

8 Reasons Why...

Effective EU Provisions on Out of Commerce Works Require an Exception

Fourteen years after Google Books, the Commission's proposals on Out of Commerce Works finally aim to give new access to European works currently only accessible within the walls of heritage institutions. While some countries have successful systems in place – whose operation should be protected – the suggested solution is not realistic for many countries, institutions and creators. Decisive progress requires an exception.

On the need for a fall-back exception libraries and archives support the following amendments:
IMCO: 57; ITRE: 41.

Here's why:

1 Collecting societies do not exist in all countries and sectors: The Commission's proposals rely on the existence of a comprehensive network of representative collecting societies across the EU. This is far from reality:

Estonia, Cyprus and Malta have no collecting society for the written word (other than for lyrics), Slovenia has none for artistic works, Netherlands no CMO for film and broadcasters (Producers);

2 Where collecting societies exist, they may not be allowed to offer licences to cultural heritage institutions to put out of commerce works on the Internet: sometimes national laws stand in the way of these activities.

In the Czech Republic, the collecting society for film is not allowed to offer licences to cultural heritage institutions. The same is true in the France, as well as in the UK (for broadcasts)¹

3 Even where they can offer licences, cultural heritage institution budgets may not be big enough to make it interesting for collecting societies to engage: libraries and archives are not lucrative markets for Collecting Societies, who prefer to focus on a limited range of content and users.

The National Library of Finland wanted to digitise newspapers up until the 1940s. However, despite repeated requests for permissions, the relevant collecting society refused to engage. To mark the 100th Anniversary of independence, the Library then put materials online until 1920, and were immediately reported to the government for copyright infringement by the collecting society.

4 Materials held by cultural heritage institutions are often of low interest to commercially-focused collective societies: significant amounts of what libraries, archives and museums hold is of low or zero commercial value, but is important for research of high research and cultural value

Unpublished materials, pamphlets, fanzines, newsletters, world war two platoon journals, samizdat, sales catalogues, postcards, posters, private manuscripts, oral histories, traditional folk music, ethnographic music, off air recordings of discussions and debates on politics, culture, diaries etc. all provide important insights into our history and culture, but have very little, if any, market value

¹ Source : Institut National de l'Audiovisuel.2009. European Commission Study: *Expérience de l'Ina sur l'utilisation d'œuvres audiovisuelles orphelines.*

5 There are potential ethical issues around the collection of royalties for works that were created for non-commercial purposes, by non-members of a collecting society: Cultural heritage institutions collect many non-commercial works, whose original creators are unlikely to be members of a collecting society.

There are serious questions about whether a collecting society can legitimately represent, for example, oral histories with miners, ethnographic field recordings of the Sami peoples' songs, platoon journals from the trenches, or home videos submitted by individual donors etc?

6 Collecting societies do not have an incentive to take account of broader social, cultural and research benefits: by leaving decisions about what to make available or not to collecting societies, there is a risk that the public interest is set aside in favour of a minor – or uncertain – commercial return.

Two recent Dutch court cases have seen collecting societies taking city archives to court for uploading historical local newspapers and exhibition posters to the Internet. The case of Finnish newspapers up to 1920 above provides a further example of public interest activities by libraries and archives facing complaints from collecting societies.

7 Where materials do have potential commercial value, an exception will act as an incentive for collecting societies offer licences: by changing the default setting for out of commerce works, there is a new incentive for rightholders to cooperate to establish collecting societies in order to offer licences and collect royalties.

When the UK introduced into copyright law in 1988 an exception for educational establishments to use broadcasts, unless there was a licence on offer, the Educational Recording Agency (ERA) formed to offer a licence. Until then, there had not been enough incentive to offer licences.

8 An exception would not interfere with systems that are working well, or with the right of creators to exclude their works: the proposed exception is a response tailored to areas of market failure, and would have no impact on functioning extended collective licensing regimes or similar regimes.

Some European countries benefit from a strong and complete network of collecting societies from which libraries and archives can obtain relevant and adequate licences. In these situations, there will be no need to use the inventive. Similarly, creators must always have the possibility to object to their works being made available online.

An exception is vital if the EU's proposals on out of commerce works are to:

- create a European cultural space, accessible to all Europeans;
- give creators the opportunity to be rediscovered;
- help researchers in their work;
- match the needs and collections of cultural heritage institutions;
- incentivise collecting societies to form and offer licences

To do this, the JURI Committee should endorse the amendments agreed by IMCO and ITRE, ensuring that an exception can be used where a licence is not available from a collecting society, or will not be in the near future.