

The out-of-commerce works system: a promise to unlock our heritage digitally

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A system that simplifies rights clearance now makes it possible for cultural heritage institutions in the European Union to digitise materials in their collections and legally make them available online, as long as they are not in commercial circulation. The so-called out-of-commerce works provisions, brought forward by the 2019 Copyright in the Digital Single Market Directive, build upon previous attempts to close the "twentieth century blackhole" and offer a promising solution.

copyright, out-of-commerce works, digital cultural heritage

A cultural heritage institution has a collection of posters of the annual town's festivities (Fig. 1). They display colourful designs and retro typographies in that year's fashion, a programme full of traditional activities, and catchy commercial messages from the local businesses sponsoring the event.

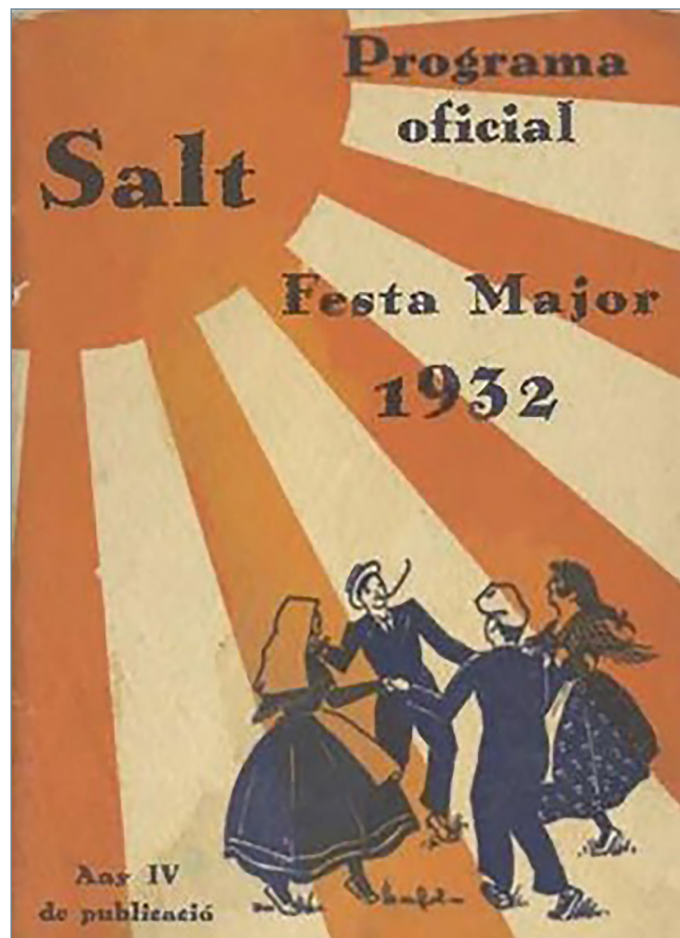


Figure 1: Salt Festa Major 1932 : Programa oficial. - 1932 - Regira. Cooperative Repository of Diputació de Girona, Spain - Public Domain¹

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The institution has obtained a bit of funding that will enable the digitisation of some of its collections, and the posters seem like a great choice – they will give visibility to the institution as an actor contributing to preserve and disseminate local culture. The posters have raised interest from researchers, who would benefit from accessing the materials remotely, and from schools, who have also been asking to bring historical sources into the classroom. By the time everyone is excited about the project, someone asks whether they have sufficient copyright permission to share these materials online. No information about who holds the rights seems to be available at a first glance. But it is such a well-intentioned project that it cannot harm anyone's interests. Is that sufficient? Are they willing to take the risk?

Unfortunately, the story of how copyright discourages societally relevant digitisation projects is common across cultural heritage institutions, and across borders. In 2015, a study (Europeana 2015) (Fig. 2) based on the materials digitised and made available on Europeana showed how "from the 1950s onwards, the amount of material that is made available online falls dramatically". While nothing proved that it is due to copyright legislation, many institutions had indicated facing challenges in this regard. According to the study, "in order to promote the online availability of cultural heritage from the 20th century, it is necessary to reduce the burden of rights clearance for these institutions".

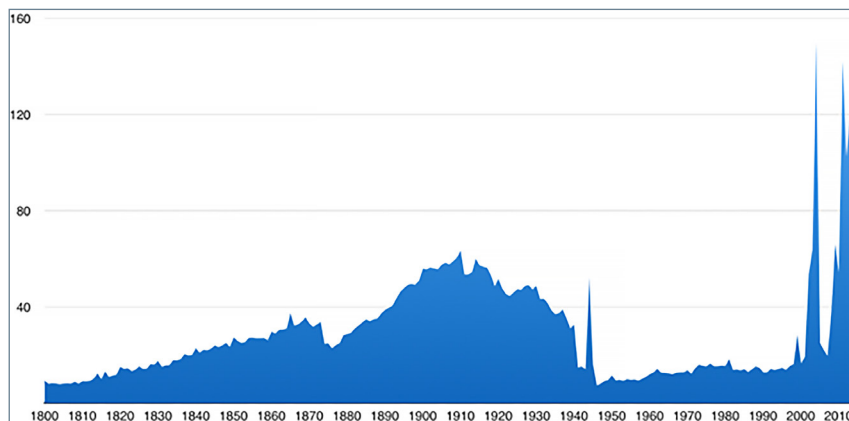


Figure 2: Chronological distribution of dcterms: issued values in Europeana dataset (1800-today). The missing decades: the 20th century black hole in Europeana²

At some point, cultural heritage professionals decided that their institution's public interest activities could not be put on hold because of copyright. They started learning more and more about copyright, and made their best to reconcile its restrictions and conditions with their institution's mission. It worked for some of their activities, but failed to support many others. This experience enabled creating a clear, constructive policy proposal for changes to copyright law that cultural heritage professionals took to policy makers, seeking fairer copyright systems.

Over the past years, policy makers have recognised this tension, and have designed various legislative and non-legislative solutions, both in specific countries, and at the European Union. This article will refer to some of them, but will mostly focus on the latest, most promising solution: the out-of-commerce works system, established through Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 (hereafter referred to as the CDSM Directive). In short, this system enables making certain uses

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¹ https://www.europeana.eu/hu/item/849/https___catalonica_bnc_cat_catalonicahub_lod_oai_pandora_bibgirona_cat_pandora_0000641815_ent0

² <https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana>

of materials that are protected by copyright, without the obligation to ask every rights holder for permission. Materials that were never in commerce, or that were in commerce but no longer are, and that are in the collections of the cultural heritage institution, can be digitised and made available online. By removing the obligation to ask copyright holders for permission, it facilitates online sharing of cultural heritage enormously. But before we go into more detail, it is worth diving into the successful and failed attempts that preceded this system, which have shaped its characteristics.

"Extended collective licensing seemed to offer a good-enough solution, if not in principle ... at least in practice."

Before the European Union out-of-commerce works solution

In 2011, a Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (European Commission 2011) was signed by European libraries, publishers, authors, and collecting societies. It established various principles for the dissemination of out-of-commerce works, and defended a system based on "extended collective licences" or a "presumption of representation". Such a system would make it possible for collective management organisations (entities in charge of collecting revenues on behalf of authors that have authorised them), to give licenses on behalf of authors whose works they represented, but also authors whose works they did not represent. By extending their representation, the transaction is simplified for the cultural heritage institution, who can approach the organisation with a large collection and obtain permission without having to evaluate item by item whether the author, and the work, is represented by that particular collecting society.

The Memorandum of Understanding was not legally binding, but encouraged this option going forward, while acknowledging that cultural heritage institutions needed a legal solution that went beyond the national borders, and applied across the European Union. At the national level, various countries explored such solutions, such as Germany or France, mostly for books. Extended collective licensing seemed to offer a good-enough solution, if not in principle (why should collecting societies receive money for materials they don't have in their repertoire, and that no one seems to be interested in exploiting commercially), at least in practice. That was until the French "unavailable books" system (BnF ReLIRE 2012) was challenged in court, going all the way up to the European Court of Justice (EUR-Lex 2016a). (Fig. 3) What was disputed was precisely that under such a system, authors or rights holders were not giving prior consent for the use of their works. The Court ruled that "a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use", and considered that the system went against European Union and International law. This, together with the need for a solution that applied across-borders, reinforced the idea that the European Union should bring forward a solution. A few years would pass before the CDSM Directive would establish the out-of-commerce work solution, based on that same approach to licensing.

Complementary to the Memorandum of Understanding, a legislative solution was being designed for the dissemination of works that are "orphans". The orphan works are materials whose rights holders are difficult to identify or to locate. The Orphan Works Directive (EUR-Lex 2012) was adopted in 2012 and it obliged all European Union member states to put in place an exception to copyright (a provision that "overrides" the default rule by which permission is needed to make use of a copyright-protected material) that enables the making

available online of orphan works by cultural heritage institutions. However, the legislator seemed to strongly fear harming the interests of rights holders and introduced cumbersome requirements: anyone wishing to rely on the exception has to conduct a "diligent search" and keep track of the results; the exception only applies to works published in the form of books, journals, newspapers, magazines or other writings, cinematographic or audiovisual works and phonograms; and compensation can be claimed by rights holders whose works have been used.

"...the articles in the CDSM Directive on out of commerce works establish a system for cultural heritage institutions to share materials that are out-of-commerce, without the need to ask every rightsholder for permission."



Figure 3: Screenshot of the French unavailable books system landing page, with an indication of the court decision³

A few years after the adoption of the Orphan Works Directive, a review (Kluwer Copyright Blog 2023) confirmed that the system remains mostly unused because of the many requirements it establishes and its limited scope.

In view of a review of the European Union copyright system, the European Commission conducted an impact assessment (EUR-Lex 2016b) that looked at the legislative solutions needed to achieve the objective of facilitating digital uses of protected content for education, research, and preservation in the single market, among other things. It acknowledged that cultural heritage institutions continued to face "important difficulties when clearing rights for digitising out-of-commerce (OOC) works of their collections and disseminating them to the public" and established that the preferred option was a "specific legal mechanisms for the conclusion of collective licensing agreements for the use of OOC works by cultural heritage institutions (CHIs) and on the introduction of a cross-border effect for such agreements".

In September 2016, the European Commission released the proposal (EUR-Lex 2016c) for a Directive on Copyright in the Digital Single Market, whose objectives were to ensure wider access to content and adapt copyright exceptions to the digital and cross-border environment, among other things. It was adopted in 2019, and contained various articles on "out-of-commerce works", describing a system for making out-of-commerce available online. The Directive mandated all European Union member states to change their national laws by June 2021 (the so-called "transposition" process) to bring them in line with its provisions.

³ <https://relire.bnf.fr/accueil>

The out-of-commerce works provisions in the CDSM Directive

As described above, the articles in the CDSM Directive on out of commerce works establish a system for cultural heritage institutions to share materials that are out-of-commerce, without the need to ask every rightsholder for permission. (Fig. 4) It is designed for materials that are in copyright, given that those that are in the public domain can be shared without limitations, and that are not in commercial circulation. It is based on extended collective licensing or a presumption of representation, the system described in the previous sections, and when this does not apply, on an exception to copyright. In order to use the system, a few steps need to be followed, and a few conditions need to be met.

By out-of-commerce, the articles refer to materials that are commercially unavailable, such as films that were once distributed and no longer available, or archival material that was never available in commerce. 'The out-of-commerce status' might be simple to determine for some materials, but a bit trickier for some others. For example, what about a musical recording that is not available in most shops, nor through the main streaming platforms, but available on YouTube because of a user's upload? What if it is not available in commerce in the country where the cultural heritage institution is based, but it is commercially available abroad? The Directive suggests that only a reasonable effort should be conducted to make such a determination, learning from the unattainable "diligent search" in the Orphan Works Directive. It also clarifies that if the material is available only to a very limited extent, for example in second-hand shops, it can be considered to be out-of-commerce. The system does not result in the possibility to use the out-of-commerce works without limitations. It specifically enables the cultural heritage institution that holds the materials in its collection to make reproductions of the materials, for example, digitisation copies (even though these are probably already legal on the basis of specific exceptions for preservation purposes) and to share these online, mostly through non-commercial websites. It might be that at the national level, member states recognise more uses. Unfortunately, it does not open the possibility for the cultural heritage institution to authorise any further uses, for example by library users, although some might be possible under exceptions to copyright.

The out-of-commerce works articles establish the need to obtain a licence from a collective management organisation. All European Union member states have collective management organisations specialised by types of materials, such as written works or visual arts, and by type of rights, such as the neighbouring rights of interpreters or producers. The cultural heritage organisation should seek a licence from a collective management organisation that is "sufficiently representative" of the type of materials and rights at stake, and in the country in which it is based. It is possible that for certain types of materials, in certain countries, no collective management organisation exists. In those cases, the cultural heritage institution can use the materials on the basis of an exception to copyright, that is, without the need to ask for permission or conclude a licence.

This is one of the key questions in the out-of-commerce works system. At the beginning, the proposal brought forward by the European Commission contemplated only the possibility to make use of the system if a licence was obtained, in line with the 2011 Memorandum of Understanding. It was only when cultural heritage institutions, engaged closely in the legislative

process, highlighted that most countries do not have collective management organisations for all types of materials, that the exception was introduced as a "fall-back" option. An exception is great news, because it acts as a "general permission" granted by law to conduct the activity. At the same time, it brings more attention to the notion of "sufficiently representative" collective management organisation, which is the pivotal concept that decides whether the exception can be used.

Another important aspect in the out-of-commerce works system is the need to declare the "materials" through an out-of-commerce works portal (EUIPO 2024) built and managed by the European Union Intellectual Property Office (EUIPO). Its role is to inform rights holders of the materials that will be shared online, and to give them a chance to "opt-out", that is, to request that they are not (or cease to be) shared. The declaration of out-of-commerce works through the EUIPO portal has to be done six months prior to using the materials. It should be noted that rights holders can "opt-out" any time, including once the materials have been shared, but they cannot claim a remuneration for the use made in line with the out-of-commerce works system prior to the opt-out.

Who is using the out-of-commerce works system?

The EUIPO out-of-commerce works portal gives a useful indication of the materials that will be made available using the out-of-commerce works system (Fig. 5). So far, over 1,725,000 cultural heritage items have been declared through the EUIPO out-of-commerce works portal. Literary works are the type of material that has been declared the most (1,659,768 records in the portal), followed by works of visual arts (36,423 records in the portal), audiovisual or cinematographic works (28,866 records in the portal) and phonographic works (32 records in the portal).

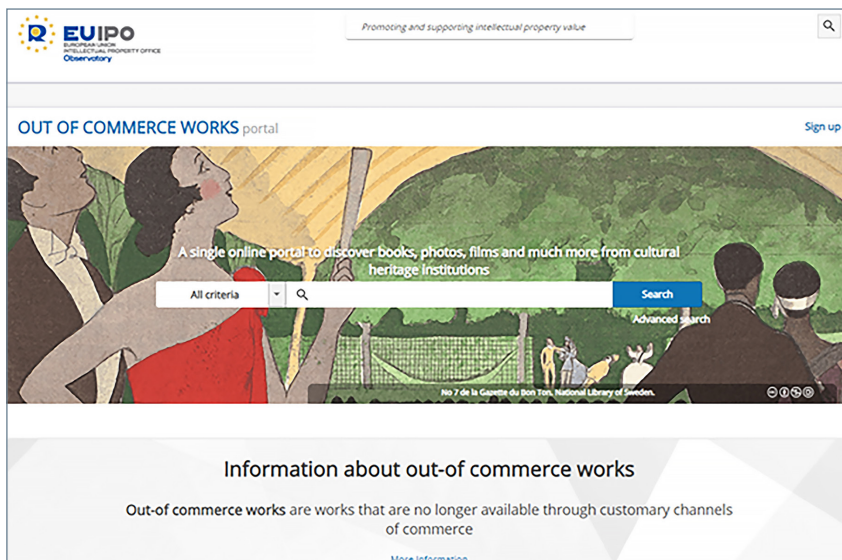


Figure 4: Screenshot of the EUIPO out-of-commerce works portal landing page⁴

These materials are in the collections of cultural heritage institutions from various countries. Slovakia, and in particular the Slovak National Library, has declared a total of 1,060,217 records, the highest number so far. It is followed by Czech Republic (600,208 records from the National Library), Germany (38,451 records from 11

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⁴ <https://euiipo.europa.eu/out-of-commerce>

different institutions, one of which is a collective management organisation, in this case responsible for submitting the data to the portal), Estonia (11,063 records from the National Library and the University of Tartu Library), Hungary (13,877 records from seven institutions), Austria (737 records from three institutions), The Netherlands (347 records from six institutions), Finland (137 records from the National Library) and Croatia (2 records from the University of Zagreb). Some of these institutions have only submitted two, three, four records. They are probably testing the system, the infrastructure, developing their internal workflows, before relying on this system more systematically.

More than two years have passed since the deadline for the transposition of the CDSM Directive (June 2021), the date in which this solution was supposed to be functional in all European Union Member States. However, only thirty-three institutions in nine countries have started relying on (or testing) the system. One national library alone has declared more than half of the items, making the remaining number almost insignificant compared to the millions and millions of out-of-commerce works that sit in the collections of cultural heritage institutions. Given the size of the problem, and the solution available, what explains the "limited" number of materials declared?

The delay in the transposition for many of the countries is probably one of the reasons behind this. Indeed, few member states complied with the transposition deadline of June 2021. Institutions in most countries have only recently been given the reassurance that they can use the system, and have started exploring it. Some institutions have also experienced challenges with the EUIPO out-of-commerce works portal. The functionalities could be improved, for example when it comes to the upload of data.

In addition to that, there is a lack of precision that some cultural heritage institutions would like to see corrected. Most countries have not organised the "stakeholder dialogues", a mandatory set of conversations that governments in every member state are obliged to put in place, and that should help bring clarity to various grey areas. In some countries, such as Belgium and France, a Decree developing the details of the system is pending. As long as legal uncertainty remains, using this system will not be an option for most cultural heritage institutions.

Last, the need to negotiate licences with collective management organisations is new for many cultural heritage institutions, which removes agility in the use of the system, at least at the beginning. At this stage, we have seen few licences for out-of-commerce works concluded. In the Czech Republic, the National Library has concluded licences with the collecting society DILIA for the use of text-based materials, and with OOA-S for the works of visual arts embedded or included in the literary works. The licences extend to the libraries of the System of Libraries Providing Public Library and Information Services, and enable online viewing via devices located in the premises of the library. Remote viewing by registered readers of the National Digital Library platform and the Czech Digital Library platform (national digital aggregator) is also possible, on the basis of authentication. Similarly, in Slovakia the Slovak National library has concluded a licence with LITA for reproducing and making available online written materials in the collections of the National Library.

Another Interesting example is that of The Netherlands, where, after lengthy negotiations, two Memorandums of Understanding have been signed. One is between BUMA/STEMRA and all publicly accessible cultural

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heritage institutions. It authorises cultural heritage institutions to make available on cultural heritage websites (within the European Union) all independent musical works in their collections. The fee agreed has a scale starting with €125,00 per 140.000 streams per year. The other agreement has been concluded between StOPnl and all publicly accessible cultural heritage institutions, which are authorised by it to make available on cultural heritage websites audiovisual works whose rights are understood to be held by the producer, in The Netherlands. This agreement is particularly interesting as StOPnl has agreed not to charge any fee for these uses.

Using the solution

European Union legislators have recognised the tension created by our copyright systems and tried to develop a solution, one that the cultural heritage sector has strongly advocated for. While it might not be perfect, or simple, it is the best one we have at the moment. I therefore hope that readers do not feel discouraged or overwhelmed, but on the contrary, willing to test out this system. It might require putting in place new processes, negotiating new agreements, but once this is done, it can function very smoothly for everyone. The posters of the annual town's festivities now have a strong legal basis to be shared online without any fear (Fig. 6).

We now need to show that we were rightfully pointing at a problem, and rightfully asking for a change. By making use of the out-of-commerce works system, the cultural heritage sector will have a strong basis to advocate for an even better solution in a future legal reform.

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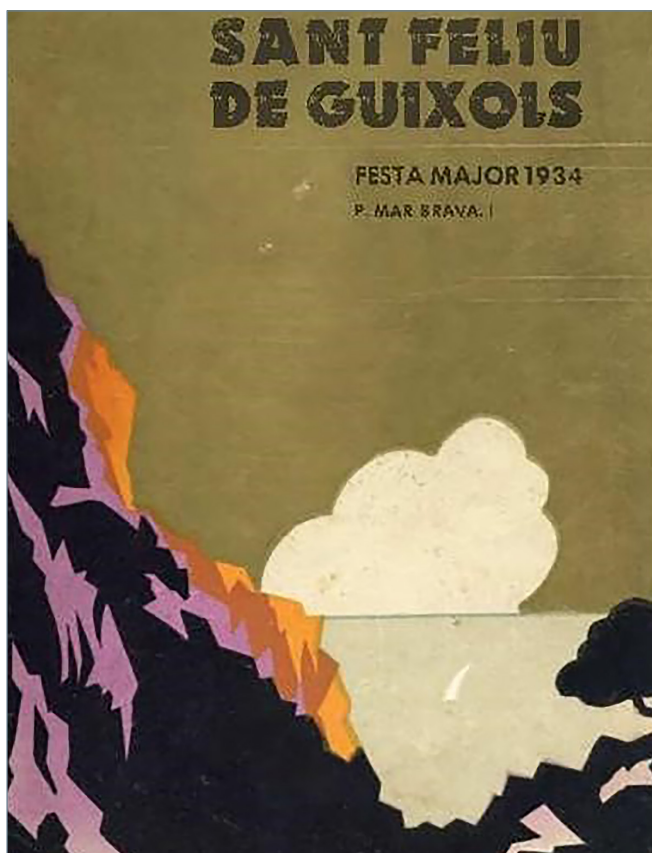


Figure 5: Sant Feliu de Guíxols : festa major 1934. - 1934 - Regira. Cooperative Repository of Diputació de Girona, Spain - CC BY-NC-ND⁵

⁵ https://www.europeana.eu/hu/item/849/https___catalonica_bnc_cat_catalonicahub_lod_oai_pandora_bibgirona_cat_pandora_0000806287_ent0

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