Articles 7 to 9 – Out of Commerce Works

While a few works continue to earn revenues for rightholders throughout their copyright terms, it is clear that for the vast majority, this is not the case. Copyright also applies to papers, photos, recordings and other materials which were never produced to be sold in the first place ('never-in-commerce'). Once there is no longer (or never was) a commercial incentive to market and sell a work, it becomes out of commerce. Libraries and cultural heritage institutions (CHIs) hold important collections of such works which are not available through other channels, but thanks to copyright rules, have no way of giving the public access to them. Initiatives for the mass-digitisation of important collections of works that are part of Europe's 20th cultural heritage have often not been possible due to difficulties in clearing rights.

The result is a form of market failure. Despite there being no market to damage, non-commercial uses (such as for exhibition, or remote access) by libraries and CHIs continue to be blocked. Indeed, locking such works away is potentially the most effective single way of preventing them from being rediscovered. While solutions exist in some countries, these are subject to important limitations concerning the type and age of works covered, and the possibilities open to libraries and CHIs.

Our Ask:

- An exception that allows CHIs to make reproductions, distribute and communicate or make available to the public out of commerce works[1], for non-commercial purposes, in cases where no adequate licences from collective management organisations are available.
- Where an adequate licence is available for out of commerce, or never in commerce works, the exception should not apply. When collective management organisations are sufficiently transparent, well-governed and representative, and able to offer adequate licences, they can facilitate the making available of works, while ensuring compensation to rightholders.
- A more practical definition of an out-of-commerce work, which does not expect libraries and CHIs or CMOs to know if a work may in the future be in-commerce again. This should also replace reference to 'versions, translations and manifestations' with a provision that only works which are not substitutable for an in-commerce work can be deemed out-of-commerce, and should explicitly reference never-in-commerce works as falling within the scope of the Directive.
- A continued guarantee that rightholders should at any point be able to object to their works being designated as out-of-commerce, or being used under the exception or a licence.
- Works by third country nationals should not be excluded from the scope of the Directive, given that to do so will make the out-of-commerce works provisions impractical.
- Libraries and CHIs should not be obliged to publish more information about works on the single EU portal than is already contained within their own catalogues.

We believe that the proposed formulation will incentivise rightholders to form a collecting society where none exist, or where none are able to respond to the needs of libraries or CHIs. An example of this hybrid exception is s.35 of the UK Copyright Act which led to the rapid establishment of a CMO, the Educational Recording Agency. Educational establishments have benefitted from this as the CMO offers a licence, and the educational establishments are legally covered for broadcasts that belong to organisations who have not given their mandate to the CMO.

[1] The acts of digitisation are not indicated as they would be covered by our suggested amendments to Article 5 of the Commission's Proposal.

Draft Opinions/Opinions – Our Views

To support these objectives, you may wish to vote for the following amendments:

- In the **IMCO Opinion**: amendments 57 to 66.
- In **JURI**: support amendments 249 by Guoga and Maydell, 41, 42, 43, 44, 45, 46, 48, 49 and 50 by Comodini, 247, 270, 271, 272, 703, 705, 706, 712, 716 and 722 by Adinolfi, Ferrara, Borrelli and Tamburrano, 246, 250, 251, 263, 265, 268, 690, 692, 694, 695, 696, 707, 711 and 715 by Reda, 261 by Chrysogonos, Mastálka and Kuneva as well as 693 by Cofferati to the rapporteur's Draft Opinion.
- In the **ITRE Opinion**: amendments 16 (to recital 25), 41 and 42.

What does the Commission's Proposal Say? The Commission's text enables collective management organisations (CMOs) to offer licences, on a non-exclusive basis, for all out-of-commerce works in a particular category. Importantly, this means that CMOs can collect licensing revenues for works by creators who are not members, through extended collective licensing or a presumption of representation. The only condition on this is that the CMO in question is representative of creators in this category.

For a work to be declared out-of-commerce, it needs to be unavailable (or unlikely to become available) through usual commercial channels – bookstores, online or offline – both in the original and in any version, translation or manifestation.

The licences offered would allow libraries CHIs to digitise, distribute and communicate to the public or make out of commerce works available. Subject to publishing key information about the out-of-commerce status of a work on a single European portal for at least six months, libraries and CHIs across the European Union would then be allowed to use works published in any other European country, subject to the terms of the licence offered. At all points, rightholders much have the possibility to object to the granting of licences for uses of their works.

What's Missing? Most importantly, the proposals do not offer an effective solution for making available all types of commercially unavailable works that will work in all member states, given that the infrastructure of collective management organisations is far from complete and differs between member states

In particular:

- Not all Member States have collecting societies representing all types of works. This is a particular issue for works which were never made available commercially, such as postcards, letters, diaries, club magazines, organisational archives or samizdat, for example.
- A CMO may exist but it may not be deemed to be sufficiently representative of rightholders for a particular category of work to be able to offer a licence;
- A CMO may be able to offer licences to certain beneficiaries for certain uses, but may choose not to offer cultural heritage institutions licences for disseminating works or other subject matter online. This may, in particular, be the case for uses in other countries, where a CMO may choose not to grant a licence for uses in other parts of the EU;
- In Central and Eastern Europe, many of the published works made post war and up to the late 1980s were made by companies that no longer exist, under copyright laws that no longer exist (and in the case of Yugoslavia, a country that no longer exists). In many instances, it is not possible to know where rights now sit, and therefore who should represent them.

As a result, the Commission's proposal is highly unlikely to work for large volumes of works, in particular those that were never in commerce. This defeats the object of the Directive.

Furthermore, there are a number of further areas of uncertainty. The Commission's proposal does not offer a definition of a 'category' of work. Similarly to the Collective Rights Management Directive (2014), it also does not set the criteria which must be fulfilled for a CMO to be representative of artists in a sector.

There are two potential difficulties in the definition of out-of-commerce works. By excluding translations of works in particular, many works may be excluded despite not being substitutable for the original – for example if a work is commercially available in its German version but not in its Slovenian one, it is unlikely that a German consumer would use a digitised version of the Slovenian text rather than buying a German-language copy.

Moreover, the exclusion of works which are likely to re-enter commerce in future is meaningless. Libraries and CHIs are not able to predict the future, and obliging them to do so will only create legal uncertainty. Given that rightholders may at any moment object to their work being made available in this way (for example if they intend to re-commercialise it), this provision is not necessary.

The text provides that works by nationals of third countries should be excluded from the provisions. This is a challenge in that a single work may have many different rightholders, notably for photos, designs, and other artistic contributions above and beyond simple text. When the work is produced in a major world language, information on the nationality of individual rightholders may simply not be available. As a result, excluding works by non-EU nationals is impractical.

In constructing the single European portal of works deemed to be out-of-commerce, the Commission's proposal requires publishing a range of information, much of which may not already be held in the catalogues of libraries or CHIs. Generating this additional information will be burdensome, and may prove impossible, which would undermine the objective of the Directive.

Finally, as the Court of Justice of the European Union underlined in Soulier and Doke (C-301/15), the absence of an exception to copyright means that extended collective licensing schemes may be in contravention of the Berne Convention. While the French scheme in question focused on commercial uses of out-of-commerce works, the lack of a clear exception to copyright in EU law for any use of such works creates legal risk.