulating CHI's activities.

1. Cultural heritage as heritage: in search of the participatory meaning of works for society

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 following their assumed public mission. The conclusions of the RICHES project[20] 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 viewed through the human rights lens, 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*

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[19] 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.

[20] Project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no 612789.

> *end in itself; rather it becomes a means for the realisation of the goals of cultural rights and of the right to culture*[21].

For these reasons the resources collected and shared by CHIs should not be considered mearly 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"[22]. Therefore, the cultural heritage is not only a matter of the past and its material artefacts, but a "process of engagement, an act of communication and an act of making meaning in and for the present"[23]. Understanding cultural heritage as a process further facilitates the understanding that works, contrary to the traditional assumption of the romantic genius[24], do not constitute the achievement of a single author, but are cumulative. For the purposes of traditional copyright perspective, 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. This approach also completely ignores the importance of socio-economic values generated in connection with the (re)use of cultural heritage by the society.

Instead, the culture cycle UNESCO approach provides a different way of conceptualising cultural heritage. "The culture cycle shows how cultural production has its origins in the social realm"[25]. 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[26].

> *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*[27].

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[21] C. Waelde, C. Cummings, RICHES, Deliverable 2.2, Digital Copyrights Framework, p. 8.
[22] art. 2 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199).
[23] Smith L., Uses of Heritage, London 2006, p. 1.
[24] 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.
[25] 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, p. 21.
[26] Drabczyk M, Janus A., Strycharz J., Tarkowsk A., Policy analysis of value chains for CHIs in the Digital Single Market (D3.1), inDICEs, 2020, p. 7.
[27] 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, p. 20.

As indicated in inDICEs *Policy analysis of value chains for CHIs in the Digital Single Market*[28] (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[29]. Such an approach also allows taking into account various groups of stakeholders and their interests in the process of creating social value. Also Sacco in his analysis puts various stakeholder groups and their interests in the core of the approach pointing out to its social value. And such an approach calls for a shift in digitisation strategies. inDICEs stresses the need to look at the digitisation process from the perspective of all involved communities - to move away from the "inside-out", object-oriented perspective towards the "outside-in" digitisation cycle taking in voices and needs of all relevant stakeholders of all digitisation stages, including objects' publication.[30]

Similarly, a community-focused and participatory approach is strongly reflected in the new museum definition[31] released by ICOM in 2022. ICOM recognises, for the first time, a direct reference between museum activities and collaborations and dialogue with communities.

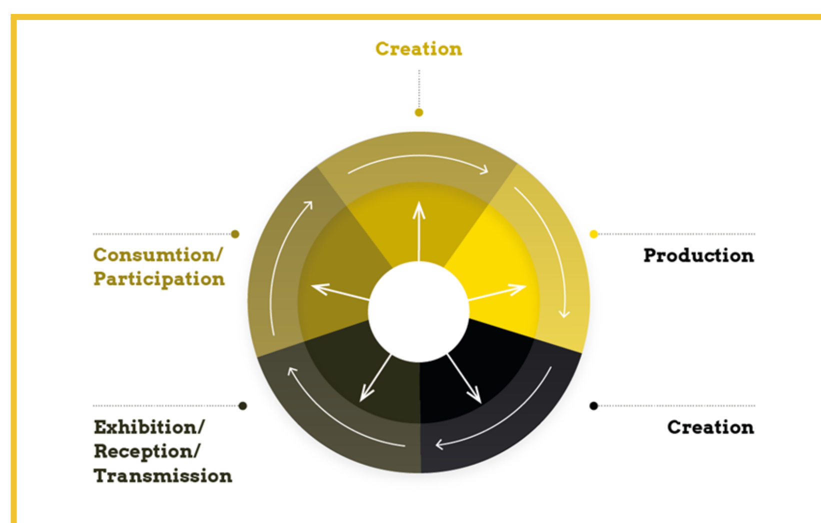

Figure 3: Culture cycle[32]

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

[29] Drabczyk M, Janus A., Strycharz J., Tarkowsk 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.

[30] Truyen, Fred, & Pireddu, Roberta. (2022). Deliverable 3.3 – Infocharts describing the CHIs DSM readiness Assessment Methodology. Zenodo. https://doi.org/10.5281/zenodo.7486663

[31]https://icom.museum/en/resources/standards-guidelines/museum-definition/

[32] 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, p. 20.

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**[33], which blurs the boundaries between producers and users, makes it necessary to redefine the role of copyright itself and its normative shape. "Cultural producers and users are enabled to interchange roles in a wide range of possibilities"[34]. 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"[35]. The rationale for a new regulatory approach is, among other things, understanding the role of the direct and indirect impact of socio-economic value creation through culture.

> *As the online participation in platforms where sharing pictures, photos, thoughts, creations, and cross-national forms of knowledge contamination grows constantly, new forms of collective intelligence may emerge from their immediate accessibility: it relies on the ''cognitive surplus'' of contributing communities to tackle important problems that cannot be tackled by a single person*[36].

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[37].** The digital dimension of CHI's activities, when reflecting the 3.0 models[38] 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, the Generation Z and C as digital users are naturally familiar with cocreation practices and there is great demand for new digital innovation-driven business models"[39]. These new socio-cognitive trends hold great promise for the future business development of cultural and creative production. Today 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

[33] 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.
[34] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 6.
[35] 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.
[36] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 7.
[37] An example of a regulation enabling a wider (re)use of cultural heritage is the Instrument proposed in this document - cf. section 5.3.
[38] 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).
[39] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 40.

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[40].

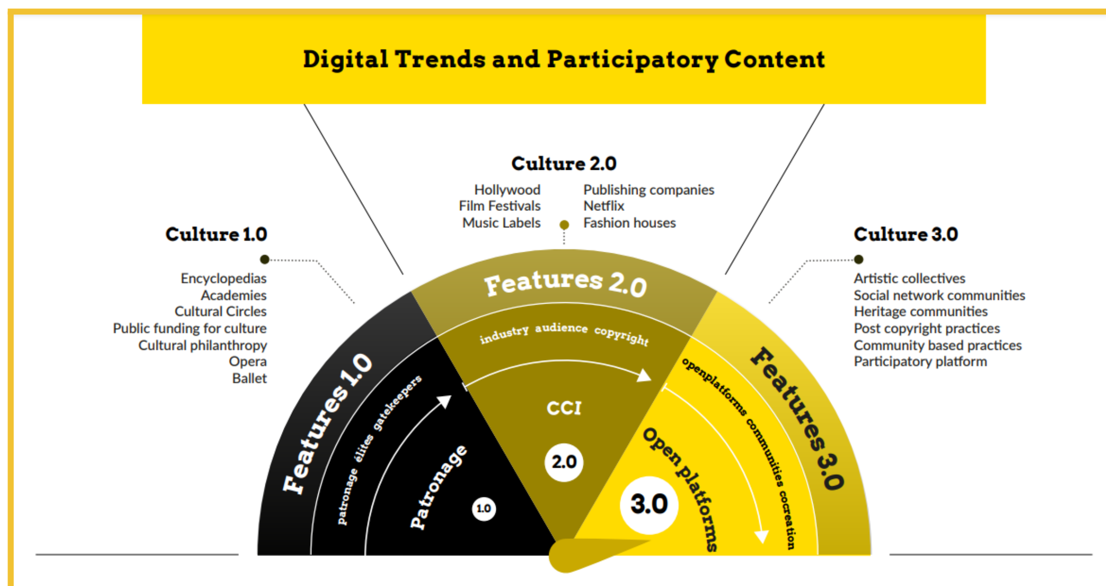

Figure 4: Speedometer of the regimes of Cultural Production.

2. Right to culture

The approach proposed in the white paper argues in favour of practical implementation of the right to culture**.** None of the existing international legal instruments defines a "right to culture" or "cultural rights". For this reason, the literature identifies various rights that are collectively referred to as rights to culture. Generally, they can be defined as part of the human rights system that includes the "right of access to, participation in and enjoyment of culture"[41].

> *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*[42].

Also, the 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"),

[40] Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 40-41.

[41]http://www.unesco.org/culture/culture-sector-knowledge-management-tools/10_Info%20Sheet_Right%20to%20Culture.pdf

[42] 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.

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 construed from a cultural rights perspective (...)”[43]. In this context, it is increasingly often argued that intellectual property rights, including copyright, are systematically incompatible with “the right to science and culture"[44]. For example, as part of the implementation of the DSM Directive, the Finnish Parliament's Constitutional Law Committee indicated that the government's draft implementation of the Copyright in the Digital Single Market Directive is not in line with the country’s constitution. “In particular, the Committee found that it conflicted with human rights – namely the right to education and science under Section 16 of the Finnish Constitution”[45]. At the same time “digitisation has the capacity to strengthen the right to participate in cultural life”[46]. 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 this approach, the intellectual property rights "should be used as a tool to support the right"[47] set out in Art. 27 sec. 1 of the Universal Declaration of Human Rights, which provides that:

> *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

For this reason, one cannot treat the regulation of intellectual property rights as a mechanism (only) to support the interests of rights holders - but as a mechanism balancing various equivalent rights and interests, including rights to culture. This approach is also in line with the principles set out in Art. 7 of the TRIPS Agreement, which are the basis for the interpretation of this agreement in the light of the International Covenant on Economic, Social and Cultural Rights[48].

3. Mission-oriented approach

The shaping of copyright in the cultural heritage sector should align with the public mission of the CH 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

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[43] 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.
[44] Shaver L., The right to science and culture, 2010(1) Wisconsin Law Review
121 (2011), p. 124.
[45] White B., The Fundamental Right to Education and Science: Constitutional Law vs Copyright Law, https://libereurope.eu/article/the-fundamental-right-to-education-and-science-constitutional-law-v-copyright-law/ (31.01.2023).
[46] 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.
[47] C. Waelde, C. Cummings, RICHES, Deliverable 2.2, Digital Copyrights Framework, p. 25.
[48] Cf. Keßler F., Commentary on Art. 7 of the TRIPS Agreement, [in:] WTO – Trade-Related Aspects of Intellectual Property Rights, P. Stoll, J. Busche, K. Arend (ed.), Leiden, 2009, p. 184.

the public interest”[49]. For this reason, also legal recommendations relevant for the use of heritage collections 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 people face in their daily lives"[50]. CHIs operating in the digital realm must redefine their mission, making it fit the online environment (different activities, community building, operational modes, etc.). The revision on the CHIs’ role due to the digital transformation of cultural heritage institutions is not solely a technological or legal decision - it is a mission-driven decision[51] taken by an institution operating with a particular purpose. In the context of the inDICEs project, such a mission leads to *maximisation of the impact of digitization of cultural heritage*[52]. In this context, the regulatory reference should be the desired state of CHIs in the digital environment supporting empowerment of a democratic and sustainable sector. Copyright and other legal regulations should be treated as a means of achieving the desired state. That is why copyright regulations should not unilaterally support rights holders but also balance their interests with the need to support the CHIs’ public mission. In particular these regulations should allow to 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[53]. In order to guarantee the possibility of participation in the process of co-creation of cultural heritage resources, the legal system should recognise the right of citizens to (re)use such resources.

For the reasons mentioned above, 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 (e.g. related to carrying out an expensive rights cleaning process, or bearing strict responsibility for non-culpable infringements of copyright). The three main arguments for this are as follows.

Firstly, CHIs’ carry out a public mission, which is expressed (among other things) in the preservation and sharing of collections constituting a cultural heritage resource, including copyrighted works. CHI’s public mission, understood in this way, is sometimes also defined similarly at the level of the

[49] M. Mazzucato, Mission-Oriented Research & Innovation in the European Union. A problem-solving approach to fuel innovation-led growth, 2018, p. 169.
[50] M. Mazzucato, Mission-Oriented Research & Innovation in the European Union. A problem-solving approach to fuel innovation-led growth, 2018, p. 4.
[51] 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.
[52] cf. more broadly on the importance of digital cultural active participation: Tartari M., Sacco P.L., Manfredini F., Pilati F., Guidelines for the best practices regarding the maximisation of the impact of digitisation of cultural heritage (D1.7), inDICEs, 2022, https://zenodo.org/record/7486639#.Y7cUb3bMJD-, p. 19.
[53] At the same time, it means that CHIs need to understand their role in this process. In particular, it is essential that CHI's take responsibility for the cultural heritage resources they make available in accordance with ethical standards. Not hiding behind the copyright system by such institutions. This means the need to design a model ethical for cultural heritage practices. See: Drabczyk M., Janus A., Tarkowski A., Ciesielska Z., & Gliściński K. (2023). Deliverable 3.6: Policy Brief: Towards community-focused cultural heritage institutions in the digital realm. Zenodo. https://doi.org/10.5281/zenodo.7500839, p. 19.

laws of the Member States[54]. 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 conflict with the copyright mechanism. By creating an artificial scarcity of intangible goods (covering them with exclusive rights), this right limits the general availability of such goods, i.e. artworks. 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*[55].

Secondly, copyright is a means to achieve specific social goals and should not be considered an end. Statements included, for example, in the InfoSoc directive[56], 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 formulating interpretative directives used by jurisprudence[57]. Therefore, it should be concluded that the level of copyright protection should not be "the highest" but adequate to the intended purpose[58]. Consequently, if CHIs do not carry out an activity 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 over-protection and should be changed. One of the proposed solutions is to increase the role of non-exclusive rights, including a situation where the use of intangible goods depends on the payment of (appropriate) remuneration[59].

[54] 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.*

[55] Młynarska-Sobaczewska A., Right to Culture, Warsaw 2018, p. 142.

[56] 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.

[57] E.g. “In that regard, it should be borne in mind that it follows from recitals 4, 9 and 10 of Directive 2001/29 that the latter’s principal objective is to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works (...)”. Judgment of the Court in Case C-161/17, 7 August 2018, para 18.

[58] 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

[59] 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. Drahos 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

> *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*[60].

Thirdly, there is the detriment of the "digital skew"[61]. 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[62]. 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 halters education, research and active societal engagement with contemporary cultural artefacts and the ability to study them contemporaneously and connect them with historical resources[63].

> *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*[64].

For example, Europeana has identified a massive gap in the datasets from the 20th-century, which notably hinder the exploration of newer archival items. A recent survey carried out across the Europeana dataset demonstrates a massive drop (the 20th century black hole) in resources available from the 1950s onwards[65]. The legal complexity of the newest archival collections certainly causes the gap.

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intangible goods, 2018, 6th International Conference of PhD Students and Young Researchers Digitalization in Law, Conference papers, 2018.

[60] 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.

[61] 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.

[62] 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).

[63] inDICEs Grant Agreement p. 25.

[64] 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.

[65] 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).

Treating cultural heritage as heritage, rather than as mere property, opens up the need for new regulatory solutions for CHIs' activities. Strengthening copyright in the traditional sense does not seem justified. As indicated above, such a traditional model ignores the socio-economic values identified in the Sacco model and does not take into account the social contribution to the creation of the significance of this heritage in the context of the UNESCO cultural cycle. The need for such changes is also supported by the need to actually implement the right to culture and the acceptance of a mission-based approach of the CHIs activities. Parts three and four of the white paper present possible directions for further changes in the intellectual property law system in this respect.

3. Legal recommendations based on evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector

The current copyright framework may be conceptualised as complex and difficult to navigate. Misconceptions about the applicable rights or licence modalities may foster risk-averse legal knowledge[66], practices and habits, and the lack of capacity-building efforts further reinforces such misconstructions. However, some uncertainties are not necessarily an outcome of a lack of copyright capacity building, skills level, or knowledge. The copyright framework itself is extremely diverse (fragmented, even), which may cause some legal uncertainty[67] and the crystallisation of the above-mentioned risk-averse legal habits.

The present Chapter intends to expose the status quo of current and ongoing harmonisation efforts for Copyright Law in the European Union. The latest and most relevant example of which, at the time of writing, being the DSM Directive[68], introduced in 2019, and yet to be transposed by some Member States[69].

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, with a special focus on the most recent instalment, the DSM Directive, providing a systematic overview of possible solutions in order to optimise these rights and limitations to foster legal certainty, cultural diversity, technological progress, fair and proportionate remuneration for authors, and cultural (re)use.

3.1. Copyright Harmonization

Within the EU copyright landscape, lack of harmonisation is often pointed out as one of the main culprits of current copyright fragmentation.[70] In fact, most non-harmonised subject matter is crucial

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[66] Andrea Wallace, Copyright (2020), Open GLAM, <https://doi.org/10.21428/74d826b1.556f5733> accessed 5 January 2023.
[67] Andrea Wallace, Copyright (2020), Open GLAM, <https://doi.org/10.21428/74d826b1.556f5733> accessed 5 January 2023.
[68] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[69] Article 26(1) (Application in time) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC: “This Directive shall apply in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021.”.
[70] C-419/13, Art & Allposters International BV v Stichting Pictoright, JUDGEMENT OF THE COURT (Fourth Chamber), 22 January 2015.

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)[71] 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 systematisation. This legal fragmentation creates a feedback loop, reinforcing misconceptions about the validity and effectiveness of provisions and exceptions.

Recommendation #1:
To advocate for concrete discussion on non-harmonized subject matter as an effort to reduce the fragmented copyright landscape in future harmonisation efforts.

3.2. Towards open legal concept of Cultural Heritage Institutions

As already established, the ultimate goal of this segment is to highlight the merits and flaws of harmonisation efforts, particularly considering the direct needs of cultural heritage institutions: from an institutional standpoint, what we usually characterise as GLAM, this is Galleries, Libraries, Archives and Museums. The definition of "cultural heritage institution" as put forward by the European legislature (and reiterated in the DSM Directive) varies slightly.

According to Article 2(3) of the DSM Directive, "'cultural heritage institution' means a publicly accessible library or museum, an archive or a film or audio heritage institution". The exclusion of "Gallery" from the scope of the provisions drafted with the intention to promote the role of institutions involved in the cultural sector does not seem, however, to be accidental.

Considering that most of the provisions introduced and targeting cultural heritage institutions as beneficiaries either allow certain forbidden uses without the authorization of the rightsholder (exceptions) or grant access licences to content without the involvement of the rightsholder by virtue of a presumption of representation of a collective management organisation, it is understandable why the "publicly accessible prong" would be present. It is, ultimately, a justifier of the public interest behind such permissions.

While, characteristically, "publicly accessible" libraries, museums and archives are either financially supported by public funding or directed at fulfilling a public mission (to preserve and protect culture and bring it to the public), galleries may be conceptualised as commercially-driven entities, not

[71] Pier Luigi Sacco, Culture 3.0: A new perspective for the EU 2014-2020 structural funds programming (2011), EENC Paper.

directly engaged with the public, but with a selected subset of the public with speculative or financial perspectives at mind[72].

While it cannot be said with absolute certainty that galleries were deliberately excluded from the legal definition of "cultural heritage institution", it is still true that this definition is based on the prior text of Article 5(2)(c) of the InfoSoc Directive[73] which allows Member States to provide exceptions to the reproduction right "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;".

The exclusion of "galleries", often present in the academic characterization of "cultural heritage institutions" from its corresponding legal definition is, therefore, not novel, and was kept as such in new harmonisation movements. However, this can be justified by the scope of the rights granted in such harmonisation effort, and not necessarily as an exclusion of "Galleries" (and other entities not contemplated in the four-letter acronym) from the scope of cultural and legal debate.

To this effect, the OpenGLAM Foundation explains, in its Glossary, that "While this term [GLAM] is imperfect and underinclusive, no alternative is put forward. Instead, GLAM is used as shorthand and intended to encompass anyone within the scope of activities discussed in this resource, including private or commercial organisations and owners involved in the reproduction and management of cultural heritage, as well as individuals and users."[74].

Two core conclusions must be put forward:

- Firstly, the definitions used to characterise cultural actors and sites are not all-encompassing and differ in scope. The academic and sectorial use of "GLAM" may, to some parties, be restricted to the institutions included in the acronym, but is, ultimately, underinclusive, and alienating to other cultural contributors, be them smaller ones, such as individual curators, or larger and commercial ones, such as online publishers.

[72] This is an interesting conceptual contrast, in the sense that, outside of legislative acts, the European Union recurrently and coherently includes "galleries" in the broader scope of "cultural site" but not "cultural heritage institutions". Accordingly, and as is explored in this text, a cultural site is one where a member of the public may enjoy culture, but a cultural heritage institution is one dedicated to the promotion of access to culture to the public. Axiomatically, all institutions are cultural sites, but not all cultural sites are institutions, even if institutional in nature (galleries). A common definition, not necessarily based on EU cultural history, may distinguish them as follows: "*An art gallery is a private and commercial enterprise curating exhibitions with its portfolio of artists while selling the exhibited artworks. In contrast, a museum is a public and non-commercial institution curating an exhibition program for cultural and educational purposes." In, Julien Delagrange,* 'What is the Difference Between an Art Gallery and a Museum?' (2021), Contemporary Art Issue, <<https://www.contemporaryartissue.com/what-is-the-difference-between-an-art-gallery-and-a-museum/#:~:text=An%20art%20gallery%20is%20a,for%20cultural%20and%20educational%20purposes.>> last accessed 5 January 2023.

[73] 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.

[74] Andrea Wallace,, Words Mean Things (A Glossary) (2020), Open GLAM <<https://doi.org/10.21428/74d826b1.51566976>>, accessed 5 January 2023.

- Similarly, the legal definition put forward by the European legislature seems to contemplate an even smaller subset of cultural actors, this is, public accessible museums, libraries, and archives. Albeit not explicitly stated in Article 2(e) of the DSM Directive, the definition of "publicly accessible" along with the exclusion of galleries from the definition implies cultural heritage institutions should not engage in commercial acts or pursue commercial goals.

Recommendation #2
To advocate for a more open legal definition of cultural heritage institution, not necessarily as a replacement for the current statutory definition, but possibly through complimentary text that embraces benevolent agents that pursue the objectives of preserving and granting access to culture, even if commercial, but ultimately do not fall under the strict characterization of a "publicly accessible library or museum, an archive or a film or audio heritage institution".

3.3. Exceptions and limitations to copyright for public mission activities

The concept of commerciality has long been a sharp edge in European Copyright Law hermeneutics.[75] In the context of the DSM Directive, it serves as the enabler of a larger gap between stakeholders and interests.

In the Directive, the definition of "research organisation" contained in Article 2(1) of the DSM Directive is fenced by a bifurcated requirement to conduct scientific research or related activities "on a not-for-profit basis", or, alternatively, "pursuant to a public interest mission recognized by a Member State". This dichotomy directly relates to the recommendation put forward in the previous sub-section: by default, a beneficiary of an exception should perform exceptional acts on a "not-for-profit basis", but, in the case that these acts or their general activity are conducted in pursuit of a public interest, these institutions should be either automatically considered to be commercially irrelevant or have the commerciality of their acts overshadowed by the public interest mission pursued.

Such a carve-out should be present in any provision that requires an entity to act on a not-for-profit basis, allowing them to elude this requirement if they actively contribute to the public interest. As is explained further down the line, this is far from what reality brings.

Recommendation #3
To advocate for a carve-out to a non-commercial requirement, allowing institutions to benefit from exceptions and limitations as long as their activities are carried out pursuant to a public interest mission recognized by a Member State.

[75] Tatiana Eleni Synodinou, Lawfulness for Users in European Copyright Law: Acquis and Perspectives, 10 (2019) JIPITEC 20 para 1, <<http://nbn-resolving.de/urn:nbn:de:0009-29-48767>>, accessed 5 January 2023.

3.4. Scope of text and data mining

The DSM Directive 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 organisations and cultural heritage institutions wishing to perform data mining operations on works protected by third party copyright.

The definition of “research organisation” highlighted above is used, in the context of the DSM Directive, primarily to separate Article 3 from Article 4 of the DSM Directive. While both set a number of permitted uses for reproductions and extractions made for the purposes of text and data mining, the scope of the former, which contemplates research organisations and cultural heritage institutions, is much broader than that of the latter, which contemplates any actor, commercial or not.

This is a good sign of double implementation of exceptions, embracing commercial actors and the merit of their activities in the objectives of the internal market (as recommended in the previous sub-section), but still an exceptional case.

According to Article 3, Member States are required to introduce a mandatory exception to copyright, related rights, and database rights for the purposes of text and data mining. The beneficiaries can carry out such operations on works or other subject matter they have lawful access to and retain copies of those assets as long as secure storage obligations are met. 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.

This exception is analysed in great detail on Chapter 4.1 of the Project inDICEs Deliverable 2.4.[76] According to the conclusions of this chapter, the fact that this exception only applies to the exclusive right of reproduction inevitably signifies that there is no clear framework for cross-border collaboration, digital collaboration, and also for the sharing and publication of research data – all of these require an act of communication to the public, which is not covered by the exception.

Although the exception contemplates cultural heritage institutions as beneficiaries, it seems to contemplate their roles, and the role of their collections from a scientific potential perspective: reproductions are allowed, but only to effectuate the processing of data, limiting cross-border collaboration and research output, as well as any cultural value of the data itself, from public access to reuse.[77]

[76] Lima F., Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), <https://zenodo.org/record/7486661#.Y747--zMI-T> accessed 10 January 2023.

[77] The European Copyright Society, Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market (2020),

Recommendation #4
To advocate for a practical and realistic scope of exceptions and limitations, destined at enabling the end goal of the exception through an enlargement of such scope to accessory and post-factum acts.

3.5. Public-Private partnerships

Another interesting bifurcation of the list of potential beneficiaries of the text and data mining exception is the case of a public-private partnership. As will be the case with many of the new exceptions, which are directly catered to regulating novel technological developments in the Digital Single Market, some institutions may be interested in performing text and data mining operations but not possess the necessary technology to do so.[78]

As such, and according to Recital 11 of the DSM Directive, "while research organisations and cultural heritage institutions should continue to be the beneficiaries of that exception, they should also be able to rely on their private partners for carrying out text and data mining, including by using their technological tools.". In conclusion, it is possible for a research organisation or cultural heritage institution to outsource the data mining tasks that they want to perform on their collections, while still being covered by the exception.[79]

This is a great complement to the scope of Article 3, and, once again, circles back to Recommendation #3. Such a rule allowing private and commercial enterprises to justify the public interest nature of their actions should serve as an example for future copyright developments targeted at promoting technological development without causing excessive financial stress on beneficiaries, which are often publicly funded, and not necessarily capable of acquiring expensive and highly technological specialised equipment.

Recommendation #5
To advocate for the application of copyright exceptions to private and commercial enterprises under the pretext of public interest, as long as these enterprises are associated to, working along with, or directly connected to the activities of the common beneficiaries of these exceptions.

<<https://europeancopyrightsociety.org/2022/05/03/https-europeancopyrightsocietydotorg-files-wordpress-com-2022-05-ecs_exceptions_final-1-pdf/>> accessed 5 January 2023.

[78] Christophe Geiger & Giancarlo Frosio & Oleksandr Bulayenko, Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU (2019), <<10.2139/ssrn.3470653>> accessed 5 January 2023.

[79] Thomas Margoni, Martin Kretschmer, A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology (2022), GRUR International 71(8) 685–701, <<https://doi.org/10.1093/grurint/ikac054>> accessed 5 January 2023.

3.6. Cultural heritage institutions in education

Article 5 of the DSM Directive 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 distance learning set through a secure environment.

The concept of "educational establishments" is not expressly defined but limited by the closed delineation provided in Recital 20 which declares the exception applicable to "educational establishments recognised by a Member State, including those involved in primary, secondary, vocational and higher education.".[80]

This means that non-formal educators, i.e., other institutions outside of the scope of Recital 20 that provide educational activities such as courses, workshops and non-formal learning programs may not be given the opportunity to conduct these activities in a cross-border online settings, since "there is rarely an overlap between the national recognition of educational establishments and cultural heritage institutions."

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. They are responsible for a large portion of the non-formal education offered to the public, as their mission is not only that of preserving culture, but promoting it, validating the intrinsic tie between culture and the education of the public. Access to culture is access to education and vice-versa.

Recital 22 mentions activities in a "museum, library or another cultural heritage institution" but explicitly states that only activities carried out under the responsibility of educational establishments qualify. By contrast, Article 5(3)(a) of the InfoSoc Directive, simply states that "Member States may provide for exceptions or limitations" for the "use for the sole purpose of illustration for teaching (…)". This approach is not based on the nature of the beneficiary as an educational establishment, but on the nature of the use as educational in itself.

Ultimately, the "exclusion" of cultural heritage institutions from the direct scope of beneficiaries of Article 5 means that, while the activity is being promoted in the context of a formal, primary to tertiary educational setting, it can be conducted online, but if a cultural establishment provides their own workshops and learning programs, they cannot benefit from the exception.[81]

Recommendation #6
To advocate for a recognition of the value of cultural heritage institutions in education and allow cultural actors and other non-profit entities running educational activities to benefit from the

[80] COMMUNIA, DSM Directive Implementation Guidelines, <https://www.notion.so/DSM-Directive-Implementation-Guidelines-45233be9c0e143338860ae5a03118bf3> accessed 5 January 2023.

[81] Francisco Duque Lima, Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), <https://zenodo.org/record/7486661#.Y747--zMI-T> accessed 10 January 2023.

same cross-border exceptions granted to formal educational establishments, either by a flexibilization of the scope of beneficiaries, or by reverting from an "institution-based" approach to an "action-based" approach, as present in Article 5(3)(a) of the InfoSoc Directive.

3.7. Cultural preservation and digital archives

Article 6 of the DSM Directive establishes an exception for cultural preservation purposes, the beneficiaries of which are cultural heritage institutions.

The copies made for preservation purposes can only be performed on "works or other subject matter that are permanently in their collections". While, traditionally, in a pre-digital era, it would not be particularly hard to categorise a particular work as being "in" the collection of an institution[82], that may not be the case nowadays, as temporary licensing modalities that grant unlimited access to works in third-party servers have become common practice.

Considering how CHIs usually operate, the terminology deployed seems insufficient. Works that are lent on 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.[83]

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.

Recommendation #7
To advocate for restrictions on exceptions and limitations developed from a realistic and contemporary perspective, respecting the immanent characteristics of the digital environment, as to allow the beneficiaries of such exceptions and limitations to properly use them to their advantage. In the case of the preservation of cultural heritage, digital archives and assets must be considered, and the definition of "permanent" must be interpreted accordingly.

3.8. Technical protection measures

According to Recital 7 of the DSM Directive, the protection of technological protection measures remains "essential to ensure the protection and effective exercise of the rights granted to authors and other rightsholders" but such protection and such exercise of rights should not conflict with the

[82] Eleonora Rosati, Copyright in the Digital Single Market Article-by-Article Commentary to the Provisions of Directive 2019/790 (Oxford University Press 2021)
[83] COMMUNIA, DSM Directive Implementation Guidelines, <https://www.notion.so/DSM-Directive-Implementation-Guidelines-45233be9c0e143338860ae5a03118bf3> accessed 5 January 2023.

"enjoyment of the exceptions and limitations".[84] The Directive highlights that this balance should be preliminarily and voluntarily enforced by rightsholders, who "remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and limitations".

Only if rightsholders choose not to take this balancing obligation into consideration by selecting not to voluntarily limit their technical protection with "appropriate means" for beneficiaries to make use of exceptions and limitations, may Member States intervene. In this scenario, according to Article 7(2) of the DSM Directive Member States are not only entitled but mandated to take "appropriate measures" to ensure compliance with the effectiveness of the exceptions and limitations in the DSM Directive "in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC".

Therefore, the technical measure has to be disproportionate to a point that it is perceived as limiting to the expected uses made under an exception or limitation, and when legal access to the protected work is necessary. While technically it may very well seem that this prescription grants the beneficiaries of exceptions and limitations the right[85] to lawfully surpass technological protection measures, all that Article 7(2) prescribes is a right to argue that the technical characteristics of the measure make it disproportional and mitigate the effectiveness of the exception and ask the concerned Member State for appropriate measures from the rightsholder, and not a right to access.

If a beneficiary of an exception (such as a cultural heritage institution) wants to make lawful use of an exception, but is faced with technological restrictions, they cannot circumvent them[86], as that is still illegal according to Article 6(4) of the InfoSoc Directive, there is no immediate procedure for removal of technical protection measures, nor any complaint and redress mechanism targeted at reducing such an impediment.

Recommendation #8
To advocate for effective mechanisms to limit the impact of disproportionate technical protection measures on the lawful uses of the beneficiaries of exceptions and limitations, either by allowing them to circumvent them in case they have received no response from the rightsholders in a reasonable time frame, or by implementing complaint and redress mechanisms to control the

[84] Technological protection measures refer to a wide variety of computational tools used by rights holders to protect the integrity of an asset in digital form. The term refers to any "measure" that deters potential online infringement, from data encryption to server authentication.. Common TPMs include access controls such as network authenticity verification, or cybersecurity measures such as rate-limiting access-control filters. According to Article 7 of the DSM Directive, rightsholders can ultimately attempt to protect their content by implementing technical protection measures that allow for the use of exceptions, while keeping content secure from unintended use. However, it is not clear how this may be implemented in a way that ensures the full enjoyment of the exceptions – while beneficiaries of the exception can certainly lodge complaints and requests to Member States to allow access to particular works that are restricted by disproportionate technical measures, these access request systems are generally known to be inefficient and bureaucratic. For more on technical protection measures and their interaction with the enjoyment of exceptions and limitations, see: Francisco Duque Lima, Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), pages 32 and 54 <https://zenodo.org/record/7486661#.Y747--zMI-T> accessed 10 January 2023.

[85] Tito Rendas, Are Copyright-Permitted Uses 'Exceptions', 'Limitations' or 'User Rights'? the Special Case of Article 17 CDSM Directive (2021), Journal of Intellectual Property Law & Practice, <http://dx.doi.org/10.2139/ssrn.3968252> accessed 5 January 2023.

[86] Anthony D Rosborough, Unscrewing the Future: The Right to Repair and Circumvention of Software TPMs in the EU (2020), JIPITEC 11(1), <https://ssrn.com/abstract=3693187> accessed 5 January 2023.

proper implementation of "appropriate means" to lawfully access content.

3.9. Out-of-commerce works and "licensing lockout"

According to Recital 30 of the DSM Directive, "Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject matter that are considered to be out of commerce for the purposes of this Directive.". To this effect, Article 8 (Use of out-of-commerce works and other subject matter by cultural heritage institutions), contemplates two novel and distinct solutions: a licensing mechanism and an exception. The exception for out-of-commerce works applies to rights and types of works for which no Collective Management Organization (CMO) can issue a licence – this encompasses both a scenario in which a CMO does not have sufficient representativity and in which a sufficiently representative CMO cannot grant a licence for a specific work or use[87].

However, what is the solution in case a sufficiently representative CMO and the CHI seeking to obtain a licence cannot reach an agreement? To answer this: if a sufficiently representative CMO exists, and is willing to offer a licensing opportunity, then there is an availability of licensing solutions. According to Recital 32, "uses under such exception or limitation only take place when certain conditions, in particular as regards the availability of licensing solutions, are fulfilled. A lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing solutions.".

This means that a smaller bargaining power against suboptimal licensing offers, and terms may effectively lock the CHI out of a licensing agreement unless they comply with the sufficiently representative CMO's terms[88]. This is a good sign for CHI's that hold particular subject matter that is often not covered by CMOs, (like video games[89]) since they can probably rely on the exception due to a lack of representativity, but less positive of a sign for CHI's attempting to make use of works pertaining to an artistic field characterised by very high representation rates (like music and audiovisual work[90]) which may lead to even lower bargaining power and higher licensing fees and restrictions.

Regardless, CMOs are bound by specific duties under Directive 2014/26, namely the obligation to conduct negotiations in good faith, draft licensing terms based on objective and non-discriminatory

[87] Tatiana Synodinou, The New Copyright Directive: Out of commerce works (Articles 8 to 11): is it possible to untie the Gordian knot of mass digitisation and copyright law without cutting it off? – Part II (2019), Kluwer Copyright Blog, <http://copyrightblog.kluweriplaw.com/2019/08/05/the-new-copyright-directive-out-of-commerce-works-articles-8-to-11-is-it-possible-to-untie-the-gordian-knot-of-mass-digitisation-and-copyright-law-without-cutting-it-off-part-ii/> accessed 5 January 2023.

[88] Francisco Duque Lima, Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), <https://zenodo.org/record/7486661#.Y747--zMI-T> accessed 10 January 2023.

[89] Tori Allen, What's in a Game: Collective Management Organizations and Video Game Copyright (2018) UNLV Gaming Law Journal 8(2), Article 8 <https://scholars.law.unlv.edu/glj/vol8/iss2/8> accessed 5 January 2023.

[90] Mihail Miller, Stephan Klingner, Transparency Reports of European CMOs: Between legislative aspirations and operational reality – comparability impending factors and solution strategies, 13 (2022) JIPITEC 160 para 1

criteria and select tariffs for exclusive rights in a reasonable manner in relation to their real economic value[91]. While, on the one hand, all of these obligations may attenuate the aforementioned difference in bargaining power, specific mechanisms for mediation or for lodging complaints related to licensing negotiations between beneficiaries of Article 8 and CMOs should be considered.

Recommendation #9
To advocate for mediation or complaint and redress mechanisms to assure good-faith negotiations and reasonable licensing terms between CMOs and beneficiaries of the out-of-commerce works regime, as a way to avoid abusive licensing solutions, the availability of which locks the beneficiaries out of the possibility to rely on the fallback exception, applicable when a sufficiently representative CMO willing to engage in negotiation does not exist.

3.10. Works of visual art in the public domain

Article 14 of the DSM Directive obliges Member States to make sure that any material resulting from the reproduction of a work of visual art in the public domain is not subject to copyright or related rights, unless the material resulting from such reproduction is sufficiently original in the sense that it is “the author’s own intellectual creation”. This works as a barrier against the unjustified and undue extension of intellectual property protection to works that should no longer enjoy it.[92]

While the new normative approach to this principle is welcome, further legal certainty is required. The scope of Article 14 is limited only to “works of visual arts”, which points towards the idea that the intended target of the provision are two-dimensional works of graphic art.[93] While it can surely be argued that the public domain is composed of all types of work and appropriation of the public domain does not exclusively affect two-dimensional visual art, it is also clear that this concept was used to target a problem that could arise particularly due to digitization initiatives[94] for visual works promoted by cultural heritage institutions[95]. However, there is no higher reason for this principle to not be broadly extended to cover the entirety of the public domain.

[91] Articles 16(1) and 16(2) (Licensing) of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance.
[92] Andrea Wallace & Ariadna Matas, Keeping digitised works in the public domain: how the copyright directive makes it a reality (2020) Europeana Pro, <https://pro.europeana.eu/post/keeping-digitised-works-in-the-public-domain-how-the-copyright-directive-makes-it-a-reality> accessed 10 January 2023.
[93] The European Copyright Society, Comment of the European Copyright Society on the Implementation of Art. 14 of the DSM-Directive 2019/790, 11 (2020) JIPITEC 110 para 1, <https://www.jipitec.eu/issues/jipitec-11-2-2020/5103> accessed 10 January 2023.
[94] COMMUNIA, DSM Directive Implementation Guidelines, <https://www.notion.so/DSM-Directive-Implementation-Guidelines-45233be9c0e143338860ae5a03118bf3> accessed 13 November 2022.
[95] Andrea Wallace & Ellen Euler, Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments (2020) IIC 51, 823–855, <https://doi.org/10.1007/s40319-020-00961-8> accessed 10 January 2023.

In fact, the recent boom in popularity of digital assets, and instances of mere appropriation, capitalization and attempts at exclusivity over all kinds of audiovisual assets online, along with the weaponization of copyright strikes against user-generated content using public domain materials[96], reinforces the need to protect the public domain as a whole.

This can be achieved by defining the scope of such protection 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, as well as by implementing proper notification mechanisms and penalties for instances when such protection is being violated.

Recommendation #10
To advocate for an extended and more robust protection of the public domain by enlarging current legal protection to all subject matter, and instituting notification procedures and penalties for those trying to claim exclusivity over works the copyright term of which has expired.

3.11. Appropriate and proportional remuneration

Articles 18 to 22 of the DSM Directive, included in the chapter on "Fair remuneration in exploitation contracts of authors and performers" introduce provisions that do not contemplate cultural heritage institutions as beneficiaries, but authors and performers.

According to Article 18, "Member States shall ensure that where authors and performers licence or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration."

This obligation arises from the fact that "Authors and performers tend to be in weaker contractual positions when they grant a licence or transfer their rights".

When talking about "appropriate and proportionate remuneration", one should consider the "actual or potential economic value of the licensed or transferred rights", and account for all the circumstances of the case, with the examples provided by the Directive being the contribution of the licensor to the overall work, market practices and the actual exploitation of the work.[97]

While the valuation and bolstering of the economic prowess of authors and performers is certainly a candidly positive effort, the nuances of the provision should be strictly considered, under the risk of allowing sufficient margin for the failure of its application.

[96] Paul Keller, Implementing the Copyright Directive: Protecting the Public Domain with Article 14, Communia Blog Post, <https://communia-association.org/2019/06/25/implementing-copyright-directive-protecting-public-domain-article-14/>, accessed 2 January 2023.
[97] Eleonora Rosati, Copyright in the Digital Single Market Article-by-Article Commentary to the Provisions of Directive 2019/790 (Oxford University Press 2021) 363.

The concepts of proportionality and appropriateness are not independent concepts, and always subject to casuistic assessment. For artists to rely on a mechanism intended to grant them fair remuneration, they need certainty as to how such a mechanism works.

Who should be in charge of setting the limits of proportionality and appropriateness? Should such an obligation function merely as a contractual leverage to enforce better terms? If so, who should be in charge of overseeing the appropriateness or proportionality of such terms? Conversely, is this obligation a reaction right granted to authors and performers? If so, how are the administrative burdens of setting such a . How are elements such as “the author’s actual contribution to the overall work” or the “potential economic value” determined? Who should be in charge of determining those?

According to Article 18(2), stating “Member States shall be free to use different mechanisms and take into account the principle of contractual freedom” it seems Member States are in charge of putting in place the appropriate bodies in charge of oversight, complaint, enforcement, and redress – any further indication of how this can or should be done is lacking. On the one hand, it makes perfect sense that the definition of the pertinent mechanism should be left to Member-States. On the other hand, and considering the vast amount of fragmentary licensing practices, and the effects of cross-border licences, the lack of further guidance on implementation may render such a promising provision useless.

Recommendation #11
To advocate for complementary definitions or horizontal guidelines to suppress the uncertainty associated with a potentially fragmented implementation of a provision intended at providing authors and performers with appropriate remuneration upon licensing or transferring exclusive rights, which can happen in different Member-States, with varying degrees and competing factors.

3.12. Transparency Obligation

Article 19 of the DSM Directive instates several layers of information duty: accordingly, authors and performers shall receive, at least once a year, relevant and comprehensive information on the exploitation of their works from licensees and sub-licensees. Article 19(3) explains that when the administrative burden to comply with this obligation “would become disproportionate in the light of the revenues generated by the exploitation”, then it is limited to “types and level of information that can reasonably be expected in such cases.”

The general objective is to bolster transparency and allow authors and performers to receive sufficient information to correctly engage with the remaining mechanisms (appropriate remuneration, contract adjustment and revocation). As such, the correct establishment of mechanisms to comply with this obligation may be the most relevant, if not only source of

information for rightsholders.[98] Proportional limitations to excessive administrative burden are also welcome as a pertinent balance of interests.

As expected, many questions follow: should this information be relayed to an independent State-mandated body, in charge of indexing and informing rightsholders about the use of their work (like the role of a CMO in the out-of-commerce works information mechanism)? Should this obligation be used independently by rightsholders? What penalties exist upon lack of compliance? What are the parameters to define "all sources of revenues relevant to the case" (Recital 74)?

Recommendation #12
To advocate for horizontal support on information duties, regardless of implementation, either through centralised information platforms and enforcement duties, or independent bodies capable of processing complaints upon lack of compliance.

3.13. Contract adjustment mechanism

Article 20 declares that, in the absence of applicable collective bargaining agreements that achieve the same result, authors and performers are entitled to claim additional, appropriate, and fair remuneration from the party to whom they have transferred or licences exploitation rights. The crucial element for the triggering of this power is the disproportionality with subsequent relevant revenue.[99]

Apart from similar questions already posed, on which body should be in charge of assuring compliance with this obligation, and on what form in order to achieve effective use of such right, in equal, proportional, and efficient manner, including cross-border uses, some questions on the definition of the scope of additional remuneration remain.

To this extent, Recital 78 explains that this adjustment should "take account of the specific circumstances of each case (…) as well as of the specificities and remuneration practices in the different content sectors". The most pressing questions are all related to the balance in the assessment of disproportionality. Considering the example of a CHI, which obtains a licence to exploit a given piece for a certain time, could the author claim additional compensation based on how successful a different institution with similar pieces has been?

More than often, and particularly in the case of museums, galleries, and archives (even if profit-driven), determining what percentage of revenue from entrance fees, sponsorships and donations was driven from a particular piece is near to impossible. How much was garnered in merchandising sales, however, may be possible, but does not correspond to the actual financial status of the institution.

[98] Eleonora Rosati, Copyright in the Digital Single Market Article-by-Article Commentary to the Provisions of Directive 2019/790 (Oxford University Press 2021) 363.
[99] European Copyright Society, Comment of the ECS on Arts. 18 to 22 DSM-D, 11 (2020) JIPITEC 132, para 71 <http://dx.doi.org/10.2139/ssrn.3695935> accessed 10 January 2023.

This mechanism seems to be more targeted at direct contracts with organisations or enterprises that exploit works in an individual manner (for example, a publisher), in which the disproportionality between fees paid (even if lump sum) and revenue garnered from sales of an individual asset is immediately evident – in the case of collection-based arrangements, how is the detachment between the exploitation of the work and the financial success of the enterprise calculated?

Recommendation #13
Advocate for clarification on how the assessment of economic disproportionality between the licensing fee paid for the exploitation of a work and the financial success of a collection-based enterprise (in which determining what percentage of revenue was driven from a particular piece is particularly difficult) is performed.

3.14. Revocation right and copyright term

According to Recital 80, "after a reasonable period of time has elapsed, authors and performers should be able to benefit from a mechanism for the revocation of rights allowing them to transfer or licence their rights to another person.". Article 22 enacts this mechanism and protects the expectations of licensees by establishing that this revocation mechanism "may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights.".

This is an excellent complementary mechanism to the informational duties prescribed by Article 19, and an overall excellent measure to ensure dynamic flow of content, and potential public access (a work that has been exclusively licensed but that is not exploited is never experienced by the public).

In the case of Article 22, licensees, this is, rightsholders, are expected to make actual use of a work they have been granted exclusivity. The lack of exploitation of a work becomes conflicting with exclusivity, and this mechanism allows the work to return to a potential pool of licensees interested in its exploitation.[100]

This leaves the question: would a similar mechanism working in the opposite direction be possible and viable? While, in the case of Article 19, the matter at hand is the lack of exploitation on behalf of the licensees (downstream), the matter of lack of exploitation of works by the author (upstream) is somewhat addressed in the new out-of-commerce works framework. Accordingly, works no longer in customary channels of commerce that are held in the collections of cultural heritage institutions, can be displayed on the institution's non-commercial online platforms for public consumption.[101]

However, if the work is not available in the collection of any cultural heritage institution, and not being commercially explored (meaning, it is not accessible to the public), then it will rarely ever see the light of day. While some types of work have extensive documentation and archival activity

[100] European Copyright Society, Comment of the ECS on Arts. 18 to 22 DSM-D, 11 (2020) JIPITEC 132, para 71 <http://dx.doi.org/10.2139/ssrn.3695935> accessed 10 January 2023.
[101] Francisco Duque Lima, Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), <https://zenodo.org/record/7486661#.Y747--zMI-T> accessed 10 January 2023.

(namely audiovisual works, such as feature films), other works, broadcast or distributed in more niche channels, may have not been preserved.

Such is, for example, the case of abandonware, commonly defined as software that is no longer commercially offered or supported by companies that have either stopped selling it, neglected support or disappeared since its publication, leaving the possibility of exploitation in the void.[102]

While many solutions to this problem have been put forward (code release upon software retirement, legal deposit obligations, reduction of penalties for circumvention by a member of the public)[103], one of the most debated solutions is a renewal and revocation system for non-exploited works unavailable to the public. Accordingly, the copyright term ends when the social cost and the benefits of protection are on the same level. When the work is being actively exploited, copyright protection is upheld in detriment of the social virtue of free access to goods. Due to the overall lifecycle of authorial works, the copyright term can be reconsidered in the case of lack of economic exploration.

Similarly to what happens with trademark law, in which lack of use leads to a loss of right to a trademark, a copyright renewal and revocation mechanism that, along the lines of the revocation right for licensees present in Article 22 of the DSM Directive "can only apply within a specific time frame, where such restriction is duly justified by the specificities of the sector or of the type of work or other subject matter concerned"[104] and "only be exercised after a reasonable time" may be the solution for a more dynamic cultural flow, and counter the limitations of the out-of-commerce works framework.

Recommendation #14
To advocate for discussion on further expansions of the revocation right, as established, not only to achieve a return to exploitation, but potentially early termination of the copyright status of an inaccessible, unpreserved cultural good, while preserving the autonomy and the interests of authors engaged in the exploitation of their work.

3.15. Refinement of legal framework of rights statements and open licences

A commonly overlooked novel legal guarantee possibly introduced in the DSM Directive and directly related to the emancipation of authors and performers and the potential promotion of cultural reuse is contained in Recital 82, which states that "Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their

[102] Dennis Wye Keen Khong, Orphan Works, Abandonware and the Missing Market for Copyrighted Goods (2007), International Journal of Law and Information Technology, Vol. 15, No. 1, pp. 54-89, <https://ssrn.com/abstract=1544558> accessed 10 January 2023.
[103] Henrike Maier, Games as Cultural Heritage: Copyright Challenges for Preserving (Orphan) Video Games in the EU, 6 (2015) JIPITEC 120, <http://nbn-resolving.de/urn:nbn:de:0009-29-42732>, accessed 10 January 2023.
[104] Article 22(2) of the DSM Directive.

works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.”.

One could argue that, in this small addition to the legal text of the Directive, confirmation of the legal validity of open licences can be found. In fact, the authorization of the use of a work for free in the form of “non-exclusive free licences for the benefit of any users” is what is commonly found in rights statements and other public licensing tools such as Creative Commons “licences”, among others.

The development of capacity building efforts to convey the importance and mechanisms of rights statements has been highlighted and reinforced as a priority 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[105]. 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 utilisation of rights statements and metadata management.

Nonetheless, and while direct support from EU institutions, the promotion of capacity building, and legal clarification of the freedom to engage in free, non-exclusive licensing are certainly positive steps, rights statements remain shrouded in a veil of legal uncertainty.

Accordingly, the most common instances of usage of such instruments contends with the right to create derivative works, which, to a large part of the academic community, conflicts with the author’s non-waivable moral right to integrity of the work.[106]

For example, the Creative Commons CC-BY, CC-SA, and CC-NC licences all allow a member of the public to create a derivative piece (for this option to be restricted, the appendix “ND”, short for “No Derivatives” would have to be present). Therefore, to some, the effective application of these public licensing mechanisms always depends on a violation of the right to integrity, while, for example, the moral “paternity” right is conserved in all modalities of CC License by mandatory attribution (the “BY” element).[107]

In short, whether the application of public licences that allow a member of the public to create a derivative work based on the licensed piece is ultimately a violation of the author’s inalienable right to integrity is still up for debate. The language of Recital 82 is obviously not attempting to revert the well-established inalienability of moral rights, and, when referring to “exclusive rights under Union copyright law”, one should understand this definition as corresponding to the waivable, assignable, licensable, and transferrable set of rights: economic rights.

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[105] COMMISSION RECOMMENDATION (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage.

[106] Alexandra Giannopoulou, The Creative Commons licences through moral rights provisions in French Law (2014), International Review of Law, Computers and Technology, Special Issue: BILETA 2014, 28 (1), pp.60-80. ff10.1080/13600869.2013.869923ff. ffhal-01226877f

[107] Creative Commons, Open Access, and moral rights (2007), Creative Commons Blog, << https://creativecommons.org/2007/11/07/cc-oa-moral-rights/>> accessed 10 January 2023.

Notwithstanding, if the European Union wants to promote the application of such instruments, often used in dynamic cultural and artistic communities, to their full extent, clarification on the relationship between “free (…) non-exclusive free licences for the benefit of any users” and the complete copyright acquis is necessary.

Recommendation #15
Further refine the legal framework of rights statements and open licences, clarifying their relationship with the EU copyright framework, such as unalienable moral rights and, more precisely, the integrity right, as a way to pursue the objectives of cultural diversity and reuse, while providing legal certainty.

3.16. From recommendations to reforming current frameworks

Most if not all these recommendations 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 having all interested parties involved. On a national implementation level, digital rights organisations, 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 to allow for a functional but above all fair and balanced implementation and gradual optimization of a promising, albeit imperfect framework. As such, and on a final note, a total of 15 recommendations to be considered for future harmonisation efforts were put forward in order to enhance legal certainty, the protection of culture, promotion of cultural reuse and the correct valuation of artistic efforts in the European internal market.

4. Legal recommendations based on value chains analysis

4.1. Public mission approach to CHIs' regulations

In the last decade policymakers on national and European levels have created a number of tools and operational resources to address existing challenges and to regulate access and use of heritage collections: 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 DSM Directive) or new frameworks for (re)use of digital heritage (the Open Data Directive). Nevertheless, these recent reforms, while very beneficial for the CHIs, focus rather on providing access and less on supporting reuse of digital or to be digitised collections. The assumptions adopted in the white paper, together with the analysis carried out in part four, indicate the need for further changes in the regulatory environment of CHIs' operations. Otherwise, existing barriers to deployment of the Culture 3.0 activities remain unaddressed. Without such changes, it will not be possible to exploit the socio-economic values identified in the eight-tier classification by Pier Luigi Sacco fully, and thus create space for creative involvement of various communities keen to actively engage with cultural heritage. For this reason, the current policy perspective should be broadened to include policies that determine the characteristics of the online ecosystem as such[108]. Creating a regulatory environment for CHIs' activities, so that it realistically secures the possibility of fulfilling their public mission, requires at least public organisation and funding, creation of dedicated rights for cultural heritage institutions and public responsibility. The new approach to the regulation of the sector requires development of more detailed assumptions on which it should be based. These are analysed below.

1. **Implementation of public mission requires public organisation and financing**

CHIs carry out a public mission and that as such entities they can not be burdened with regulations typical for market relations (such as clearing rights, negotiating licences, incurring legal risk for actions taken to fulfil its public mission). Furthermore, it should be recognised that the success of digital transformation in the cultural heritage sector depends on public support, both on the organisational and financial levels (both on European and national levels). Such an 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*[109]

[108] 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.
[109] Młynarska-Sobaczewska A., Right to Culture, Warsaw 2018, p. 208.

CHIs should be, therefore, 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 by CHIs in a short to long-term perspective, following the Culture 3.0.[110] operational paradigm "should be accompanied by a new policy perspective and structural funds programming that takes into account the Culture 3.0 framework"[111]. 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 the broad accessibility of digital collections[112]. 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 public-mission linked activities from other sources (e.g. by licensing or charging fees for the possibility of (re)using digitised objects). This requires creation of alternative, tailored business models for the heritage institutions.

2. **Implementation of public mission requires creation of dedicated rights for cultural heritage institutions**

CHIs are increasingly expected to take on the role of a defender of copyright, an agent representing the rights holders, which stands in conflict with the CHIs' public mission of providing access to and preserving the cultural heritage for humanity. After recognising that CHIs pursue a public mission, distinct from that of profit-oriented enterprises, separate regulations should be provided for such institutions enabling them to fulfil that mission. In particular, **CHIs should enjoy rights which enable them to appropriately carry out their specific public mission**. The public mission of CHIs does not only refer to activities related to the preservation and professional curation of the accumulated heritage. Heritage does not exist as such. An art piece gains value when a community recognises and cherishes it. For these reasons, one of CHIs missions is to enable and support this process of community recognition, not just the collection and preservation of tangible cultural heritage objects. This is why the public mission of CHIs also requires their involvement in the process of co-creation and co-curation, empowerment of the commons and dissemination of heritage, also by contributing to establishing and maintaining a shared digital public space[113]. CHIs' rights should constitute a mechanism for implementing the rights to culture in practice.

3. **Implementation of 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

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[110] see sections 3.2 above.
[111] 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.
[112] Evens T., Hauttekeete L., Challenges of digital preservation for cultural heritage institutions, Journal of Librarianship and Information Science 1– 9 (2011), p. 4.
[113] Drabczyk M., Janus A., Tarkowski A., Ciesielska Z., & Gliściński K. (2023). Deliverable 3.6: Policy Brief: Towards community-focused cultural heritage institutions in the digital realm. Zenodo. https://doi.org/10.5281/zenodo.7500839, p. 18.

to share the content without restrictions in order to fulfil their mission. For this reason, CHIs' use of copyrighted works may, in some cases, be eligible for fair compensation. The right to culture justifies the model of 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 one must consider that when cultural heritage institutions acquire a work they not only are disseminating the work but in the first place commit to its preservation. The cost that comes along with this activity must not be forgotten. Not only acquisition costs have to be considered, but all the resources that are needed to digitise, restore, research, and manage. When asking to remunerate rights holders for the use of works, one has to shift the attention to a different value - a value that a cultural heritage institution adds to the work in a longer perspective. The value that these institutions add by performing their preservation and conservation tasks, research and educational programs, and creative use of collections must not be underestimated. By providing (gifting, lending, selling) CHIs with works for the collections, the rights holders should acknowledge that the cost and value of preservation of their work is in itself a form of remuneration. Giving importance to cultural heritage is a social process that can sometimes translate into commercial value. Placing a given object, e.g. in a museum or other CHI, is therefore vital for the status of a given creator. In this approach, one finally steps away from the disruptive leading idea of calculating the value of work and its use merely in money. At the same time, CHIs should not be fully exposed to the legal risk if their activities involve the implementation of a public mission. In this case, solutions should be sought to protect such institutions by creating a system of safe harbours. CHI's public mission designators should assume responsibility for them in such a situation.

4.2. Complementary policy recommendations in the area of intellectual property rights regulations for CHIs

One of the objectives of the CDSM Directive was to create a European system of additional support mechanisms enabling CHIs to legally use copyrighted works. As the analysis contained in part four of the white paper has shown[114], the current legal situation in the European Union still does not sufficiently meet the needs of CHIs in supporting them in fulfilling their public mission. This state of affairs is also pointed out by the authors of various recently published recommendations in this area. “Still, the EU copyright framework as it currently stands is not yet fit for the digital future of cultural heritage, featuring a disjoined and complex landscape of multiple norms without a far-reaching clause that would allow free uses of copyright resources in the cultural heritage sect”[115]. They call for further changes in the law at the European Union level. Below is an overview of selected recommendations (see Figure 4 for details) which are consistent with the assumptions of the inDICEs project and which - when implemented - would allow CHIs to more fully fulfil their public mission assigned to them by societies.

[114] See further: Francisco Duque Lima, Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), <https://zenodo.org/record/7486661#.Y747--zMI-T> accessed 10 January 2023.

[115] Dore G., Caso R., Guarda P., Arisi M., D5.7 Final Policy Recommendations for EU Lawmakers, 2023, Zenodo. https://doi.org/10.5281/zenodo.7544364, p. 9.

title	abbreviation	organisation/project	year
Policy Paper on the Digitization of Museum Collections	DMC (2021)	Council of Museums and the University of Geneva	2021
Towards Better Sharing of Cultural Heritage — An Agenda for Copyright Reform	(CC)TBSCH - Agenda (2022)	Creative Commons - Open Culture	2022
COMMUNIA's 20 Policy Recommendations for the Public Domain	Communia20 (2022)	COMMUNIA association	2022
Towards better sharing of cultural heritage. A Creative Commons Call to Action to Policymakers	(CC)TBSCH-Action (2022)	Creative Commons - Open Culture	2022
Final Policy Recommendations for EU Lawmakers	(ReC)FPR (2023)	ReCreating Europe	2023

Figure 5: List of reviewed policy documents

The policy documents analysed were selected as their thematic scope was in line with the assumptions and objectives of the inDICEs project. Moreover, they were published after the adoption of the DSM Directive. Undoubtedly, the instruments provided for in the CDSM Directive (including Article 3: Text and data mining for the purposes of scientific research, Article 6: Preservation of cultural heritage, Article 8-11: Use of out-of-commerce works and other subject matter by cultural heritage institutions, Article 14: Works of visual art in the public domain) are a step in the right direction. However, from the point of view of the assumptions adopted in the white paper, and in particular in order to ensure that CHIs can generate social values recognized under the eight-tier classification, the current state of law has to be considered insufficient.

The policy documents outline a number of necessary policy changes. As regards the general principles that should be expressed in copyright regulations in the area of European cultural heritage, the documents indicate, among other things, that:

1. The term of copyright protection should be shortened[116].
2. Limitations and exceptions to copyright should be based on open ended norms[117], modelled, for example, on the fair use system, and additionally supplemented with a list of explicitly stated limitations and exceptions, both existing and new ones[118]. Such a structure of regulations should be complemented by the following principles, according to which:

[116] Communia20 (2022), Recommendation nr 1; (CC)TBSCH - Agenda (2022), Area 3; (CC)TBSCH-Action (2022), Action 2; (ReC)FPR (2023), Recommendation 3.
[117] (ReC)FPR (2023), Recommendation 1.
[118] (CC)TBSCH- Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 3; (ReC)FPR (2023), Recommendation 1.

  a. human rights should be recognised as the basis for shaping new exceptions and limitations to copyright law through jurisprudence[119];
  b. exceptions and limitations should be mandatory[120];
  c. exceptions and limitations should be technologically neutral[121];
  d. the possibility of a cross-border use of works should be ensured on the basis of exceptions and limitations[122] (e.g. the application of exceptions and limitations could be based on the country of origin principle[123]).

3. In order to ensure a uniform standard and organise one European system of exceptions and limitations for CHIs, a special directive or regulation dedicated to this issue should be planned. It should include all current exceptions and limitations[124]and new ones dedicated to CHIs should become beneficiaries of all applicable exceptions and limitations. In particular CHIs should be able to:
  a. use works in the contexts of public speech and news reporting[125];
  b. use works for purposes of quotation, criticism, review and parody, caricature, and pastiche[126];
  c. make (re)uses of works, e.g. remixes and other forms of user-generated content[127];
  d. create digital exhibitions of works, including works in digital version as well as digitised from analogue works by CHIs, contained in the collections of CHIs to ensure remote access to that collections[128];
  e. reproduce works for the purpose of e-lending them in the *one copy one user model* [129][130]
4. Legal instruments should be introduced to protect the public domain and secure the possibility of real (re)use of works by CHIs on the basis of exceptions and limitations. In particular the law should:
  a. state that public domain materials can be legally (re)used freely, for all purposes[131];

[119] Communia20 (2022), Recommendation nr 12; (ReC)FPR (2023), Recommendation 1.
[120] DMC (2021), Proposal 2; (CC)TBSCH-Action (2022), Action 3; (ReC)FPR (2023), Recommendation 1.
[121] (ReC)FPR (2023), Recommendation 2.
[122] (ReC)FPR (2023), Recommendation 2; (CC)TBSCH - Agenda (2022), Area 1.
[123] (ReC)FPR (2023), Recommendation 2.
[124] (ReC)FPR (2023), Recommendation 1.
[125] (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 3.
[126] (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 3;
[127] (CC)TBSCH-Action (2022), Action 3;
[128] DMC (2021), Proposal 1, Proposal 7; (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 1, Action 3.
[129] Communia20 (2022), Recommendation nr 5; (CC)TBSCH - Agenda (2022), Area 1.
[130]According to the ruling in the VOB case (CJUE, C-174/15), it is possible to conduct e-lending activities under EU law. However, such a possibility is subject to the introduction of appropriate regulations at the level of national law of the Member States. Moreover, the ruling does not directly indicate whether it is possible to copy paper books for the purposes of e-lending. This possibility is supported by the Advocate General in his opinion on this case (AG Opinion, C-174/15, para 57). However, these issues should be regulated directly in EU law, so as to ensure maximum legal certainty in CHI's activities.
[131] DMC (2021), Proposal 5; Communia20 (2022), Recommendation nr 5; (CC)TBSCH - Agenda (2022), Area 2; (CC)TBSCH-Action (2022), Action 1; (ReC)FPR (2023), Recommendation 3.

   b. prohibit the use of contracts to restrict access and (re)use to public domain materials or (re)use of works based on exceptions and limitations[132];
   c. prohibit the use of Technical Protection Measures (TPM) to restrict access and (re)use to public domain materials or (re)use of works based on exceptions and limitations[133];
   d. prohibit the use of financial means to restrict access and (re)use to public domain materials[134];
   e. create a claim of action for CHIs (and other users) against abusive or incorrect copyright claim and situations in which the legal use of works on the basis of exceptions and limitations is prevented or hindered, in fact (e.g. by means of TPM) or in a legal way (e.g. contractual clauses)[135].
5. A rule should be introduced protecting a CHI, which in good faith and in order to fulfil its public mission, performed an act contrary to law (in particular copyright), from being liable until it becomes aware of this fact (Safe Harbor for CHIs)[136].
6. Beyond existing exceptions and limitations (see point 2 and 3 above), CHIs' users should be allowed to (re)use works from CHIs' collections, i.e. to build upon existing protected works for creative purposes, in accordance with fair practice, such as remixes and other forms of user-generated content[137].

These policy recommendations call for further changes in the copyright regulations on the European level that would support CHIs in fulfilling their role in the society. These desirable changes could be further amplified by an introduction of a more radical approach. An example of such an instrument is outlined below.

4.3. European Instrument for ensuring access and (re)use of cultural heritage resources

1. General objectives of the Instrument

The primary way of carrying out the public mission of CHIs is to preserve and share the collected cultural heritage by these institutions. Article 6 of the DSM Directive made it possible, albeit with some reservations[138], to carry out CHIs' public mission of preserving cultural heritage. However, the

[132]Communia20 (2022), Recommendation nr 13; (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 1, Action 3; (ReC)FPR (2023), Recommendation 2.
[133]Communia20 (2022), Recommendation nr 13; (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 1, Action 3; (ReC)FPR (2023), Recommendation 2.
[134]Communia20 (2022), Recommendation nr 13; (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 1, Action 3;
[135]Communia20 (2022), Recommendation nr 5; (CC)TBSCH-Action (2022), Action 1.
[136] DMC (2021), Proposal 8; (CC)TBSCH-Action (2022), Action 4.
[137] Communia20 (2022),Recommendation nr 7; (CC)TBSCH - Agenda (2022), Area 1; (CC)TBSCH-Action (2022), Action 3.
[138] Lima F., Deliverable 2.4. – Evaluative assessment of the impact of the EU Directive on Copyright in the Digital Single Market in the cultural heritage sector (2022), https://zenodo.org/record/7486661#.Y747--zMI-T, p. 43-48.

current legal regulations do not allow CHIs to effectively implement the second part of their mission: to make the accumulated cultural heritage available to a broad audience, both at the level of member states and the entire European Union. Moreover, the current state of regulation does not allow for the full exploitation of the socio-economic values identified under Sacco's eight-tier classification, which can be generated thanks to CHIs' activities. In particular, the existing regulations do not allow the public to (re)use the cultural heritage accumulated by these institutions. This state of affairs results from treating the activities of these institutions only as a supplement to the market method of providing access to works, implemented under the paradigm of traditional copyright law, and not as the implementation of independent goals and values of CHIs. In practice, this means that the current state of law regulation does not maintain the proper balance and puts the copyright system and the interests protected by it in a privileged position.

White papers support the need to look for new policy and institutional solutions, including changing existing legal regulations. The mission-oriented approach means that one should first define what one wants to achieve and then adapt the existing regulatory system to it. The analysis carried out within the inDICEs project indicates that CHIs' activities can generate several direct and indirect socio-economic values identified under Sacco's eight-tier classification. In order to balance the legitimate interests of rights holders with CHIs' public mission and the right to culture that all people enjoy as a human right, further law reforms seem necessary. The recommendations presented in point 4.2 above constitute a particular minimum set of instruments allowing, to some extent, to restore the right balance between various interests. However, their introduction will not enable CHI to exploit the socio-economic values identified under the eight-tier classification fully. In order to enable CHIs to fully implement their public mission, which will translate into the values mentioned above, it is advised to introduce a solution or several solutions, empowering wide sharing and (re)use of cultural heritage collected by heritage institutions. Below - as an inspiration and a trigger for a discussion - an initial shape of such a solution has been developed, which, in conjunction with the recommendations referred to in point 4.2. above, could allow CHIs to fulfil their public mission.

The proposed solution aims to ensure access to and (re)use of the cultural heritage collected as part of CHIs' activities at the European level (hereinafter: "The Instrument"). The objective of the Instrument is to enable CHIs' right to fulfil their mission and, at the same time, to respect the right to remuneration for authors. When a given object is in the CHI's collection (e.g. because it was acquired from the creator), basing the regulation on the right to remuneration (instead of the exclusive right) seems to properly balance the interest of the rights holders with the interest of fulfilling CHI's public mission[139]. Moreover, understanding the values generated within the Culture 3.0 framework, while respecting the right to culture, means that for some parts of the works in heritage collections, the Instrument should allow for (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"[140]. The proposed Instrument could provide a legal basis for realising these possibilities.

[139] This issue needs to be supplemented with considerations about what cultural heritage works should be covered by the Instrument. See point 4 below.
[140] 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.

The standard approach governing CHIs' activities in the context of IPR is that such institutions should learn to use the works in accordance with the rules imposed by these laws. This standard approach assumes that CHIs, like any other organisations, should use the works on the same terms (with some minor exceptions). CHI's must therefore acquire capabilities typical of entities using works for commercial purposes. In practice, however, this means that they are treated in the same way as entities that use works to generate profits for themselves. In other words, they should, among others, be able to negotiate licence agreements and carry out the rights clearance process. It is assumed that CHIs will cover the costs associated with such activities, both transaction costs of concluding a licence (e.g. search costs, administrative costs, lawyers' costs) and costs related to remuneration for using works in question.

Consequently, it is assumed that CHIs can cover such costs partly from public funds and partly from their additional revenues (e.g. by licensing or charging fees for the possibility of (re)using digitised objects). In practice, however, this means that many CHIs cannot afford to meet such requirements. Undoubtedly, there are CHIs that, due to their position and financial situation, can develop such activities. However, many CHIs do not have this capacity. In addition, some Member States allocate more resources to CHIs' activities and some allocate less. This state of affairs deepens inequalities between CHIs from different EU countries. At the same time, such a state of things causes those CHIs that want to focus on exploiting their public mission - and not on generating additional income from their economic activities - to be disadvantaged. Moreover, even if some CHIs wish to conduct business activities, it is not always possible. They either do not have adequate financial or organisational resources, or the nature of the cultural heritage they possess does not allow for its commercialisation, etc. Such a standard approach to collection management does not sufficiently consider the fact that CHIs are entities pursuing a public mission - a mission different from the activities of entities dealing with the commercial use of works. Therefore, one of the objectives of the Instrument is to remove from CHIs' tasks those activities which, from the point of view of their public mission, are incidental but necessary for the use of works under the standard, market-oriented approach.

2. Proposed structure of the Instrument

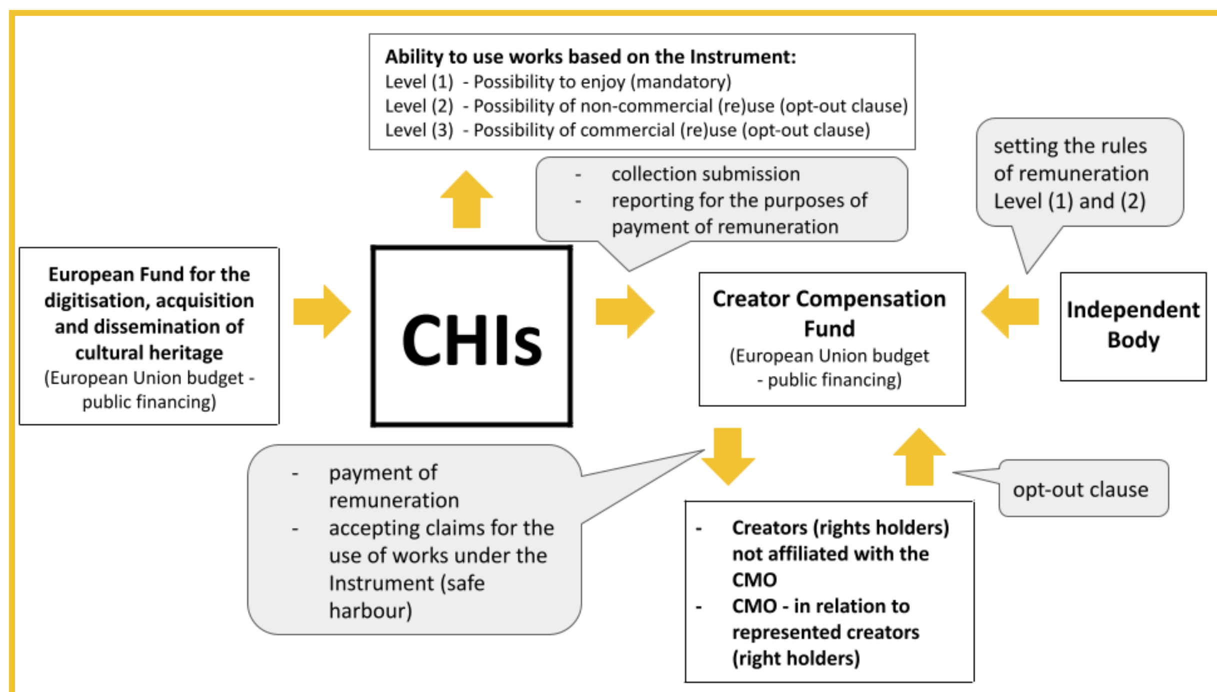

Figure 6: Structure of the European Instrument for ensuring access and (re)use of cultural heritage resources

The Instrument is based on an assumption enabling CHIs to use the works gathered in its collections on three levels linked to remuneration for creators (rights holders). The first level (Possibility to enjoy) enables CHIs reproduction, communication to the public and making artworks in their collections available to the public. The second level (Possibility of non-commercial (re)use) allows for non-commercial use of the works on the terms analogous to the rules set out in the current version of the Creative Commons licence: 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 licence: Attribution International (CC BY). In order to be operational.

The Instrument is not just a modification of the intellectual property rights system - it is an attempt to create a comprehensive solution enabling CHIs to fulfil their public mission. For this reason it should contain two types of funding mechanism (financed from the budget of the European Union): (1) the European Fund for the remuneration of creators (rights holders) - the Creator Remuneration Fund, and (2) the European Fund for the digitisation, acquisition and dissemination of cultural heritage[141].

CHIs wishing to use works under the Instrument should register their collections to the Creator Remuneration Fund. Creators (right holders) should receive remuneration for the use of works

[141] see point 6 below: Funding mechanism and remuneration.

directly from the Creator Remuneration Fund or through a collective management organisation (CMO). Creators (rights holders) should be entitled to an opt-out clause from level (2) or (3) of the Instrument. Level 1 (Possibility to enjoy) should be mandatory because the goal of the Instrument is to enable CHIs at least to create virtual collections of its entire collection. The rules for determining remuneration should be set by an Independent Body. All claims for the use of works under the Instrument should be addressed directly within the Creator Remuneration Fund (via contact points in each Member State). CHIs must also be provided with legal certainty and financial security for the use of works under the Instrument. The Instrument should therefore act as a safe harbour for CHIs. Since the proposed Instrument should be financed with public funds, 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*[142].

This Instrument should apply *mutatis mutandis* to related rights and *sui generis* database rights and metadata related to the works. Also, 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.

The Instrument should be a regulation (not a directive) to provide online access to their collections throughout the EU. Only through such a unified solution a systematic change will be ensured that will strengthen the operational potential of CHIs in the digital single market. Moreover, such a unified solution would enable all Europeans to freely enjoy and benefit from the cultural heritage accumulated by CHIs.

The Instrument in the presented form is a special case of using works by expressly indicated CHIs to allow them to fulfil their public mission. Due to the built-in remuneration mechanism, it ensures creators (and rights holders) that the use of works will not interfere with their normal exploitation. In addition, the use of works collected by CHIs as cultural heritage also does not prejudice any legitimate interests.

3. Possibilities of (re)use of works on particular levels of the Instrument

The Instrument is based on an assumption enabling CHIs to use the works gathered in their collections on three levels which are linked to remuneration for creators (rights holders).

(1) **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.
(2) **Possibility of non-commercial (re)use** - the second level should allow for non-commercial use of works on the terms analogous to the rules set out in the current version of the Creative Commons licence: Attribution-NonCommercial International (CC BY-NC).

[142] 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.

(3) **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 licence: Attribution International (CC BY).

Level	Scope of the exception for CHIs	Possibility of re-use	Opt-out clause	Remuneration
(1) possibility to enjoy	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 CHI's to fulfil 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
(2) possibility of non-commercial (re)use	Same as (1) level (+) additional uses on the terms specified in the CC-NC licence		yes - using it means switching to level (1)	yes - on a non-commercial basis, established by the Independent Body
(3) possibility of commercial (re)use	Same as (1) level (+) additional uses under the terms of the CC-BY licence		yes - use means switching to level (1) or (2) depending on the decision of the right holder	yes - on commercial terms, established by the Independent Body

Figure 7: Instrument levels

The Instrument, on all its three levels, should permit uses proposed in the International Instrument on Permitted Uses in Copyright Law[143] and serving:

1. freedom of expression and information to the extent justified by the purpose of the use. Such uses shall include those for purposes such as:
    (1) quotation of works which have been lawfully made available to the public;
    (2) reporting of news and other matters of public interest;
    (3) criticism, review, parody and caricature;
    (4) search, organisation and analysis of data;
    (5) any utilisation of legislative, administrative and judicial works, including international treaties, as well as official translation of such works.
2. social, political and cultural objectives to the extent justified by their purpose. Such uses shall include those for purposes such as:
    (1) private utilisation;
    (2) benefiting persons with disabilities;
    (3) education;

[143] 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.

(4) research;
(5) preservation or restoration of works, by libraries, museums and archives;
(6) reproducing and making available to the public of orphan
(7) works by libraries, museums and archives;
(8) ensuring public security and the proper performance of administrative, parliamentary or judicial proceedings.

4. Selection of the categories of works to be covered by the Instrument

The decision of which specific types of works should be covered by the Instrument is one of the basic decisions for its functioning. The categories of works that the Instrument should cover 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, works the original copies of which have been acquired, restored or stored by CHIs, and works created as a result of public funding or co-financing. Specific categories of works might not fall under Instrument (e.g. commercially available books or films). What is essential, however, is that the scope of works covered by the Instrument should be as comprehensive as possible to ensure the broadest possible access to the cultural heritage gathered in European CHIs.

The Instrument should not restrict the use of works, including use without remuneration, based on already existing exceptions (e.g. orphan works, out-of-commerce works). In addition, works in the Public Domain are not covered by the Instrument.

5. Opt-out mechanism

The Instrument should be based on the opt-out mechanism. Creators (rights holders) should be entitled to an opt-out clause from level (2) or (3) of the Instrument. Level 1 (Possibility to enjoy) should be mandatory because the goal of the Instrument is to enable CHIs at least to create virtual collections of its entire collection.

The use of out-of-commerce works (Article 8-11 Directive DSM) is also based on the opt-out mechanism. However, unlike that solution, the Instrument's functionality is independent of the CHI's carrying out any reasonable effort to determine whether a work is available to the public. This fact is due to the assumption that the availability of such works via CHIs is not complementary to their availability through ordinary commercial channels but constitutes an independent social value. In other words, CHI's activity is not aimed at market fixing (i.e. making works available only when they are not available in customary channels of commerce.), but it pursues a specific public mission. 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 CHI's 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 CHI 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 CHI's 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 CHI's, i.e. levels (2) and (3).

6. Funding mechanism and remuneration

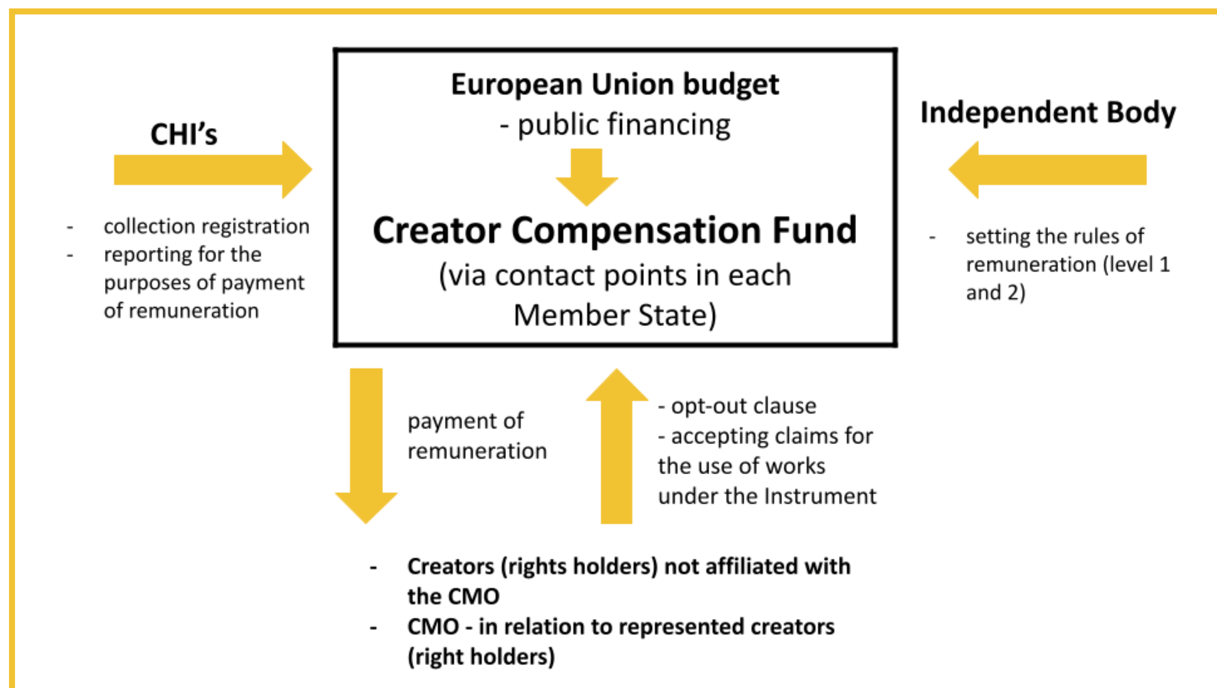

Figure 8: Funding mechanism and remuneration

The Instrument should comply with the authors' (rights holder) remuneration mechanism and the financing mechanism of digitisation, acquisition and dissemination of cultural heritage. CHIs benefiting from the Instrument should not be allowed to restrict access to their collections. In current practice CHIs try to restrict access to their collections (either factually or legally) in order to gain additional benefits from the commercialisation of the collected resources. Such an approach is contrary to the notion of the CHI's public mission, but in many cases it is a necessity resulting from the lack of sufficient funds for their activities from public sources. An important objective of the Instrument would be to ensure that all CHIs from all over Europe can use it on the same terms, ensuring that all EU residents have equal access to European cultural heritage. For these reasons, financing of the Instrument should be ensured at the level of the European Union and not shifted towards CHIs[144]. In this context, it should be emphasised - as indicated by Mariana Mazzucato - "The

[144] This results, among others, from the fact that CHIs have budgetary constraints. This means that as users of the currency, they cannot independently create money according to their needs. However, such restrictions do not apply to countries with sovereign currencies, which are currency issuers. "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". Mitchell W., Wray R., Watts M., Macroeconomics, London 2019, p. 100. See further: Mazzucato M., Mission Economy, Dublin 2021, p. 181 - 188, 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, Gliściński K., Reclaim the state: public interest in copyright and Modern

wrong question is: how much money is there and what can we do with it? The right question is: what needs doing and how can we structure budgets to meet those goals"[145]. This means that the basic limitation for financing certain expenses is their recognition as justified by a political decision. From this perspective, the primary objective of the proposed Instrument is to ensure the possibility of implementing CHIs' socio-economic values identified under the eight-tier classification. For these reasons financing of remuneration and the digitisation process should be based on public funds facilitated on the European Union level[146]. Two public funds should be created for the implementation of the CHIs mission: (1) the European Fund for the remuneration of creators (rights holders) - Creator Remuneration Fund and (2) the European Fund for the digitisation, acquisition and dissemination of cultural heritage[147]. The remuneration for the Instrument should be paid via a designated local collective copyright management organisation under contract with the Creator Remuneration Fund.

CHIs should focus on fulfilling their tasks driven from their public mission and not only relying on legal issues related to the use of collected works. CHIs using the Instrument do so not to generate profit but to fulfil their societal role. For this reason CHIs must be provided with legal certainty and financial security for the use of works under the Instrument. CHIs should therefore bear no legal or financial risk related to the use of works within the Instrument. The Instrument should act as a safe harbour and a clearing rights mechanisms. All claims for the use of works under the Instrument should be addressed directly with the Creator Remuneration Fund (via contact points in each Member State) and not directly to individual CHIs.

Since the proposed Instrument should be financed with public funds, 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 with the FAIR principle, and in particular suitable for (re)use[148].

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. The remuneration could be specified (and indexed) by an Independent Body, consisting of, among other things, authorised representatives (e.g. CMO representatives), representatives of excepted

Monetary Theory, internet&sociedade, volume 3, numero 2, 2022, https://revista.internetlab.org.br/reclaim-the-state-public-interest-in-copyright-and-modern-monetary-theory/

[145] Mazzucato M., Mission Economy, Dublin 2021, p. 8.

[146] Leaving the financing of the Instrument at the level of the Member States could lead to a situation where some CHI's - due to decisions of individual countries - would have access to more opportunities to use the accumulated cultural heritage than others. Such a state of affairs would translate into overrepresentation of part of the cultural heritage and economic discrimination of another part.

[147]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.

[148] "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.

institutions (CHIs), representatives of non-commercial users of works, representatives of commercial users and representatives of the European Commission.

Determining the amount of remuneration, the Independent Body should consider the differences in the rights to use the works at the different levels of the Instrument. In particular, when determining the amount of remuneration for level (1), it should be taken into account that the works are in the collections of public institutions that have collected them (including purchase) and published them to fulfil their public mission. Recognising that the public mission of CHIs is, among other things, linked to acquiring objects for a collection in order to make them freely available, 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. Remuneration should not include the use of the works associated with freedom of expression, information, and implementing social, political and cultural objectives, i.e. within the scope specified in International Instrument on Permitted Uses in Copyright Law[149].

[149] 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.

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