



Rethinking digital copyright law for a culturally diverse, accessible, creative Europe

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Executive Summary

As one of its main endeavours, *reCreating Europe* aims at engaging with its stakeholders to produce deliverables that effectively contribute to the state of the art of the research and possibly build a regulatory framework towards a culturally diverse, accessible creative Europe. With a specific focus on cultural heritage institutions like galleries, libraries, archives, and museums (GLAMs), the activities of WP5 address precisely the needs of such organisations through a mixed methodology that combines theoretical research with empirical analysis, e.g., online questionnaires and semi-structured interviews, which most WP5 deliverables have or will be based on.

The present output, which comprises a descriptive analysis of the legal framework (part 2), a set of Frequently Asked Questions (part 3) and Guidelines (part 4), all focusing on digital preservation, use of orphan works and use of out-of-commerce works, precisely follows this approach. The work builds upon preceding deliverables D5.1 Report on the existing legal framework for Galleries and Museums (GM) in EU¹ and D5.2 Report on the existing legal framework for Libraries and Archives (LA) in the EU.² Both these reports were produced based on the research carried out under T5.1 European Legal Framework for GLAM industries: from closure to Openness.

The goal of this deliverable is to produce a first draft of Guidelines and FAQs to help GLAMs deal with some selected issues arising from digitisation. The draft which will be circulated during the upcoming workshops organised under WP5, in which participants will be invited to discuss the FAQs and apply the guidelines to suggest (a) whether different and/or clearer rules (i.e. considering laws and policies) may facilitate the process of dealing with the identified controversial issues, and (b) whether the current legal framework is too strict to comply with, and thus possibly hindering GLAM's mission of democratising culture.

The present deliverable also mirrors - to the extent possible - its twin deliverable D5.4 Guidelines & FAQs (LA) industries - Interim version,³ which was dedicated to Libraries and Archives, under T5.2 Implementation of legal requirements and criteria for openness.

Both D5.3 and D5.4 are designed to serve as instruments (thus their temporary nature) for further discussion with stakeholders, under T5.3 Valuing and engaging in openness with GLAM, to which these deliverables are presented during the dissemination or training events agreed under the project's Grant Agreement. The outcomes of such a process will flow into the final version of the twin Guidelines & FAQs, with the wider goal to support digitalisation in the framework of a rebalanced copyright law.

It is worth specifying that the present deliverable will be used as a basis to develop the set of FAQs and Guidelines that will be available by the end of the project. This is a sample to be adjusted after gaining specific insights by cultural heritage institutions (CHIs) that will be testing this interim version, with the ultimate aim to provide a final version of FAQs and Guidelines with a bottom-up methodology, in order to be more effective and useful for the GLAM community. Ideally, GLAM professionals who are on the front line will help to reshape and adjust the FAQs that appear too technical or comprehensible only to an academic or other expert audience, but also to further clarify the Guidelines, addressing the most contentious topics they face in their everyday activities.

¹ R. Caso, G. Dore, M. Arisi, C. Sganga, G. Priore, P. Guarda, *reCreating Europe - D5.1 - Report on the existing legal framework for Galleries and Museums (GM) industries in EU*, 2021, <https://zenodo.org/record/5070449#.YbxJzC1abL8>.

² G. Priora, C. Sganga, G. Dore, R. Caso, P. Guarda, *reCreating Europe - D5.2 - Report on the existing legal framework for Libraries and Archives (LA) industries in EU*, 2021, <https://zenodo.org/record/4621049#.Ycl41y1aZD0>.

³ V. Kalaitzi, A. Papadopoulou, *reCreating Europe - D5.4 - Guidelines & FAQs (LA) industries - Interim version*, 2021, <https://zenodo.org/record/5070484#.Ycl4ay1aZD0>.

1. Methodology

The present deliverable finds its foundation in the survey analysis conducted under T5.2 Implementation of legal requirements and criteria for openness.⁴ Such analysis comprised initially the evaluation of the online questionnaire that ran from September 2020 to January 2021, receiving 125 complete responses, aimed at mapping and determining whether GLAMs were aware of the implications that copyright law and open policies have on the digitisation practices undertaken by GLAM stakeholders, but also at determining to what extent the law functioned as a barrier to access, use and reuse of digital content and open policies represented a balanced countermeasure. The broader goal of the survey was to provide a better understanding of the impact that copyright law has on digitisation practices by consulting directly with those GLAM professionals who are mostly involved in such practices. It also aimed at understanding the limits of the current regulatory framework and any possible change that should be made to allow GLAMs to make the best use of digitisation. Therefore, the data therein collected have helped to produce the FAQs and Guidelines that follow in this document.

In the subsequent months, the survey was complemented by a dozen semi-structured interviews, all conducted online, with selected GLAM professionals involved in the digitisation activities, who responded on behalf of their organisation. In particular, interviews allowed to deepen the understanding of some aspects that the online questionnaire alone could not entirely grasp, since they let interviewers detach some of the most controversial topics and some of the copyright provisions they perceived as the most difficult to comply with.⁵

The present research output also looks at the FAQs Author's right, copyright and free licenses for culture on the web,⁶ that some of the authors of this work contributed to review. The scope and structure of this deliverable has been adjusted also to avoid duplication of efforts and rather provide a complementary instrument to guide stakeholders.

The instant deliverable mostly shares the same backdrop of D5.4, the interim version of Guidelines & FAQs (LA) industries on exploring legal compliance and fulfilment with standards for Openness, application of technological measures, and implementation of specific policies and informal practices. However, it differs from D5.4 for its more specific emphasis on three main topics, which have demonstrated to be particularly relevant for GM and yet deserving further analysis because of their rather ambiguous legal scope and difficult practical functioning, which both precedes and follows the implementation of the Directive on copyright in the Digital Single Market, Directive (EU) 2019/790,⁷ (hereinafter "CDSMD"), such as preservation of cultural heritage, use of orphan works, and use of out-of-commerce works.

Filtering the overall results of the survey on the impact of copyright law on digitisation in the GLAM sector to focus only on Galleries and Museums (GMs) (out of the 125 participants in the survey 42 GMs responded and the 95.2% of them held digital resources), it is possible to address a few aspects that also support the

⁴ G. Dore, L. Beltrame, I. Buunk. (2021). Impact of Copyright Law and Open Policies in relation to digitisation practices in the GLAM Sector. Zenodo. <https://doi.org/10.5281/zenodo.4887261>

⁵ Additional information about the questionnaire and the interviews are discussed in a dedicated paper authored by G. Dore, L. Beltrame, S. Giovanetti, Measuring the Impact of Copyright and Open Policies on Digitisation: Evidence from the GLAM sector, to be published in 2022.

⁶ S. Dominique Orlandi, D. De Angelis, P. Fasano, C. Manasse, A.A. Marras, M. Modolo. (2020). FAQs Author's right, copyright and free licenses for culture on the web, 10.5281/zenodo.4301983.

⁷ 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 [2019] OJ L130/92.

methodology followed by this deliverable by focusing on digital preservation of cultural heritage, use of orphan works, and use of out-of-commerce works.

First, the data show that most of GM hold digital collections with both born-digital and digitised works, including a consistent percentage of orphan and out-of-commerce works (around 60%). However, intellectual property law was not unequivocally identified as a significant barrier to digitalisation, but the lack of legal expertise and of legal training appears to be among the circumstances that are impeding the full development of digitisation. This was confirmed during the semi-structured interviews, when interviewees wished to receive more focused legal training, not only in EU law but also on national copyright law.

Second, questionnaire data indicate a moderate to high awareness of copyright law. However, while issues such as authorship and ownership of rights, duration, copyright exceptions and licensing appear to be relatively well-known, other more specific topics such as use of orphan works and of out-of-commerce works are relatively less known. When this was discussed in the follow-up interviews, interviewees showed special interest in being trained on orphan works and out-of-commerce works (according to the questionnaire's results, over 60 percent of GM respondents indicated them as preferred areas of copyright for training), of which they realised the opportunity but were uncertain on how to take advantage.

Third, the issue of preservation was detected in the questionnaire by asking respondents to provide more information about the technological measure taken to preserve digital and digitised resources. Most respondents did not refer to any specific technologies other than storage on the hard drive and flash memory, while over 20 percent declared not undertaking any digital preservation effort, and only some mentioned their use of computational analysis and machine learning, although they did not provide further details or specific examples. Interviewees confirmed the interest to be further guided also on this topic.

The following section 2 considers digital preservation in more detail, placing the use of orphan works and out-of-commerce works in context, before turning to the FAQs in section 3 and Guidelines in section 4.

2. Digital preservation, use of orphan works and of out-of-commerce works

Digital cultural heritage is a complex phenomenon tackled by sociological, media and cultural studies and that also implies technical and interdisciplinary knowledge, e.g., in the field of digital humanities, IT and the law.⁸ The present overview focuses on the aspects which are relevant to illustrate the EU legal framework on digital preservation, use of orphan works and out-of-commerce works as far as copyright law is concerned. Such overview of the legal framework is indeed the necessary context for understanding the core concern of the deliverable, which are the FAQs and Guidelines for the GLAM sector.

As a general background, within the broader regulatory framework on the protection of heritage, including provisions on an international, regional, national and local level, it is possible to refer to a variety of nomenclatures referring to cultural heritage. As a main example, the World Heritage Convention of 1972 by the United Nations Educational, Scientific and Cultural Organization (hereinafter, UNESCO) differentiates between cultural and natural heritage⁹, but also tangible and intangible heritage, as evidenced in the

Convention for the Safeguarding of the Intangible Cultural Heritage of 2003.¹⁰ The latter perspective is shared with the World Intellectual Property Organization (WIPO) as well.¹¹ Different categories of cultural heritage are also acknowledged by different European Union policy and legislative documents, as the recent Commission Recommendation on a common European data space for cultural heritage recently published in November 2021, C(2021) 7953 final,¹² listing tangible cultural heritage, intangible cultural heritage, natural heritage and born-digital heritage in Article 3 on definitions.

In the era of digitisation, also datafication, heritage becomes increasingly digital indeed. The term digital heritage should be understood as referring to both the fact that heritage can be digitalized or is more and more born digital.¹³ Already in 2009 the UNESCO Charter on the Preservation of Digital Heritage¹⁴ defined digital heritage in Article 1 as “unique resources of human knowledge and expression”, embracing “cultural, educational, scientific and administrative resources, as well as technical, legal, medical and other kinds of information created digitally, or converted into digital form from existing analogue resources”. From this perspective, digital heritage therefore includes - without being limited to - born digital resources.

Compared to the past, more pervasive digital heritage and a rapidly evolving technological context urges us to rethink what CHIs can do to fulfil their role and mission - the preservation and promotion of cultural heritage. Nowadays, cultural heritage can be accessed and or even re-used digitally and online. This implies a change for CHIs, their authority and trustworthiness, shall be considered.¹⁵ Overall, the increasingly

⁸ For an overview on the methodological challenges around digital heritage see M. Dulong de Rosnay, F. Musiani, The Preservation of Digital Heritage: Epistemological and Legal Reflections, *Journal for Communication Studies*, Vol. 5, No. 10, 2012, 81-94, <https://ssrn.com/abstract=2193682>.

⁹ Confront Articles 1 and 2 of the UNESCO Convention for the protection of the world cultural and natural heritage (1975) 151 UNTS 1037.

¹⁰ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2006) 3 UNTS 2368. On intangible cultural heritage see also UNESCO Intangible Cultural Heritage webpage, <https://ich.unesco.org/en/home>.

¹¹ See WIPO Glossary webpage, <https://www.wipo.int/tk/en/resources/glossary.html>.

¹² European Commission webpage, Commission proposes a common European data space for cultural heritage (10 November 2021), <https://digital-strategy.ec.europa.eu/en/news/commission-proposes-common-european-data-space-cultural-heritage>

¹³ See International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), What is your digital heritage? (22 July 2021), <https://www.iccrom.org/news/what-your-digital-heritage>

¹⁴ Charter on the Preservation of the Digital Heritage, Adopted at the 32nd session of the General Conference of UNESCO, 17 October 2003, CL/3865.

¹⁵ K. Fouseki, K. Vacharopoulou, Digital Museum Collections and Social Media: Ethical Considerations of Ownership and Use. *Journal of Conservation and Museum Studies*, 2013, 11(1): 5, 1-10, <http://dx.doi.org/10.5334/jcms.1021209>.

important role of authors and often digital native users, who use computers and the Internet to access and share cultural content and create new forms thereof, shall be considered.¹⁶

Digitisation and digital preservation scope and practices have become increasingly shaped by a constantly evolving technological context¹⁷, and so are organization and technical challenges faced by CHIs. These challenges closely follow the information life-cycle. Considering the notion of digital heritage, Article 5 of the UNESCO Charter on the preservation of digital heritage states “[...] To preserve digital heritage, measures will need to be taken throughout the digital information life cycle, from creation to access. Long-term preservation of digital heritage begins with the design of reliable systems and procedures which will produce authentic and stable digital objects”. In this context, legal issues, and primarily copyright issues, have proved of strengthened importance, for they heavily impact digital objects.

In addition, going beyond established practices of digitisation and digital preservation, current emerging technology offers multiple new opportunities, from the creation of interoperable and accessible knowledge base management to different kinds of interactive and co-creative media spaces and digital objects, as for example considering 3D representations and augmented reality, gamification, the tokenization in the blockchain, and Artificial intelligence. These pose unique and still unanswered legal challenges.

Despite previous consistent interest and initiatives for the digitalisation of the cultural heritage,¹⁸ especially represented by the Europeana project,¹⁹ the EU most recent regulatory initiatives are more clearly consistent with the EU Digital Policy, that increasingly include the cultural sector.²⁰ In addition, the quest for the digital transition of the CHIs has been recently accelerated by the Covid-SARS-19 pandemic.²¹

The ultimate description of these efforts and desiderata for the digital turn of the cultural heritage and CHIs has been conveyed in the Recommendation on a common European data space for cultural heritage recently published in November 2021 (hereinafter, also “the Recommendation”). In the 2021 evaluation²² of the recommendation on online accessibility of cultural material and digital preservation (2011/711/EU),²³ the Commission acknowledged that many of the challenges evidenced at the time are still present today. Conclusions of the evaluation highlighted the still scarce resort to advanced technologies and data, the need for better quality digital resources and to address immovable, born-digital and intangible resources, the further adoption of common standards and approaches, the enhancing digital skills and literacy, and the possibility for a greater role of Europeana.

¹⁶ A key element of this field of study could be a new attention to “the role of amateurs, citizens, initiatives born outside the walls of institutions traditionally dedicated to heritage”, as in F. Musiani, V. Schafer, Digital Heritage and Heritagization, RESET, 6, 2017, 4, <http://journals.openedition.org/reset/806>.

¹⁷ For an overview, see A. Bentkowska-Kafel, L. MacDonald, Digital Techniques for Documenting and Preserving Cultural Heritage, Amsterdam University Press, 2017. <https://doi.org/10.1515/9781942401353>.

¹⁸ An overview of the evolutions is given in Argyri Panezi, Europe’s New Renaissance: New Policies and Rules for Digital Preservation and Access to European Cultural Heritage, 24 COLUM. J. EUR. L. 596 (2018). See also EU Commission webpage, Expert Group on Digital Cultural Heritage and Europeana (DCHE), <https://digital-strategy.ec.europa.eu/en/policies/europeana-digital-heritage-expert-group>.

¹⁹ EU Commission webpage, The Europeana platform. <https://digital-strategy.ec.europa.eu/en/policies/europeana>

²⁰ EU Commission webpage, Digital cultural heritage. <https://digital-strategy.ec.europa.eu/en/policies/cultural-heritage>

²¹ Inter alia, Factum Foundation for digital technology in conservation, A series of online discussions about new technologies and the preservation of cultural heritage (1-2-3 May 2020), <https://www.factumfoundation.org/pag/1608/a-series-of-online-discussions-about-new-technologies-and-the-preservation-of-cultural-heritag>

²² EU Commission, Staff Working Document Evaluation of the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, SWD (2021) 15 final, <https://op.europa.eu/en/publication-detail/-/publication/c1486ba2-6226-11eb-aeb5-01aa75ed71a1/language-en/format-PDF/source-219809146>

²³ EU Commission, Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation [2011] OJ L 283/39.

The new Recommendation highlights the need to accelerate the digital transformation of the cultural sector building on cultural heritage as a key element for the creation of a European identity that relies on common values, but also as a contributor to the European economy, fostering innovation, creativity and economic growth. It also links cultural heritage to sustainable development and the support of the EU Green Deal.

That cultural heritage institutions can, within the Digital Single Market and in line with the European data strategy, foster the reuse of content and spur creativity in various sectors, with value for the whole economy and society, is indeed the ultimate objective pursued with the creation of a common European data space for cultural heritage (Recommendation para 18).

The Recommendation especially focuses on digitisation and digital preservation in its Chapter II which is thus considered a fundamental source for this work. Here, “digital preservation” is intended as “a set of activities necessary to make sure digital objects can be located, rendered, used and understood in the future” (point 1(7)), and “digitisation” means converting assets from an analogue format to a digital one (point 1(5)).

The Commission urges Member States for the adoption of an holistic approach, promotion of partnerships between the cultural and other sectors, including partnerships with private companies, but is also briefly mentions the relevant EU legal framework that impacts digitisation and digital preservation activities of CHIs, primarily mentioning copyright law (i.e., para 16 and point 12) and public sector information laws (para 14 and point 10).

As for the latter, the main reference is to the Directive (EU) 2019/1024, also “the Open Data Directive”.²⁴ This has recently modified the discipline provided by the Directive 2003/98/EC on the re-use of public sector information,²⁵ previously amended in 2013.²⁶ The Directive applies to documents held by libraries, including university libraries, museums and archives but excludes other cultural establishments (Article 1(2)(h)). It deserves emphasis that the selected institutions are considered holding a significant amount of valuable public sector information resources, especially thanks to digitisation projects (recital n. 65). Therefore, notwithstanding the constraints deriving from intellectual property rights, these documents shall generally be re-usable for commercial or non-commercial purposes and subject to principles such as openness by design and by default, transparency, and information duties. However, these institutions are also subject to a few specific derogations, i.e., they can charge for re-use (Article 6) and conclude exclusive arrangements for the digitisation of cultural resources (Article 12).

The increasing overlap between these two subjects - Open Data laws and copyright - is hereby confirmed as a key area for legal study on cultural heritage. However, being the main focus of the present legal analysis copyright law, further study of this aspect has been demanded for future work. As mentioned in the introduction, EU copyright legislation represents indeed the core of the current questions and challenges experienced by the CHIs. The Recommendation of 2021 acknowledges that in the EU specific measures have addressed copyright-related obstacles when digitising and sharing cultural heritage, such as the costs associated with clearing rights, lack of sufficient copyright expertise among cultural heritage professionals, limitations to cross border cooperation between institutions (para 16). The reference is to the Directive (EU)

²⁴ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L172/56.

²⁵ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information [2003] OJ L 345/90.

²⁶ Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information [2013] OJ L175/1.

2019/790, which despite the term for the implementation having expired in June 2021, still needs to be transposed in a few Member States.²⁷

Several provisions in the CDSMD impact CHIs²⁸ building on a definition of “cultural heritage institutions” in Article 2 number 3 of the same Directive as publicly accessible libraries or museums, archives or film or audio heritage institutions.

Next to Articles 3 and 4 CDSMD regarding text and data mining, also by research and cultural heritage institutions and for scope of scientific research,²⁹ Article 6 of the CDSMD introduced a dedicated exception or limitation to the objective of preservation, also digital preservation, asking Member States to provide for an explicit exception to copyright, so that cultural heritage institutions can make copies of those works that are in their permanent collections for the aim of preservation, in any format or medium - therefore including the digital one.

Article 14 CDSMD is also of interest for the topic of digitisation and digital preservation, as it introduces a new rule for the reproductions of works of visual art in the public domain, which is essentially addressed at the digital environment (recital n.53 CDSMD). Although several doubts regarding its correct interpretation

(i.e., the definition of works of visual art is not provided) and overlap with existing national laws,³⁰ establishing that any material resulting from an act of reproduction shall not be subject to copyright or related works, the provision aims at providing not only users but also cultural heritage institutions with enhanced legal certainty in the design of new practices of digitisation and dissemination of contents online.³¹

However, it should be considered that before the CDSMD, EU Member States have relied on different provisions that would allow cultural heritage institutions to reproduce and digitise works for different purposes,³² within the exceptions and limitations provided by the Information Society Directive (hereinafter “InfoSoc Directive”)³³ and other sectorial, also “vertical”, Directives.³⁴

More specifically, one fundamental exception or limitation has been provided by Article 5(2)(c) InfoSoc Directive, which is a non-mandatory exception or limitation that would permit specific acts of reproduction by CHIs, and namely publicly accessible libraries, educational establishments, or museums, or by archives, which are not for direct or indirect economic or commercial advantage.

²⁷ For continuing updates, see: CDSMD implementation trackers created by CREATE and developed in collaboration with reCreating Europe, Copyright in the Digital Single Market Directive - Implementation an EU Copyright Reform Resource, <https://www.create.ac.uk/cdsm-implementation-resource-page/>; COMMUNIA DSM Directive Implementation Portal, <https://www.notion.so/DSM-Directive-Implementation-Portal-97518afab71247c-fa27f0ddeee770673>.

²⁸ P. Keller, Explainer: What will the new EU copyright rules change for Europe’s Cultural Heritage Institutions, Europeana Pro Blog, 9 June 2019, <https://pro.europeana.eu/post/explainer-what-will-the-new-eu-copyright-rules-change-for-europe-s-cultural-heritage-institutions>.

²⁹ R. Ducato, A. Strowel, Ensuring Text and Data Mining: Remaining Issues With the EU Copyright Exceptions and Possible Ways Out, CRIDES Working Paper Series no. 1/2021; 43 European Intellectual Property Review, 2021/5, 322-337 (forthcoming).

³⁰ For an overview on Italy, see M. Modolo, La riproduzione del bene culturale pubblico tra norme di tutela, diritto d’autore e diritto al patrimonio, Aedon - Rivista di arti e diritto online, 2021, n. 1., <http://aedon.mulino.it/archivio/2021/1/modolo.htm>

³¹ M. Arisi, Digital Single Market Copyright Directive: Making (Digital) Room For Works Of Visual Art In The Public Domain, *Opinio Juris in Comparatione* v. 1 n. 1, 2020, <https://www.opiniojuriscomparatione.org/articles/digital-single-market-copyright-directive-making-digital-room-for-works-of-visual-art-in-the-public-domain/>

³² See n. 1.

³³ 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 [2001] OJ L 167/10.

³⁴ As for instance the so-called Database Directive and Computer Programs Directive: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20 and Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16.

Finally, the new Copyright Directive contains new and long-awaited provisions on out-of-commerce works and CHIs, with Articles from 8 to 11 CDSMD.

Out-of-commerce works, now regulated by the CDSMD, together with orphan works, that are addressed by the Directive 2012/28/EU on certain permitted uses of orphan works, also known as the “Orphan Works

Directive” (OWD)³⁵ represent the two other main topics addressed by the present work. They both point to the problem of copyright uncertainty as a severe barrier to digitisation and digital preservation. The unclear status of copyright ownership is a first important example: when cultural heritage institutions wishing to digitise resources cannot identify or locate the related copyright holders and thus obtain their authorisation to digitise, such resources are deemed to be orphan and they pose significant limitations to the opportunities that digitisation has to offer to CHIs.

Orphan works, which represent a significant part of cultural heritage collections,³⁶ pose significant challenges to the extent that have been appropriately defined as “the starkest failure of the copyright framework to adapt”.³⁷ Not only for the overall difficulties of tracing copyright ownership, but also for the intrinsic complexity of the works nature, for instance in case of collective works or when embedded works are concerned. Yet, orphan works represent a crucial matter for copyright and unlocking their potential is still one of its main challenges.³⁸

At the European level, as mentioned, the first dedicated legal instrument is the Orphan Works Directive, setting the legal framework to allow public cultural organisations to use, like digitise, orphan works that have been identified as such after a diligent search, and only for non-commercial purposes. The Directive was preceded by the Commission Recommendations (2006 and 2011), promoting the use of licensing mechanisms of orphan works and out-of-commerce works in order to ease rights clearance and digitisation thus accessibility of such resources,³⁹ and by other supporting documents such as Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works (2008)⁴⁰ the Green Paper on Copyright in the Knowledge Economy (2008), the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works (2011), and followed by the progress Report 2013-2015 on the Implementation of Commission Recommendation 2011/711/EU (2016).⁴¹

³⁵ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5. For an overview, M.L. Montagnani, L. Zoboli, The Making of an ‘Orphan’: Cultural Heritage Digitisation in the EU. *International Journal of Law and Information Technology*, Oxford University Press, Volume 25, Issue 3, (2017), 196, <http://dx.doi.org/10.2139/ssrn.2757245>.

³⁶ EC, Commission Staff Working Paper. Impact Assessment on the cross-border online access to orphan works. Accompanying the document proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf. Cf. the UK Impact Assessment: Orphan works, 2014 No. 431, <https://www.legislation.gov.uk/ukia/2014/431>

³⁷ I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*; London: Intellectual Property Office; 2011; 38, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf

³⁸ D. Mendis, P. Oruç, *Orphan Works*. <https://www.copyrightuser.org/understand/exceptions/orphan-works/>

³⁹ EU Commission, Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, OJ L236/28; EU Commission, Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, 2011/711/EU, OJ L 283/39. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011H0711&from=EN>.

⁴⁰ i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, 03/06/2008. <https://ifap.ru/library/book305.pdf>.

⁴¹ EU Commission, Implementation of Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, Progress report 2013-2015, Working document, https://ec.europa.eu/information_society/newsroom/image/document/2016-43/2013-2015_progress_report_18528.pdf.

With a clearly limited scope, in terms of beneficiaries (only publicly accessible libraries, museums, educational establishments, archives, film or audio heritage institutions and public service broadcasting organizations), type of works (as indicated in the exhaustive list of works under Article 1) and of permitted uses (all serving their institutional mission to preserve, restore and provide cultural and educational access to the works held in their collections), the Orphan Works Directive is widely criticised for leaving out potential beneficiaries, type of resources and uses (also of a commercial nature), that would indeed contribute

considerably to the ultimate goal of unlocking the potential of orphan works within the boundaries of copyright law.⁴²

The Orphan Works Directive also provides that, in addition to the work being under copyright protection, a diligent search in good faith must be undertaken prior to the use as to establish the orphan status of the work. The required diligent search indeed receives only partial harmonisation by the Directive, largely leaving it to the Member States' national implementation. To facilitate the process, under Article 3(6) OWD, the European Intellectual Property Office (EUIPO) is indicated as responsible for establishing and managing the online database for orphan works, which provides information on orphan works held in the collections of publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations established in the Member States.⁴³

Beyond the exceptions therein provided, OWD does not preclude Member States to use other instruments,⁴⁴ such as extended collective licensing agreements.⁴⁵ In addition, it excludes from its scope "cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting

organisations which have not been produced or commissioned by such organisations, but which those organisations have been authorised to use under a licensing agreement".⁴⁶

Nevertheless, studies confirmed the difficulties of putting into practice the use of orphan works,⁴⁷ with supporting evidence on the ex-ante procedure of rights clearance (features by a consistent fragmented setting across Member States) and the ex-post risk assessment.⁴⁸ In addition to research findings that shows the relevance of the topic across the world,⁴⁹ and those that further note how the current system poses tangible barriers against the broadest preservation of cultural heritage, especially of less represented groups,⁵⁰ guidelines have been drafted to illustrate the Orphan works directive background and its core

⁴² See M.C. Janssens, R. Tryggvadottir, Facilitating Access to Orphan and Out of Commerce Works to Make Europe's Cultural Resources Available to the Broader Public (September 2014), <http://dx.doi.org/10.2139/ssrn.2538097>; E. Rosati, The Orphan Works Directive, or Throwing a Stone and Hiding the Land, 8 J. INTELL. PROP. L. & PRAC. 303, 303 (2013).

⁴³ EUIPO Orphan Works Database, <https://euiipo.europa.eu/orphanworks/>

⁴⁴ OWD, Recital § 24.

⁴⁵ About the UK licensing scheme, for instance, see Martinez, M. & Terras, M., (2019) "'Not Adopted': The UK Orphan Works Licensing Scheme and How the Crisis of Copyright in the Cultural Heritage Sector Restricts Access to Digital Content", Open Library of Humanities 5(1), p.36. doi: <https://doi.org/10.16995/olh.335>

⁴⁶ OWD, Recital § 11.

⁴⁷ Among the most recent contributions, see Bzhar A. Ahmed, The Situation of Orphan Works under Different Jurisdictions, 20 Chi.-Kent J. Intell. Prop. 1 (2021), <https://scholarship.kentlaw.iit.edu/ckjip/vol20/iss1/5>.

⁴⁸ See, in particular, M.Favale, F. Homberg, M. Kretschmer, D. Mendis and D. Secchi, Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance, CREATE Working Paper No. 7, 2013, <https://www.create.ac.uk/publications/copyright-and-the-regulation-of-orphan-works/>, which comprises a precious comparative review of different jurisdictions and a comprehensive analysis of the EU regulatory framework.

⁴⁹ See, e.g., M.H.M. Khair, H.N.M. Hashim, Liberating Orphan Works from The Copyright Orphanage: The Malaysian Perspective, Asian Journal of University Education, [S.l.], v. 16, n. 4, p. 211-219, jan. 2021, <https://doi.org/10.24191/ajue.v16i4.11960>.

⁵⁰ B. Dahlberg, The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups (May 19, 2010). Southern California Review of Law & Social Justice, Vol. 20, 2011, <https://weblaw.usc.edu/students/journals/rjsj/issues/assets/docs/volume20/spring2011/3.Dahlberg.pdf>.

provisions,⁵¹ but its framework remains largely unclear and mostly difficult to implement. Additionally, other instruments targeting specific aspects of the orphan works' usage have been promoted, such as the ARROW infrastructure to facilitate rights information management (including copyright ownership) in digitisation

projects,⁵² and the platform to conduct the digital search designed by the EnDOW project.⁵³ Despite all these efforts, the subject and the procedure remain still unknown to many stakeholders or it appears too risky to be worth pursuing, which pushes to question whether a solution to “the orphan works problem”⁵⁴ may ever be achieved.⁵⁵

A new process of review of the Orphan Works Directive initiated in 2020 with a survey on the application of the Directive in order to evaluate whether it effectively promotes digitisation and dissemination of orphan works,⁵⁶ and it is currently ongoing. A study on the application of the Directive was also commissioned and it

is being carried out.⁵⁷ The future of the OWD is therefore to be seen in the upcoming years, while the debate over the barriers posed to the mission of CHIs to preserve and disseminate culture endures across the world,⁵⁸ and it is not limited to the issue of orphan works but also of the other equally challenging subject: the out-of-commerce works.⁵⁹

Indeed, in its preamble the OWD clarifies to apply without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, as with out-of-commerce works, which would consider the specificities of different types of resources and of users, but also be construed with the

⁵¹ See the EIFL Guide, <https://www.eifl.net/resources/european-orphan-works-directive-eifl-guide>, but also other tailored documents addressing one of the main concerns of CHIs that is risk management, e.g. <https://naomikorn.com/wp-content/uploads/2020/03/Museums-Orphan-Works-and-Risk-Management-.pdf>. See also the most recent Orphan Works Guidance for archive services on reasonable searches to identify rights holders by the UK National Archives, <https://cdn.nationalarchives.gov.uk/documents/archives/orphan-works-guidance.pdf>

⁵² ARROW stands for Accessible Registries of Rights Information and Orphan Works, a EU-funded project committed to support the EC's i2010 Digital Library Project and establish an interoperable system to help clarifying the rights status of works, e.g., whether orphan works or out-of-print works. <https://pro.europeana.eu/project/arrow>.

⁵³ EnDow stands for Enhancing Access to 20th Century Cultural Heritage through Distributed Orphan Works clearance, A EU-funded project aimed at facilitating the process of rights clearance for European cultural institutions, which has successfully designed and implemented a system for determining the orphan work status. <https://diligentsearch.eu/do-a-search/>

⁵⁴ Cf. S. van Gompel, P.B. Hugenholtz, The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It, *Popular Communication: The International Journal of Media and Culture*, Vol. 8, No. 1, pp. 61-71, 2010, https://www.ivir.nl/publicaties/download/the_orphan_works_problem.pdf, which proposed some practicable solutions long before the Orphan Works Directive.

⁵⁵ B. Siso-Calvo, R. Arquero-Avilés, G. Marco-Cuenca, S. Cobo-Serrano (2018) Is There a Solution to the Orphan Works Problem? Exploring the International Models. In: G. Chowdhury, J. McLeod, V. Gillet, P. Willett (eds) *Transforming Digital Worlds*. iConference 2018. Lecture Notes in Computer Science, vol 10766. Springer, Cham, https://doi.org/10.1007/978-3-319-78105-1_73. Cf. J. M. Urban, How Fair Use Can Help Solve the Orphan Works Problem (December 2012). *Berkeley Technology Law Journal*, Vol. 27, 2012, UC Berkeley Public Law Research Paper No. 2089526, <https://ssrn.com/abstract=2089526>.

⁵⁶ Critical is the position of Europeana that suggests the retraction of the Orphan Works Directive because of its flaws, cumbersome conditions, legal uncertainty and limited scope: <https://pro.europeana.eu/post/evaluating-the-orphan-works-directive>. See also a collection of critical positions, including L. Guibault, Are European orphans about to be freed? *Kluwer Copyright Blog*, September 21, 2012, <http://copyrightblog.kluweriplaw.com/2012/09/21/are-european-orphans-about-to-be-freed/>, tagged by Communia: <https://www.communia-association.org/tag/orphan-works/>.

⁵⁷ Milieu Law Policy and Consulting, Study on the application of the Orphan works Directive, 2020. <https://www.milieu.be/study-on-the-application-of-the-orphan-works-directive/>.

⁵⁸ *Ex multis*, see S. van Gompel, “The Orphan Works Chimera and How to Defeat It: A View From Across the Atlantic.” *Berkeley Technology Law Journal* 27, no. 3 (2012): 1347–78. <http://www.jstor.org/stable/24119459>.

⁵⁹ Other countries have shown and still demonstrate special interest in the topic. See, in particular, the Canadian copyright consultation: <https://www.ic.gc.ca/eic/site/693.nsf/eng/00188.html#s22>, but also the most recent consultation on the UK's future exhaustion of intellectual property rights regime: <https://www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime>.

agreement of stakeholders⁶⁰. In line with this principle was the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works (2011),⁶¹ which endorsed voluntary agreements concluded between users, rightsholders and collective rights management organisations to licence the use of out-of-commerce works.⁶²

Out-of-commerce works represent indeed a larger category of works compared to orphan works, posing equal if not larger challenges to CHIs. Defined as copyrighted works that were never or are no longer available in commerce, they are currently regulated by Articles 8-11 CDSMD, enabling uses of out-of-commerce works owned or permanently held by CHIs, such as digitisation and cross-border dissemination, through an extended collective license or a copyright exception.

At the time of its proposal, the idea of establishing an EU regulatory framework for promoting access and use of out-of-commerce works was welcomed by most advocates of accessible culture, which finally saw the possibility for CHIs to fight at least one of their battles against copyright, which often constrains their liberty to pursue their mission to make culture accessible and available, meaning what is also referred as “20th century black hole”.⁶³ However, the draft provisions on out-of-commerce were mostly criticised as being overly-complicated especially with regard to its licensing mechanism, and indeed far from offering an effective solution.⁶⁴ The final and consolidated version had gained more consensus,⁶⁵ appearing very promising especially in relation to mass digitisation projects,⁶⁶ also thanks to the insertion of a specific exception that yet operates as an alternative option.

Under Article 8 CDSMD Member States must provide a legal solution that CHIs to digitise out-of-commerce works and make these available online. To do so it envisions two alternative solutions: a licensing mechanism issued by representative Collective Management Organizations (CMOs), which are organisations designated by copyright holders to manage their copyrights, and a copyright exception. The licensing scheme is unmistakably preferential, as the exception applies only if there is no sufficient CMO representation, but it does not come without complexities. The possibility that the extended collective licensing scheme applies to the works of non-members of the CMO requires in fact attention and a careful assessment to be justified.⁶⁷

Another core aspect is indeed the possibility that rightsholders opt-out from the mechanism by requesting that the works be removed from where they have been made available. To facilitate this, the CDSMD provides for the institution of European portal gathering information on out-of-commerce works (Article 10), which should also facilitate cross-border use of such works (Article 8), whether the licensing option applies - and in this case the licence should allow use of out-of-commerce works in any Member States, or the copyright

⁶⁰ OWD, Recital § 4.

⁶¹ Memorandum of Understanding – Key Principles on the Digitisation and Making Available of Out-of-Commerce Works [hereinafter MoU], Signed on 20 September 2011, http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

⁶² Various Authors, Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, 2 (2011) JIPITEC 257 para 1, <https://www.jipitec.eu/issues/jipitec-2-3-2011/3180>

⁶³ <https://reform.communia-association.org/issue/cultural-heritage/>

⁶⁴ Cf. P. Keller, Copyright reform: a first look at the Commission's plans for cultural heritage institutions, *Europeana Pro Blog*, September 8, 2016, <https://pro.europeana.eu/post/copyright-reform-a-first-look-at-the-commission-s-plans-for-cultural-heritage-institutions>; P. Keller, A better solution to making out of commerce works available online, *Europeana Pro Blog*, September 26, 2016, <https://pro.europeana.eu/post/a-better-solution-to-making-out-of-commerce-works-available-online>.

⁶⁵ These provisions were welcomed as perhaps the most important change introduced by the CDSMD. See n. 23. Cf. COMMUNIA webpage, Cultural Heritage, <https://reform.communia-association.org/issue/cultural-heritage/>.

⁶⁶ See the analysis by COMMUNIA Association, which has since the beginning been supportive of promoting wider access to out-of-commerce works, but it has also illustrated key points for improving the text: <https://www.notion.so/Articles-8-11-Use-of-out-of-commerce-works-b0091ea89dac4cca96fe537293ed22e6>.

⁶⁷ This aspect is well discussed by Guibault, L., Schroff, S. Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders. IIC 49, 916–939 (2018), <https://doi.org/10.1007/s40319-018-0748-5>, focusing on the notion of CMO representativeness on the basis of current European and national legislation.

exception option applies - which on the contrary should occur solely in the Member State where the CHI undertaking that use is established. Finally, Article 9 CDSMD provides that Member States should encourage dialogue of users and rights holders, through their respective representatives, to make its provisions most effective and its procedures workable.

As with other copyright matters that have been harmonised at the EU level, it all depends on the national implementation. As highlighted by the work so far undertaken by the project, key issues to discuss for a fair and most effective implementation related to the interpretation of the CDSMD wording by Member States, and concern how to define and determine the out-of-commerce status and the requirement of permanent holding of resources; how to assess the sufficient representativeness of CMO to follow the main licensing

route; how to identify the type of reasonable effort required to conduct the search; how to cope with the prevention of further reuse and commercial purpose; how to successfully establish an opt-out scheme.⁶⁸

To guide CHIs in their journey to out-of-commerce works, checklists and other types of guidance have been delivered and disseminated by different stakeholders.⁶⁹ These include guidance on how to implement Articles 8 to 11 CDSMD,⁷⁰ general recommendations for the implementation of the CDSMD,⁷¹ and more specific guidelines for supporting CMOs with licensing of the digitisation and the making available of out of commerce works.⁷² Like the tools designed to manage orphan works, specific instruments have been developed to support the use of out-of-commerce works, including the EUIPO out-of-commerce works portal, foreseen by the CDSMD and recently launched with the aim to make out-of-commerce works held in the collections of European CHIs publicly available, but also to put in practice the opt-out mechanism.⁷³

In general, proposals to facilitate use of out-of-commerce works are generally useful, like those focusing on collective licensing of rights.⁷⁴ However, as with the provisions on orphan works, the destiny of out-of-commerce is also to be seen, but it yet appears to have a brighter future ahead, if not to some extent eventually undermined by the discretionary national implementation.⁷⁵

Ideally, the following FAQs and Guidelines will integrate with most of the available resources. At the same time, they expressly aim at addressing such topics with the necessary details but using a language, i.e. terminology and expressions, that is easier to comprehend also for those who have not any specific expertise in the subject, especially from a legal standpoint. Most of all, they (in their final version) are to be shaped upon the direct involvement of those who are most likely to use them and thus fill the gaps left by resources that are usually rather drafted with a top-down approach, as the analysed empirical data have projected.

⁶⁸ C. Geiger, G. Frosio, O. Bulayenko, Facilitating Access to Out-of-Commerce Works in the Digital Single Market – How to Make Pico della Mirandola’s Dream a Reality in the European Union, 9 (2019) JIPITEC 240, <https://www.jipitec.eu/issues/jipitec-9-3-2018/4803>

⁶⁹ B. White, Digital Single Market Directive - Articles 8-11: Checklist for Determining When This Exception for Mass Digitisation of Out-of-Commerce Works Can Be Used, <https://doi.org/10.5281/zenodo.3549393>

⁷⁰ A. Matas, P. Keller, Articles 8-11: Use of out-of-commerce works, <https://www.notion.so/Articles-8-11-Use-of-out-of-commerce-works-b0091ea89dac4cca96fe537293ed22e6>

⁷¹ A. Matas, B. White et al., Communia Association. DSM Directive Implementation Guidelines, <https://www.notion.so/DSM-Directive-Implementation-Guidelines-45233be9c0e143338860ae5a03118bf3>

<https://www.communia-association.org/2019/12/02/guidelines-implementation-dsm-directive/>

⁷² See Licensing of out-of-commerce works. An IFRRO Guide, <https://ifrrro.org/page/out-of-commerce-works/>, which includes an overview of the CDSMD on the licensing of out-of-commerce works and makes suggestions for successfully licensing schemes

⁷³ EUIPO Out of commerce works portal, Rightholders webpage. <https://euipo.europa.eu/out-of-commerce/#/ooc/rightholders>

⁷⁴ A.L. Bandle, Y. Benhamou et al., Policy Paper on the Digitization of Museum Collections, <https://www.digitizationpolicies.com/medias/Policy-Paper-on-Digitization-of-Collections.pdf>.

⁷⁵ T. 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 I, Kluwer Copyright Blog, July 29, 2019, <http://copyrightblog.kluweriplaw.com/2019/07/29/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-i/>.

3. Frequently Asked Questions (FAQs)

3.1 Preservation of digital cultural heritage

- **What is digital preservation of cultural heritage?**

Digital preservation maintains the value of heritage for the present and the future, being consistent with the degradation of materials, and sustainability and environmental concerns. The [Recommendation on a common European data space for cultural heritage of 2021](#) of the EU Commission provides a definition of digital preservation, although non-binding in nature, as “a set of activities necessary to make sure digital objects can be located, rendered, used and understood in the future” (see point 3(7)). This appears logically subsequent to the digitisation phase, which is defined as converting assets from an analogue format to a digital one (see point 3(5)). The Recommendation calls for the adoption of clear digitisation and digital preservation goals in the national digital strategy, to be based on objective and clear criteria, including: cultural heritage at risk, the most physically visited cultural and heritage monuments, buildings and sites and the low level of digitisation for specific categories of cultural heritage assets (see point 6).

- **Does digital preservation of cultural heritage include online access and re-use?**

Yes, in the current EU policy-making, the concept of digital preservation is inherently linked to cultural heritage promotion through access and re-use in digital and online resources. From this perspective, digital preservation represents a crucial creative motor for co-creation, public participation and democratisation of heritage and it fosters the development of new innovative services and growth, proving a valuable ally in enhancing education and research, but also economic activities, primarily including tourism.

- **What is the difference between the preservation of born digital and digitised cultural heritage?**

The difference between preservation of born digital heritage and digitised cultural heritage regards the material that is preserved. Differently from cultural heritage that needs to be transformed to exist in a digital format, born digital heritage is originally created in a digital format. Born digital cultural heritage and digitised cultural heritage are however both covered under the umbrella notion of digital heritage. In terms of preservation, the two categories pose different challenges and could also give rise to different legal issues, because of possibly different authorship, the digitisation process (e.g., format conversion, changes in quality, creation of derivative material), and the potential role of intermediaries - all circumstances that differentiate the path leading to the creation of the digital object for the aim of preservation.

- **Which EU laws and policies are applicable to digital preservation?**

Digital preservation activities are impacted by different pieces of law, from which both opportunities and obstacles descend. These include: cultural heritage laws, since these regulate every activity that regards cultural heritage, including its promotion and preservation; intellectual property laws, that protect authors of intellectual creations, such as original or derivative works of art; public sector information laws, that prescribe principles and duties of public sector organisations, including certain types of cultural heritage institutions, to share the information they retain to allow access and re-use thereof. Finally, digital preservation can include personal data processing, so personal data protection laws would apply.

Overall, it is possible to identify a tension between policies and regulatory initiatives that push for a digital turn of the cultural heritage, vis-à-vis existing legal constraints that can limit the digitisation and digital preservation of cultural heritage, as well as access and re-use of cultural data.

Furthermore, additional constraints may be considered since digital preservation activities require disposing of hardware and software, and emerging technologies.

The mentioned laws overlap at both the national and EU level. Despite increasing harmonization in several areas of law in the EU, as in the area of copyright ([Copyright for the Digital Single Market Directive, Directive EU 2019/790](#), “CDSMD”), public sector information and open data ([Open Data Directive, Directive EU 2019/1024](#)), and personal data protection laws ([GDPR, Reg. EU 2016/679](#)), applicable national laws may vary.

- **Do the EU public sector information laws affect digital preservation?**

The EU rules on public sector information - recently reformed (i.e., [Open Data Directive, Directive EU 2019/1024](#)) - apply to documents held by certain CHIs, which are libraries, including university libraries, museums and archives. The Directive explicitly covers digitisation projects of cultural resources, and pursues in this regard further harmonization, to address the divergences between Member States with regards to the digitisation of cultural resources. This is why public sector information laws are relevant to digital preservation activities.

- **What are the EU public sector information rules for CHIs?**

The general principle is that documents held by libraries, including university libraries, museums and archives shall be re-usable for commercial and non-commercial purposes, subject to principles such as “openness by design and by default”, transparency, and information duties.

- **Are CHIs subject to derogations in the EU public sector information rules?**

Yes, despite libraries, including university libraries, museums and archives being subject to EU public sector information rules they are addressed by very important derogations:

1. Libraries, including university libraries, museums and archives can charge for re-use, considering the cost they bear, e.g., the anonymisation of personal data, and return on their investments.
2. Since they often partner with private companies, libraries, including university libraries, museums and archives can conclude agreements for the digitisation of cultural resources that would grant private parties exclusive rights on digitised resources, to allow them to recoup their investments. Exclusive rights can be granted, although limited in time and, in any case, subject to periodic review. Limits are established “*to comply with the principle that public domain material should stay in the public domain once it is digitised*” (recital n. 49 of the Open Data Directive, Directive EU 2019/1024). Yet, the application of such rules is subject to, amongst others, intellectual property and data protection laws.

- **What are the main EU copyright law challenges related to digital preservation?**

Copyright laws may represent a major obstacle to digital preservation, as copyright and related rights in the works to be digitised and preserved affect and more specifically obstacle different actions that are instrumental to the preservation, e.g., making a copy of the work, uploading the digital object, and linking. Beyond dealing with copyright related issues during the digital preservation activities, one preliminary obstacle relates to the correct understanding of the rights on the works to be digitised and preserved, which could be unclear for different reasons, for instance the nature of the work, unclear authorship or unclear contractual clauses. For specific issues related to orphan works, see further details below in Section 3.1.1 of the present work.

- **Does EU copyright law apply if the work or other subject matter is in the public domain?**

From a general standpoint, a distinction shall be made between works which are protected by copyright (within the EU, copyright has generally a duration of 70 years after the death of the author) and works for which copyright has expired and thus belong to the public domain.

In the latter case, even if work is not protected by copyright anymore, copyright law still needs to be carefully considered. Importantly, the moral rights of the author, contrary to his economic rights in the work, have no expiration in time. Also - what is crucial for digital preservation - copyright or

related rights may rise in the material that result from reproductions of the work in the public domain e.g., photographs, 3D models, databases.

Article 14 of the CDSMD introduces an important new rule in this respect, although limited to works of visual arts. The Article establishes that Member States shall provide that any material deriving from acts of reproduction of works of visual arts in the public domain shall not be protected by copyright or related rights. However, not only the provision is limited to works of visual arts, as mentioned, but its scope largely depends on its national implementation.

- **Are there EU copyright exceptions and limitations that promote digital preservation?**

Yes. Generally, exceptions and limitations to copyright permit certain uses of the work or other subject matter that would be otherwise not allowed. Under EU Copyright Law, there are specific exceptions and limitations that make the digital preservation or other use of copyrighted works or other subject matter by CHIs possible.

Within EU Copyright law and the InfoSoc Directive, Member States have been encouraged to adopt non-mandatory exceptions or limitations for acts of reproduction by cultural institutions, as for when the reproduction has not a commercial aim (Article 5(2)(c) InfoSoc Directive).

More recently, however, EU Copyright dispositions in the CDSMD have mandated Member States to create new exceptions or limitations and rules addressed to CHIs, that are of mandatory nature.

These new dispositions establish Member States shall provide exceptions and limitations (Articles 8-11 CDSMD) that would allow CHIs to use orphan works - that are works for which the rightholder cannot be identified - and out-of-commerce works - that are works not available through channels of commerce. These specific exceptions and limitations primarily regard the case that works or other subject matter are permanently included in the CHIs collections.

Another rule (Article 14 CDSMD) establishes that Member States shall exclude copyright or related rights on the reproductions of works of visual arts in the public domain.

Finally, a specific provision (Article 6 CDSMD) mandatorily requires Member States to adopt an exception or limitation for CHIs when their objective is preserving works or other subject matter that are permanently in their collections.

- **What does Article 6 of the CDSMD provide?**

Article 6 of the CDSMD mandatorily requires Member States to provide for an exception or limitation to copyright, so that CHIs can make copies of works in their permanent collections for the aim of preservation.

The exception allows CHIs to make copies of any works or other subject matter that are permanently in their collections, e.g., as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements. The copy can be in any format or medium and, according to recital n. 27 of the CDSMD, it shall also be made by the appropriate preservation tool, means or technology, in the required number, at any point in the life of a work.

- **Which institutions can benefit from Article 6 CDSMD?**

The subjects addressed by the exception of Article 6 CDSMD are “cultural heritage institutions” as defined by Article 2 number 3 of the same Directive. These are publicly accessible libraries or museums, archives or film or audio heritage institutions. Private entities are thus excluded from the application of this exception or limitation.
- **Can the copy be used for purposes other than preservation by CHIs, according to Article 6 CDSMD?**

Article 6 CDSMD provides that the copy shall be made for purposes of preservation only. Plus, the copy shall be limited to the extent necessary for the preservation aim. The purpose of preservation is exemplified as to address technological obsolescence or the degradation of original supports or to insure. Acts of reproduction for purposes other than the preservation should remain subject to the authorisation of rights holders, unless permitted by other exceptions or limitations in EU law (recital n. 27 CDSMD).
- **Is Article 6 CDSMD already applicable by CHIs in the EU?**

All the provisions of the Directive need to be implemented in national law. At the time of the writing of the present work, despite the term for the implementation having expired, Article 6 has not been transposed in national law by all Member States. However, CHIs may rely on other copyright exceptions and limitations provided by national laws for the purposes of preservation.
- **Are EU personal data protection laws applicable in digital preservation?**

Yes. Data protection laws, that are currently strongly harmonized across the EU (i.e., [GDPR, Regulation EU 2016/679](#)), apply whenever personal data is processed. Personal data is defined as any data related to an identified or identifiable natural person. Therefore, processing of personal data can characterise different activities within the digital preservation project (for instance, personal data may be included in the digital object, or accessing and sharing the digital object may involve the processing of personal data of online users).

The major challenge for data protection and digital preservation is represented by the fact that personal data is often implied in the use of digital technologies (e.g., website cookies, data requests). Thus, CHIs must comply with personal data laws (e.g., principles of lawfulness, information, data minimisation and security), from the early design phase (cf. principle of data protection by design and by default) when they engage in digital preservation.

Since data protection laws apply when personal data are processed, the anonymization of personal data is often considered for compliance, next to pseudonymization. However, depending on the dataset, anonymization can be of high technical complexity and could require significant resources. Often, at the current technological advances and according to the legal doctrine, anonymization cannot relieve from compliance with data protection rules.

3.1.1 Use of orphan works

- **What are orphan works?**

Orphan works are works under copyright protection whose rightsholders are not identified or located despite a diligent search. Works can also be partially orphaned, when only one or some of the rightsholders pertaining to the work are unknown or cannot be located.
- **Why are orphan works important?**

Since rightsholders cannot be identified or located the necessary copyright permission required to use the work cannot be obtained. Therefore, those wishing to use the work in question may not legally do it unless a copyright exception applies. This for instance impedes digitisation of such resources and prevents their subsequent access and further use. It is estimated that a considerable

portion of cultural heritage collections are orphan works. For cultural heritage institutions engaging with digitisation projects, especially on a large scale, this essentially prevents them from pursuing their institutional mission to preserve and disseminate culture and knowledge.

- **What laws apply to the use of orphan works in Europe?**

The essential European legal framework applicable to orphan works comprises the [Orphan Works Directive, Directive 2012/28/EU](#) (“OWD”), and its implementation at the national level. The same OWD specifies that its provisions shall not interfere with other national arrangements concerning the management of rights nor with national provisions on anonymous or pseudonymous works. Similarly, the OWD shall be without prejudice to other applicable legal provisions, including those referring to intellectual property rights, competition, data protection and privacy, legal deposit and access to public documents, contracts, freedom of the press and freedom of expression in the media.

- **What are the main elements of the Orphan Works Directive?**

The OWD permits certain uses of orphan works by publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, to achieve their public-interest missions. For that it requires that Member States provide for an exception or limitation to the right of reproduction and the right of making available to the public provided in the Infococ Directive to ensure that the beneficiary organisations are permitted to use orphan works contained in their collections. Such uses are allowed provided that a diligent search prior to the use is undertaken.

The OWD establishes the principle of mutual recognition of orphan work status across the Member States and it regulates the instances in which the orphan work status may cease. Finally, the OWD does not impede Member States to enable the use of orphan works by other means, in particular through licensing.

- **Who are the beneficiaries of the exceptions provided under the Orphan Works Directive?**

Only publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations established in the Member States can benefit from the copyright exceptions therein established.

- **What works are covered by the Orphan Works Directive?**

The OWD provides a list of works that as orphans may be used according to its provisions. Such a list, deemed to be exhaustive, comprises books, journals, newspapers, magazines or other writings; cinematographic or audiovisual works and phonograms, all protected by copyright, first published or broadcast or made publicly accessible in a Member State, and contained in the collections of publicly accessible cultural heritage institutions. Orphan works can also be works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of other works or phonograms referred above, like visual works including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works.

- **What is a diligent search?**

A diligent search is the procedure that must be followed before using any alleged or presumed orphan works. It consists of the consultation of the appropriate sources for the category of the work, whose status is uncertain.

- **How should diligent search be carried out?**

A diligent search must be always carried out in good faith, i.e., with the genuine intention to identify or locate the rightsholder. The diligent search shall be carried out usually in the Member State of first publication or broadcast, unless special circumstances apply, e.g., in the Member State of the producer's headquarters or habitual residence in case of cinematographic or audiovisual works. However, the diligent search may be carried out also in other countries should there be evidence supporting it.

- **What are the appropriate sources for a diligent search?**

The appropriateness of the sources is determined by Member States. Appropriate sources must however include those indicated in the Annex to the OWD. For published books, e.g. legal deposit or existing databases and registries; for newspapers, magazines, journals and periodicals, e.g. the ISSN or indexes and catalogues from library holdings and collections; for visual works, e.g. the databases of the relevant collecting societies or of picture agencies; for audiovisual works and phonograms, e.g., databases of film or audio heritage institutions and national libraries or credits.

- **How is the search proved to be diligent?**

Member States shall ensure that the diligent searches are supported by evidence and that such evidence is recorded by ensuring that the competent national authorities receive updated information regarding the results of the diligent searches that the organisations have carried out; the use that the organisations make of orphan works; the relevant contact information of the organisation concerned. Such information shall be recorded in a single publicly accessible online [database](#) established and managed by EUIPO.

- **What is the Orphan Works Database?**

The Orphan Works Database is the EUIPO online database for orphan works that provides information on orphan works held in the collections of publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations established in the Member States.

- **What uses are permitted under the Orphan Works Directive?**

Orphan works can be used in following ways: by making the orphan work available to the public or by acts of reproduction, within the meaning of the Infosoc Directive, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration. Such uses are only permitted in order to achieve aims related to the beneficiary organisations' public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.

The name of identified authors and other rightsholders in any use of an orphan work must be indicated.

- **Are beneficiaries allowed to generate any revenue?**

Beneficiary organisations may generate revenues in the course of the permitted uses of orphan works, but only for the purpose of covering their costs of digitising orphan works and making them available to the public.

OWD provisions are without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, also in respect of public-private partnership agreements.

- **Is the status of orphan work perpetual?**
No. The status of orphan works may end, at any time, by the intervention of the rightsholder of the work in question. Rightsholders that put an end to the orphan work status are entitled to a fair compensation, determined by the Member States, for the use that has been made of their works and other protected subject-matter.
- **What other options does the law consider to facilitate the use of orphan works?**
The OWD does not preclude and it is without prejudice to other instruments pursued by Member States to manage orphan works such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them.

3.1.2 Use of out-of-commerce works

- **What are out-of-commerce works?**
Copyrighted works that are not available through customary channels of commerce, as no longer commercially exploited by rights holders, or that have never been intended for commercial exploitation, as if not published or disclosed. They can be, e.g., books that are out of print, films that are out of circulation, a leaflet not subject to commercialisation.
- **What are the legal provisions in Europe?**
The most recent EU legal tool that regulates the use of out-of-commerce works is the CDSMD of 2019, under Articles 8-11 that should allow CHIs to digitise out-of-commerce works and make them available online. These provisions must be implemented in the Member States and therefore national legislation regulate the use of out-of-commerce works in more detail.
- **What are the main features of the EU out-of-commerce provisions?**
Articles 8-11 CDSMD provide CHIs with the possibility to digitise out-of-commerce works and make these available to the public, through (a) a licensing mechanism issued by representative Collective Management Organizations (CMOs) that copyright holders appoint to manage their rights, or, in case of not sufficient CMO representation, (b) an exception to copyright. However, rightsholders may opt-out and request that the works made available be removed. The extended licensing mechanism allows use of out-of-commerce works in any Member States, while the copyright exception only applies in the Member State where the CHI undertaking that use is established. To guarantee the effectiveness of such provisions, the CDSMD urges Member States to facilitate dialogue between the representatives of users and of rights holders.
- **How is the out-of-commerce status determined?**
Under the CDSMD to determine that a work or other subject matter is out of commerce it should be presumed that it is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine it. Such presumption must be made in good faith and Member States may provide for specific requirements, such as a cut-off date, as long as they are necessary and reasonable.
- **Who are the beneficiaries of the EU out-of-commerce provisions?**
Articles 8-11 CDSMD concern cultural heritage institutions that should be allowed for reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in their collections. CHIs should sign under a non-exclusive licence for non-commercial purposes with a representative collective management organisation, or based on a copyright exception, also only for non-commercial purposes.

- **What kind of out-of-commerce works may be used under CDSMD?**
Under Articles 8-11 CDSMD, CHIs may use any works or other subject matters that are permanently in the collection of the institution, which are not available through customary channels of commerce, as no longer commercially exploited by rights holders, or that have never been intended for commercial exploitation. The CDSMD does not impose any further limitation of single categories or types of works.
- **What is the EU-Wide Extended Collective Licensing?**
The main option foreseen by the CDSMD to use out-of-commerce works is the application of an extended collective licensing mechanism by sufficiently representative CMOs. This option may function irrespective of whether all rights holders covered by the licence have mandated the collective management organisation, but on the condition that: (a) the CMO is, on the basis of its mandates, sufficiently representative of rights holders in the relevant type of works or other subject matter and of the rights that are the subject of the licence, and (b) all rights holders are guaranteed equal treatment in relation to the terms of the licence.
- **What is the out-of-commerce works portal?**
The EUIPO out-of-commerce works portal is the platform that should facilitate making out-of-commerce works that are permanently held in the collections of European CHIs publicly available, by also supporting Member States to comply with the CDSMD obligation to ensure that information, retrieved from CHIs, CMOs or relevant public authorities, referred to the identification of out-of-commerce works, is made permanently, easily and effectively accessible on a public single online portal.
- **What is the opt-out mechanism for out-of-commerce status?**
The law contemplates the possibility that rightsholders may, at any time, opt-out from the out-of-commerce scheme, by excluding their works or other subject matter from the licensing mechanism or from the application of the exception or limitation. Member States should ensure that this can be done easily and effectively, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

4. Guidelines

4.1 Forewords

This section offers preliminary recommendations for Galleries and Museums to address with relative ease and efficacy the topics that have been perceived as most complex and on which GMs could be trained. As with D5.4 for Libraries and Archives, this interim version, including FAQs and Guidelines, will be submitted for consultation with Galleries and Museums stakeholders and their communities, and their feedback will help to define the final version to be disseminated at the end of the project.

Ideally, this preliminary version of the Guidelines comprises the “ABC” of a guide to navigate the complex regulatory framework that applies to digital preservation, use of orphan works and of out-of-commerce works. This approach is suggested by the overall difficulty of CHIs to understand and effectively use the instruments that the law provides to fulfill their digital mission. An approach that aims to simplify and clarify the typical complexity and ambiguity of the law, emerged in the overview accompanying this guiding document. It also wishes to address the challenges of CHIs to keep pace with the changes in the law that would urge to boost a stronger copyright literacy, and the general lack of legal training for CHIs.

4.2 Digital preservation of cultural heritage

A. Establish the basis for digital preservation

The cultural heritage material that needs to be preserved highly varies in nature and characteristics that affect the digitisation and the digital preservation. Mapping such resources, the risks and opportunities to digitise them and related preservation goals is thus the first step to identify the best strategies and potential legal issues to undertake the digital preservation project.

The overview has shown that when digitising resources, even though limited to the scope of preservation, several legal challenges emerge. Conducting a legal assessment in the early stages of the project is vital to ensure compliance with the applicable laws, such as the laws on intellectual property and data protection, and to rely on those national provisions and policy initiatives that may support digital preservation. Such mapping can also lead CHIs to establish internal policies on digital preservation and define related standard procedures.

B. Enhance collaboration and transparency, relying on existing resources

Collaborating with other institutions, joining networks, and resorting to existing resources created by stakeholders and associations can support CHIs in the digital preservation, and can help them in all the steps of the project, from the early design to its execution, monitoring and future enhancement. The relationship with stakeholders, including authors and service providers, can be strengthened and made more transparent with the adoption of standard model licenses or data exchange agreements. Considering dissemination and the relationship with users, clear information policy and rights statements and disclaimers accompanying digital objects can help CHIs to ensure the public knows how to navigate, or access and even re-use digitised cultural heritage.

Against this backdrop, it needs to be considered that the role of Europeana for digitisation and digital preservation of cultural heritage emerges as stronger from the recent Commission Recommendation on cultural data spaces of 2021. CHIs will need to take into account the opportunities offered by this leading organisation in their digital preservation projects, since Member States have been asked to elaborate national strategies that foster the collaboration with the Europeana network, also through aggregators.

C. Preserve, monitor, and consider access and re-use when possible

In realizing the digital preservation project, preservation goals need constant assessment: technical and organizational risks, but also changes in legal status and any other legal circumstances that may affect the digital preservation project need to be monitored.

Finally, since digital preservation of cultural heritage is linked with its promotion, especially through access and re-use of digital and online resources, the enhancement of access and re-use thereof, should be also tackled from a legal perspective.

4.3 Use of orphan works

A. Identify the orphan work

In accordance with the provisions of the OWD and pursuant to the specific provisions implemented by Member States, the status of orphan work may be granted to works whose single or multiple rights holders cannot be identified or located. The instances in which a work may be deemed orphan vary. In many cases, it may be identified as such a work whose author is unknown or has deceased leaving no locatable heirs. It may also be the case in which the publisher or other rightsholder has ceased to exist without having a legal successor or it has undergone a merger or acquisition. In all these circumstances, a diligent search must be made to confirm the orphan status.

The law requires a diligent search, meaning that the search has to be conducted in good faith and therefore with a genuine intention to identify or locate the rightsholders. National legislation indicates the appropriate sources to be consulted. The search may be carried out in the country of first publication or the country where the producer of an audio-visual work or of a phonogram is established. It may be extended to any other countries should there be evidence indicating that relevant information about the copyright ownership may be found. The EUIPO dedicated database can be also consulted. Such a diligent search must be undertaken prior to commencing any use of orphan works and it should be undertaken for each work considered.

Notwithstanding the complexity and often difficult implementation of this precondition, diligent search must be supported with evidence. The beneficiary CHIs must therefore record any diligent searches and send any related information, e.g., about the pursued usage of the orphan work, to the national competent authority. This will subsequently forward the information to the EUIPO, for the work to be included in its dedicated [database](#).

B. Use legitimately the orphan work

Within the current legal framework, only certain uses of orphan works are permitted. With its quite narrow scope, also with regard to the specific orphan works that can be used (books, journals, newspapers, magazines or other writings; audiovisual, cinematographic and phonographic works), the OWD allows use of orphan works to a limited extent. In particular, it is permitted to make the orphan work available to the public or reproduce it for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration. Therefore, when using orphan works, publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations, which are the sole beneficiaries of the OWD exceptions, should bear in mind that such permission is justified as long as it serves the beneficiary organisations' public-interest missions, i.e. preservation, restoration, provision of cultural and educational access to resources that are contained in their collections.

When using the orphan works, the name of identified authors and other rightsholders must be always acknowledged.

C. Deal with the orphans works challenges

The complexity of orphan works is not limited to the difficulties of establishing the orphan work status and to ascertain the exact scope of the legal provisions on the matter. A peculiar but common situation occurs when the work under consideration has a plurality of rightsholders and only some cannot be traced or located. In this instance, the work may be still deemed only partially orphan, meaning that the rightsholders who are known must authorise the use of the work.

Equally complex is to deal with the further challenges of orphan works, whose orphan status may indeed cease at any time. Should a rightsholder put an end to the orphan work status, the use of the work shall be immediately terminated, and the rightsholder will be awarded for the previous use.

Given this overall challenging setting, it should be to the extent possible avoided the appearance of future orphans works with all their criticalities attached.

4.4 Use of out-of-commerce works**A. Identify the out-of-commerce work**

Under the CDSMD provisions and its related national implementation, there is now the opportunity to use works or other subject matters that are still under copyright protection, but are no longer in commerce or never have been. To grab this opportunity, CHIs must follow carefully the procedure that allows them to determine the special out-of-commerce status, by presuming that a certain work is not to be available through customary channels of commerce, which ideally should be clarified at the national level by also referring to the usual business practices of the given country with respect to that particular work. For instance, limited availability of the work in commerce or its scarce availability, e.g., in second hand shops, are not sufficient to presume that the work is out-of-commerce.

When assessing the out-of-commerce status with the reasonable effort required by the law, CHIs may conduct a search in the country where they are established and in the country where the work was first published. For this CHIs should make use of existing databases including the out-of-commerce [EUIPO portal](#).

Potentially, this opens the way for CHIs to use books that are out of print, films that are out of circulation, but also works like pamphlets or leaflets that may have never been commercialised, as long as they are permanently held in their collections.

It is the law that determines specific conditions for the out-of-commerce status, e.g. cut-off dates or limitation to certain types of works, that may be required by national legislation, with the sole important limitation that they are needed and reasonable.

B. Use the out-of-commerce work

CHIs can benefit from the opportunity to use the out-of-commerce taking advantage of both the two different mechanisms provided for in the CDSMD: the extended collective licensing and the exception or limitation. However, in doing so, CHIs are called to a careful analysis of the implementation of the EU rules; for example, certain categories of works could be excluded from the application of the two mechanisms, detailed requirements (e.g. related to the non-commercial nature of the website, the indication of the author's name) could be provided.

C. Deal with the out-of-commerce works challenges

According to the CDSMD, rightsholders may, at any time, easily and effectively, exclude their works or other subject matter from the application of the described mechanisms. CHIs should be prepared for this possibility, and to the extent possible reveal their intention to use or inform the public on its actual usage, thus allowing rightsholders to reach out and possibly make an informed decision as not to prevent further use.

At the same time, there should be clear communication and collaboration with the different stakeholders involved, including CMOs, and could benefit from monitoring any change in the status of the work.