

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

by **Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko***

Abstract: Renaissance genius Pico della Mirandola dreamed of making all knowledge accessible in one place. The Proposal for a Directive on Copyright in the Digital Single Market could help Pico's dream come true. The proposal, *inter alia*, aims at facilitating wider access to Europe's cultural heritage through the introduction of a mechanism enabling the use of out-of-commerce works by cultural heritage institutions in the digital environment. After examining the key elements of this mechanism, this Opinion critically discusses the definition of the scope of search required for establishing the out-of-com-

merce status of works, the requirement of the representative character of collective management organisations, and the non-application of the mechanism to third-country works. This Opinion also looks into the coordination between the CJEU's *Soulier* decision and the Directive Proposal, with special emphasis on the sufficiency of general publicity measures, and the creation of the EUIPO's out-of-commerce online database. In conclusion, while being supportive of the proposal and the idea of promoting more access to out-of-commerce works, this Opinion provides some suggestions for improving the text.

Keywords: Copyright; digital single market; reform; digitisation; out-of-commerce

© 2018 Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Christophe Geiger, Giancarlo Frosio and Oleksandr 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*, (2018) JIPITEC 240 para 1

A. Introduction

1 Cultural heritage stands as perhaps one of the major assets of the European Union. No other world region can showcase such a vast amount of cultural riches. Digitisation has enabled access and the ability to reuse this heritage to an extent previously unknown, rendering the fundamental right to culture a reality in the European Union.¹ Cultural heritage can be

made available online from a single access point for all EU citizens—and the international community—to enjoy. The entire collection of European cultural heritage may only be one click away. As the former European Commissioner for the Digital Agenda,

Researcher and Lecturer at CEIPI; Oleksandr Bulayenko is a Researcher and PhD Candidate at CEIPI.

- 1 On the right to culture, see Christophe Geiger (ed.), *Intellectual Property and Access to Science and Culture: Convergence or Conflict?*, CEIPI/ ICTSD publication series on "Global Perspectives and Challenges for the Intellectual Property System", Issue No. 3, Geneva/Strasbourg, December 2016.

* Christophe Geiger is a Professor of Law, Director General and Director of the Research Department of the Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg, France; Giancarlo Frosio is a Senior

Nellie Kroes, has recalled:

Just as artists have always travelled, to join sponsors, avoid wars or learn from masters far from home, now digital technology helps them to cross borders and break down barriers. Their work can be available to all. In a sense, the internet is the realisation of the Renaissance dream of Giovanni Pico della Mirandola: all knowledge in one place. Yet, it does not mean there are no more obstacles to sharing cultural and artistic works on the net.²

- 2 Thus, it seems essential that this “digital renaissance” is not hindered by the copyright legal framework, as there are immense positive externalities for society that could be lost. In fact, digitised cultural heritage can serve to promote new businesses, boost tourism in the EU, take research and data aggregation to an all new level, and finally push democratization through better access to knowledge.³ In particular, a potential welfare loss in the context of unavailable works, whether out-of-commerce works or orphan works, meaning works where the right owner cannot be identified, is evident. For example, a recent survey found that 39% of feature films in European collections are out-of-commerce.⁴ Again, according to data from the German National Library, there were 2 million books out-of-commerce in 2013.⁵ In this scenario, digitisation does not conflict with the exploitation of works protected by copyright law, thus undermining potential remuneration of rightholders. Instead, when works are unavailable on the market, such as in the case of out-of-commerce works, there is no benefit to rightholders, creators

or the public at large. As Neelie Kroes further underlined, it is dysfunctional to keep cultural treasures “stuck in the digital darkness when they could be on digital display for future generations. It is time for this dysfunction to end.”⁶

- 3 Actually, the European Union has increasingly taken up Kroes’ call for action. Of course, the EU Directive on certain permitted uses of orphan works represented a first fundamental initiative by adopting a diligent search standard for public digitisation projects across Europe.⁷ Recently, however, the EU is furthering this action by considering how to also unlock broader availability of out-of-commerce works. In particular, on 12 September 2018 the European Parliament approved with some amendments (Parliament’s Amendments) the European Commission’s Proposal for a Directive on copyright in the Digital Single Market (DSM Draft Directive)⁸ that aims to ensure EU-wide access to works held in collections of European cultural heritage institutions when such works are no longer available to the public through customary channels of commerce (e.g., bookshops). To this end, the Commission would like to introduce a collective licensing mechanism facilitating uses of out-of-commerce works, building upon Member States’ experiences with similar schemes.⁹ The proposed provisions should enable—through a legal presumption—representative collective management organisations to authorise non-commercial use of works of their members as well as of other unrepresented rightholders. In the following, this Opinion will discuss underlying critical issues with the proposal and room for improvement.

2 Neelie Kroes (2010), A Digital World of Opportunities, SPEECH/10/619, Forum d’Avignon - Les Rencontres Internationales de la Culture, de l’Économie et des Medias, Avignon, France, 5 November 2010.

3 See Giancarlo Frosio (2018), *Reconciling Copyright with Cumulative Creativity: the Third Paradigm*, Cheltenham, UK: Edward Elgar, pp. 220-225; Laura King, James Stark and Paul Cooke (2016), ‘Experiencing the Digital World: The Cultural Value of Digital Engagement with Heritage’, *Heritage & Society*, Vol. 9(1), pp. 76-101; Henning Kagermann (2015), ‘Change Through Digitization—Value Creation in the Age of Industry 4.0’, in: Horst Albach, Heribert Meffert, Andreas Pinkwart and Ralf Reichwald (eds.), *Management of Permanent Change—New Challenges and Opportunities for Change Management*, Heidelberg, Germany: Springer Gabler, pp. 23-45; Giancarlo Frosio (2011), *COMMUNIA Final Report on the Digital Public Domain*, report prepared for the European Commission on behalf of the COMMUNIA Network and the NEXA Center, pp. 76-83; Olga Hadžić (2004), ‘Tourism and Digitization of Cultural Heritage’, *Преглед НИД*, Vol. 5, pp. 74-79.

4 See Gilles Fontaine and Patrizia Simone (2017), *The Access to Film Works in the Collections of Film Heritage Institutions in the Context of Education and Research*, Strasbourg, France: European Audiovisual Observatory, p. 16.

5 See Deutscher Bundestag, BT 17/13423, Entwurf eines Gesetzes zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes § 13, available at: <<http://dip21.bundestag.de/dip21/btd/17/134/1713423.pdf>>.

6 Nellie Kroes (2010), Ending Fragmentation of the Digital Single Market, SPEECH/11/70, Business for New Europe event, London, 7 February 2010.

7 See Directive 2012/28/EU of the European Parliament and the Council of 25 October 2012 on certain permitted uses of orphan works, 2012 OJ (L 299)5.

8 European Parliament, Copyright in the Digital Single Market ***I, Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), P8_TA-PROV(2018)0337 (Parliament’s Amendments); and European Commission (14 September 2016), Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, 2016/0280 (DSM Draft Directive).

9 E.g., in France, Germany and Poland, described further below.

B. In search of a Comprehensive Notion of Out-of-Commerce Works

- 4 The DSM Draft Directive emphasises the promotion of digitisation and cross-border availability of European cultural heritage building upon the Orphan Works Directive¹⁰ and other non-binding instruments.¹¹ Besides the specific mandatory exception for the preservation of cultural heritage,¹² the reform proposal would like to facilitate the **use of out-of-commerce works** by cultural heritage institutions (CHI)—and ensure access to cultural heritage—by improving licensing practices.¹³ According to Recital 22 of the Directive Proposal:

Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. However, the particular characteristics of the collections of out-of-commerce works mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works

- 10 The circle of beneficiaries of the out-of-commerce mechanism are more limited than in the Orphan Works Directive, Art. 1(1) enabling uses of orphan works also by educational establishments and public-service broadcasters, Directive 2012/28/EU, *supra* 7.
- 11 Memorandum of Understanding, Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, 20 September 2011; European Commission (2011), Recommendation 2011/711/EU of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, 2011 OJ (L 283)39; European Commission (2006), Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, (2006) OJ (L 236)28; and European Parliament and Council (2005), Recommendation 2005/865/CE of 16 November 2005 on film heritage and the competitiveness of related industrial activities, (2005) OJ (L 323)57.
- 12 Art. 5 of the DSM Draft Directive. On this new exceptions, see Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko (2017), ‘The EU Commission’s Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction’, *EIPR*, Vol. 40, No. 1, pp. 12-15.
- 13 Libraries and CHIs have pointed at the insufficiency of this solution due to a serious limitation to the number of works covered and suggested instead the introduction of an exception to make out-of-commerce works as well as works that have never been in-commerce, which are kept in their collections, available online for non-commercial purposes. EBLIDA, Public Libraries 2000, IFLA, Europeana and Liber (2017), *Commission Proposal on Copyright in the Digital Single Market, Library and Cultural Heritage Institution Responses*, p. 2, available at: <https://www.ifla.org/files/assets/clm/publications/copyright_proposals_-_library_and_chi_responses.pdf>. In response to these concerns, the new Article 7(1a) and (1b) and Recital 22a of the Parliament’s Amendments provide Member States with a “back-up” option to introduce an exception for use of out-of-commerce works if collective licenses are not available (Amendments 23 and 69).

*or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the licensing of rights in out-of-commerce works that are in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.*¹⁴

- 5 Enabling the digitisation and making available to the public of materials establishing facts of historical and other significance will also contribute to addressing the problem of so-called “fake news”.¹⁵ For example, convenient one-click online access to verified photographs documenting important events and accompanied by appropriate comments can help to more easily check the correctness of (mis) represented information.

- 6 According to the DSM Draft Directive, all types of copyrighted works in CHIs’ collections can possibly enjoy an **out-of-commerce status**.

*A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.*¹⁶

- 7 In this respect, the DSM Draft Directive would expand the scope of the notion of out-of-commerce works in comparison to the non-binding Memorandum of Understanding,¹⁷ which is limited to books and journals, and the Orphan Works Directive’s notion of orphan works, which does not include stand-alone photographs.¹⁸ Furthermore, according to the proposal, the notion of out-of-commerce works should also **encompass works never intended for commercial use**.¹⁹ Also, in order to ensure maximum

14 Commission (2016), *supra* 8, Recital 22.

15 European Commission, Digital Single Market, Policies, Fake news: <<https://ec.europa.eu/digital-single-market/en/fake-news>>.

16 Commission (2016), *supra* 8, Art. 7(2). Parliament’s Amendments propose to completely delete the quoted definition from the Directive (Amendment 69).

17 The Memorandum of Understanding, *supra* 11, was signed 20 September 2011 by representatives of some major stakeholders, rightholders as well as European cultural heritage institutions.

18 Directive 2012/28/EU, *supra* 7, Art. 10. According to Article 12 “Review clause” of the Orphan Works Directive, the European Commission is under an obligation to provide annual reports “concerning the possible inclusion in the scope of application of this Directive of [...] stand-alone photographs”.

19 Commission (2016), *supra* 8, Recital 22. The Parliament’s Amendment 22 further extends the scope of the notion to works that “have never been in commerce” (even if intended for commercial use) by amending Recital 22. This position reflects the suggestions of three Committees of the European Parliament: Amendment 22 of the Report of the Committee

legal certainty to cross-border digitisation projects, the **proposed definition** of out-of-commerce works would be **mandatory in all Member States**. The DSM Draft Directive dropped the Impact Assessment's proposal giving Member States "the possibility to establish further national-specific criteria for works to be eligible for the mechanisms in question."²⁰ For example, currently, German law provides mechanisms for making available out-of-commerce literary works published before 1 January 1966.²¹ Instead, Polish law requires for a work to qualify as out-of-commerce to be a literary work published before 24 May 1994.²² However, the possibility for Member States (to continue) to provide different national cut-off dates for determining the out-of-commerce status of works and subject matter has been revived by the European Parliament.²³

- 8 The scope of the search to establish the out-of-commerce status remains undetermined.** Are offers of second-hand sales covered by the notion of "customary channels of commerce" (e.g., through brick and mortar second-hand bookshops or e-commerce platforms)?²⁴ Should the search be conducted in "customary channels of commerce" of the Member State of origin of the works,²⁵ the

on Legal Affairs (JURI) of the European Parliament of 29 June 2018 (PE601.094v02-00 - A8-0245/2018), adopting the Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 - C8-0383/2016 - 2016/0280(COD)) (JURI Report); Amendment 58 of the Opinion of the Committee on the Internal Market and Consumer Protection (IMCO) of 14 June 2017; and Amendments 18 and 61 of the Opinion of the Committee on Culture and Education (CULT) of 4 September 2017.

- 20 Commission (2016), Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, Part 1/3, pp. 70-71.
- 21 Ibid., Part 3/3, Annex 9E, p. 131; and Axel Paul Ringelmann and Marc Mimler (2017), 'Digital exploitation of out-of-print books and copyright law: French licensing mechanism for out-of-print books under CJEU scrutiny', *EIPR*, Vol. 39, No. 3, p. 193.
- 22 Commission (2016), *supra* 20, Part 3/3, Annex 9E, p. 131.
- 23 Parliament's Amendment 69 provides that "Member States may provide a cut-off date in relation to determining whether a work previously commercialised is deemed to be out of commerce.", reflecting Amendment 69 of the JURI Report.
- 24 Memorandum of Understanding, *supra* 11, referred to "second hand bookshops or antiquarian bookshops" in its definition of out-of-commerce books. This definition is supported by Reto M. Hilty, Tao Li and Valentina Moscon (2017), 'Out-of-Commerce Works', in: Reto M. Hilty and Valentina Moscon (ed.), *Modernisation of the EU Copyright Rules*, Position Statement of the Max Planck Institute for Innovation and Competition, Max Planck Institute for Innovation and Competition Research Paper No. 17-12, p. 63.
- 25 Commission (2016), *supra* 8, Art. 7(4)(a).

Member States where the CHI's collections in which the works are permanently located is established,²⁶ in both, or in all EU Member States? If this last option were the case, searching all "customary channels of commerce" in all the Member States could be challenging, particularly due to linguistic hurdles involved and the requirement to consider all "translations, versions and manifestations".²⁷ With regard to the need to verify commercial availability of translations, it could be questioned whether the presence in the commercial channels of commerce of a translation into one language has to influence the status of a translation into another language of the same work. Why should the availability of a Polish translation prevent a Swedish translation from being considered out-of-commerce, while the likelihood of hypothetical harm for rightholders through the substitute is negligent?²⁸ However, the DSM Draft Directive does limit possible negative externalities of this indeterminacy by **barring unnecessary and unreasonable licencing—and therefore search—requirements** for out-of-commerce works. According to Article 7(2) of the Directive Proposal:

*Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the requirements used to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 do not extend beyond what is necessary and reasonable and do not preclude the possibility to determine the out-of-commerce status of a collection as a whole, when it is reasonable to presume that all works or other subject-matter in the collection are out of commerce.*²⁹

- 9 In particular, the possibility to determine the out-of-commerce status of a collection of works as a whole** might overcome those limitations for mass digitisation projects that the Orphan Works Directive's work-by-work diligent search requirement brought about.³⁰ In any event, according

-
- 26 Commission (2016), *supra* 8, Art. 7(4)(c).
- 27 Conference of European National Librarians (CENL), CENL Statement on Proposal for a Directive in the Digital Single Market, 22 February 2017, p. 2, available at: <<http://www.cenl.org/wp-content/uploads/CENL-DSM-FINAL.pdf>> (considering this obligation impractical).
- 28 Probably to remedy this situation, Amendment 69 of Parliament's Amendments and of the JURI Report, proposes to delete the reference to all "translations, versions and manifestations" of out-of-commerce works or other subject matter in Article 7(2) of the DSM Draft Directive.
- 29 Commission (2016), *supra* 8, Art. 7(2).
- 30 Commission (2016), *supra* 20, Part 2/3, Annex 2B, p. 16 (discussing CHIs' responses to the Public consultation on the review of EU copyright rules highlighting this issue); and EUIPO (2017), Orphan Works Survey 2017: Summary Report, pp. 7 (Executive Summary: "Technical and legal challenges exist mainly in the area of diligent search requirements which are perceived as too complex and as rendering the system unsuitable for mass digitisation."), 14, 19, 20-22, 27, 29, 32 and 37.

to Article 9 of the DSM Draft Directive, a stakeholder dialogue shall also be set up to fine-tune licencing requirements, particularly those mentioned above.

Member States shall ensure a regular dialogue between representative users' and rightholders' organisations, and any other relevant stakeholder organisations, to, on a sector-specific basis, foster the relevance and usability of the licensing mechanisms referred to in Article 7(1), ensure the effectiveness of the safeguards for rightholders referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2).³¹

C. Implementing EU-Wide Extended Collective Licensing

- 10 Acknowledging—often insurmountable—difficulties for obtaining prior consent to the use of out-of-commerce works, Title III of the DSM Draft Directive would like to promote their use through a **collective management mechanism**.

Member States shall provide that when a collective management organisation, on behalf of its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation [...].³²

- 11 **Extended collective licenses (ECL)** have become a policy option in several jurisdictions to tackle, *inter alia*, the orphan works problem within digitisation projects.³³ They are traditionally applied in various sectors in Denmark, Finland, Norway, Sweden and Iceland.³⁴ More recently the ECL legislation was

adopted in other EU Member States: Hungary,³⁵ Slovakia,³⁶ and the UK³⁷. Proposals to introduce the ECL in important jurisdictions outside of Europe were notably made in China,³⁸ Japan³⁹ and the USA.⁴⁰ The system combines the voluntary transfer of rights from rightholders to a collective management organisation (CMO) with the legal extension of the collective agreement to third parties who are not members of the substantially representative CMO. Use of this mechanism for the digitisation and making available of out-of-commerce works in the EU was approved by the consensus of stakeholders, representing libraries and archives on the one hand, and authors and publishers on the other hand, and witnessed by the European Commissioner for Internal Market and Services.⁴¹ A user may obtain a licence to use all the works included in a certain category. With the exception of the rightholders claiming individual remuneration or opting out from the system, the ECL automatically applies

Schovsbo (2010), 'Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon?', *Columbia Journal of Law and the Arts*, Vol. 33, No. IV, pp. 471-498.

35 Article 87(1) of the Hungarian Copyright Law. Dora Hajdu (2016), *La gestion collective des droits des auteurs : ses formes imposées par la loi hongroise et française*, doctoral thesis, Université Paris-Saclay, France, pp. 17 and 34; and Peter Mezei (2014), 'The New Orphan Works Regulation of Hungary', *IIC*, Vol. 45, No. 8, p. 943.

36 Matej Gera (2016), 'Extended collective licensing under the new Slovak Copyright Act', *JIPLP*, Vol. 11, No. 3, pp. 170-171.

37 The mechanism of extended collective licensing was introduced in the UK law in 2014 through adoption of two statutory instruments, the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (SI 2014/8988) and the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (SI 2014/2588). Dinusha Mendis and Victoria Stobo (2016), 'Extended collective licensing in the UK - one year on: a review of the law and a look ahead to the future', *EIPR*, Vol. 38, No. 4, pp. 208-220.

38 Fuxiao Jiang and Daniel Gervais (2016), 'Collective Management in China', in: Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, 3rd edn., Alphen aan den Rijn, Netherlands: Kluwer Law International, p. 444 and Wenqi Liu (2012), 'Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance', *Journal of Intellectual Property Rights*, Vol. 17, p. 54 (footnote 12).

39 In Japan, the Intellectual Property Promotion Plan ("知的財産推進計画") 2016, p.11, available at: <www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikeikaku20160509.pdf>, considered facilitation of copyright licensing through introduction of extended collective licensing.

40 The study of the US Copyright Office recommended establishment of a "pilot" extended collective licensing for mass digitisation projects "serving nonprofit educational and research purposes", US Copyright Office (2015), *Orphan Works and Mass Digitization*, Report of the Register of Copyrights, p. 106.

41 Principle No. 2 "Practical Implementation of Collective Agreements" of the Memorandum of Understanding, *supra* 11.

31 Commission (2016), *supra* 8, Art. 9.

32 Commission (2016), *supra* 8, Art. 7(1).

33 Johan Axhamn and Lucie Guibault (2011), *Cross-border Extended Collective Licensing: a Solution to Online Dissemination of Europe's Cultural Heritage?*, August 2011 (final report prepared for EuropeanaConnect); Marco Ciurcina, Juan Carlos De Martin, Thomas Margoni, Federico Morando and Marco Ricolfi (2009), *Creatività Remunerata, Conoscenza Liberata: File Sharing e Licenze Collettive Estese*, 15 March 2009 (position paper prepared for the NEXA Center for Internet and Society); Alain Strowel (2011) 'The European "Extended Collective Licensing" Model', *Columbia Journal of Law & the Arts*, Vol. 34, No. 4, p. 665.

34 Tarja Koskinen-Olsson and Vigdís Sigurdardóttir (2016), 'Collective management in the Nordic Countries', in: Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, 3rd edn., Alphen aan den Rijn, Netherlands: Kluwer Law International, pp. 243-262; and Thomas Riis and Jens

to all domestic, foreign, traceable or untraceable rightholders.

12 In other words, according to the DSM Draft Directive, when a CMO concludes a non-exclusive licence for non-commercial purposes with a CHI for digitising and making available out-of-commerce works, such a licence may be extended to other unrepresented rightholders under the conditions above.⁴² This provision does not oblige Member States to introduce ECL schemes only, but it is open to any alternative models capable of factitiously representing non-members,⁴³ taking pragmatically into account existing national mechanisms.⁴⁴ However, in order to also represent CMOs' non-members, any chosen model must fulfil three mandatory conditions:

- (a) *the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence;*
- (b) *equal treatment is guaranteed to all rightholders in relation to the terms of the licence;*
- (c) *all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.*⁴⁵

13 **Territorial extension of the licences between a CHIs and CMOs does reach the entire EU territory.**⁴⁶

*Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in all Member States.*⁴⁷

14 Apparently, the proposal provides CHIs with the capacity of disseminating their collections as widely as possible according to the goals of the DSM whose

42 Commission (2016), *supra* 20, Part 3/3, p. 120.

43 Commission (2016), *supra* 8, Recital 23 ("Such mechanisms can include extended collective licensing and presumptions of representation").

44 Commission (2016), *supra* 20, Part 3/3, Annex 9E, pp. 131-132. New Recital 22a of Parliament's Amendments states: "Several Member States have already adopted extended collective licensing regimes, legal mandates or legal presumptions facilitating the licencing of out-of-commerce works." (Amendment 23).

45 Commission (2016), *supra* 8, Art. 7(1)(a-c). Lucie Guibault and Simone Schroff (2018), 'Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders', *IIC*, Vol. 49, pp. 918 and 937.

46 Opinion of the European Economic and Social Committee, Copyright package, INT/804, adopted 25 January 2017, para. 5.8.

47 Commission (2016), *supra* 8, Art. 8(1) (emphasis added).

achievement promoted the reform. The DSM Draft Directive's Explanatory Memorandum qualifies the need for EU action as follows:

*initiatives [for facilitating dissemination of and access to out-of-commerce works] only exist in some Member States and are only applicable on the national territory. EU intervention is therefore necessary to ensure that licensing mechanisms for the access and dissemination of out-of-commerce works are in place in all Member States and to ensure their cross-border effect.*⁴⁸

15 Finally, the Impact Assessment reinforces this point by noting that "[w]ithout EU intervention, such actions would be limited by national borders (and would happen only in some MS [Member States])."⁴⁹ Accordingly, Article 8(1) in the DSM Draft Directive does pre-empt territorial limitations as CHIs are granted the right to use licenced works in all Member States. The reference to a use "in accordance to the term of the licence" clearly refers to terms other than territorial limitations. Otherwise, the provision would be meaningless.

16 In order to strengthen legitimacy, only **broadly representative CMOs** would be entitled to conclude ECLs or other similar schemes. Obviously, if interpreted too strictly, this requirement might pose challenges to the practical implementation of the ECL mechanisms. The proposal does introduce some clarifications in determining the representativeness criterion by noting:

Member States shall ensure that the licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State where:

- (a) *the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audiovisual works;*
- (b) *the producers of the works have their headquarters or habitual residence, for cinematographic and audiovisual works; or*
- (c) *the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).*⁵⁰

17 Apparently, representativeness must only be of **national character**, since licences have to be sought from CMOs only *representative in the Member State* where works first originate, unless the country

48 Commission (2016), *supra* 8, p. 5 (emphasis added).

49 Commission (2016), *supra* 20, Part 1/3, p. 13.

50 Commission (2016), *supra* 8, Art. 7(4).

of origin cannot be determined. However, some clarifications regarding the territorial scope of the notion of representativeness would be welcome. Again, CMOs have to be broadly representative (a) in the **category of works** (or other subject matter) and (b) in the **category of rights**, which are the subject of the licence.⁵¹ Therefore, representativeness needs to also be assessed according to a specific category of works and licenced rights.

- 18 As the Impact Assessment noted, establishing CMOs’ “broad representativeness” for works and rights might be a critical challenge to the effectiveness of the reform as in some Member States there are no CMOs in the audio-visual and visual arts sector—especially photography—to begin with.⁵² How this lack of representativeness can be overcome—or representative CMOs set up if never created given the relevant transaction costs involved⁵³—unfortunately, the reform proposal does not say.⁵⁴ A possible solution might be reliance on existing CMOs for the exercise of rights to remuneration (e.g. private copying and/or reprography)⁵⁵. While these CMOs usually do not manage the rights to making available audiovisual and photographic works, they do however, manage non-exclusive rights over *the same works and of the same rightholders*. Therefore, possibly, also as a solution to minimise transaction costs, **where no CMO representative of “rights” is established, CMOs representative of “works” might be considered to be representative**.
- 19 If necessary collective management arrangements are not in place or if the representativeness of CMOs cannot be established (e.g., due to the lack of cooperation among rightholders) it would be necessary to adopt a new exception for achieving the cultural objectives of the copyright reform.

The European Parliament proposes to leave it up to each Member State to decide whether to adopt a new exception, provided that there is not collective licensing alternative.⁵⁶

- 20 According to the DSM Draft Directive, the possibility for rightholders to **opt out** should be provided prior to and during the licencing term. This provision differentiates the model endorsed by the proposal from the traditional ECL model, where opting out is usually possible only once licences are concluded.⁵⁷ This arrangement should further enhance safeguards to rightholders’ interests when contrasted with Nordic countries’ ECL.

D. Overcoming the Soulier Decision? Introducing General Publicity Obligations Rather Than Individualised

- 21 The proposed change to the EU *acquis* would also help to **overcome some of the consequences of the CJEU’s Soulier decision**.⁵⁸ The CJEU ruled against the French law enabling an approved CMO to authorise the digital reproduction and communication to the public of out-of-commerce books.⁵⁹ Although the law provided authors with an opt-out mechanism and some other safeguards, the CJEU declared the French law uncompliant with European law,⁶⁰ which

51 Commission (2016), *supra* 8, Art. 7(1)(a).

52 Commission (2016), *supra* 20, Part 3/3, Annex 9E, p. 132.

53 Eugene Mopsik (2011), ‘Photographers and Collective Licencing: A Short History with No Ending’, *Columbia J. of L. & the Arts*, Vol. 34, No. 4, pp. 619-622 (discussing practical problems related to the establishment of collective management of rights in photographic works).

54 Considering the representativeness as a “contextual” criterion (the test should not be the same for a just-created CMO as for a well-established CMO) can be helpful in some situations. In favour of this interpretation, Daniel Gervais (2016), ‘Collective Management of Copyright: Theory and Practice in the Digital Age’, in: Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, 3rd edn., Alphen aan den Rijn, Netherlands: Kluwer Law International, p. 24 (footnote 64).

55 For a comparative approach on the various existing “limitation-based remuneration rights”, see Christophe Geiger and Oleksandr Bulayenko (2017), ‘General report: Scope and enforcement tools to ensure remuneration’, in: Silke von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, pp. 112-182 (report for the ALAI Congress 2015).

56 New Article 7(1a) and (1b) and Recital 22a of the Parliament Amendments 23 and 69. This proposal was supported by: Amendments 23 and 69 of the JURI Report, Amendment 57 of the Opinion of the Committee on the Internal Market and Consumer Protection (IMCO) of 14 June 2017, and Amendment 41 of the Opinion of the Committee on Industry, Research and Energy (ITRE) of 1 August 2017. According to the Parliament’s text, rightholders retain the right to opt out from the use of their works under this exception and limitation, like they otherwise would under an ECL.

57 Oleksandr Bulayenko (2016), ‘Permissibility of Non-Voluntary Collective Management of Copyright under EU Law: The Case of the French Law on Out-of-Commerce Books’, *JIPITEC*, Vol. 7, No. 1, pp. 57-58 and 64-65 (discussing the difference between a *priori* and a *posteriori* opt out).

58 As also seen in the *Google Books* case in the USA, courts have expressed hesitations in endorsing mechanisms similar to the ECL without explicit statutory provisions, Giancarlo Frosio (2011), ‘Google Books Rejected: Taking the Orphans to the Digital Public Library of Alexandria’, *Santa Clara Comp. and High Tech. L. J.*, Vol. 28, pp. 81-141.

59 Loi No. 2012-287 du 1er mars 2012 relative à l’exploitation numérique des livres indisponibles du XXe siècle. For analysis of the French mechanism for making available out-of-commerce works, Bulayenko (2016), *supra* 57, pp. 51-68; Jane Ginsburg (2015), ‘Fair Use for Free, or Permitted-but-Paid?’, *Berkeley Tech. L.J.*, Vol. 29, pp. 1425-1430; Franck Macrez (2012), ‘L’exploitation numérique des livres indisponibles : que reste-t-il du droit d’auteur ?’, *Recueil Dalloz*, Vol. 12, pp. 749-757.

60 With the Directive 2001/29/EC of the European Parliament

provides authors—not CMOs—with the right to authorise the reproduction and communication to the public of their works.⁶¹ In particular, the CJEU pointed at the fact that the French legislation *did not include a mechanism ensuring authors are actually and individually informed*.⁶² This requirement might actually render practical implementation of ECL very difficult—due to associated substantial transaction costs—if not impractical.⁶³ In addition, upholding this requirement would threaten the compatibility with EU law of existing ECL schemes.⁶⁴ In the aftermath of *Soulier*, the definition of sufficient information measures for informing rightholders about uses of their works become a bit of a quagmire.

- 22 Given the potentially disruptive effects of the above-mentioned finding of the *Soulier* case, it is advantageous for the digitisation of Europe’s cultural heritage that **the Directive Proposal does not require individualised publicity measures**.⁶⁵ It is desired to specifically mention the **sufficiency of general publicity measures** in the legislation for the avoidance of doubt. Amendment 30 adopted by

and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2000 OJ (L 167)10, Arts. 2(a) and 3(1).

- 61 Judgment in *C-301/15, Marc Soulier Sara Doke v Ministre de la Culture et de la Communication Premier ministre* (16 November 2016), ECLI:EU:C:2016:878, § 52. See also *Opinion of Advocate General Wathelet, C-301/15, Marc Soulier Sara Doke v Ministre de la Culture et de la Communication Premier ministre* (7 July 2016), ECLI:EU:C:2016:536, §§ 38-39 (discussing prior consent and exclusivity).
- 62 *C-301/15, ibid.*, §§ 38-43.
- 63 Valérie-Laure Benabou (2017), ‘Pourquoi l’arrêt Soulier et Doke dépasse le cas ReLire : le contrôle par la CJUE des modalités de l’autorisation préalable de l’auteur’, *Dalloz IP/IT*, Vol. 2, pp. 110-112; Caterina Sganga (2017), ‘The eloquent silence of Soulier and Doke and its critical implications for EU copyright law’, *Journal of Intellectual Property Law & Practice*, Vol. 12, No. 4, p. 330 (“the requirement to inform individually each and every author [...] undermines the basis of the balanced mechanism through which ECLs facilitate the market-efficient licensing of whole repertoires by decreasing transaction costs”); and Matej Gera (2017), ‘A tectonic shift in the European system of collective management of copyright? Possible effects of the Soulier & Doke decision’, *EIPR*, Vol. 39, No. 5, pp. 263-264 (“the costs of informing and ensuring that each author is informed and able to decide would be so high as to prevent any meaningful functioning of the schemes”).
- 64 Commission (2016), *supra* 20, Part 3/3, Annex 9E, pp.131-132 (noting that the requirement of individualised information goes against the currently existing national models in a number of Member States such as Denmark, Finland, Hungary, Poland, Sweden and the UK). See also Franck Macrez (2017), ‘«Soulier» et la résurgence de l’auteur’, *Recueil Dalloz*, Vol. 2, p. 86; Lucie Guibault (2015), ‘Cultural Heritage Online? Settle It in the Country of Origin of the Work’, *JIPITEC*, Vol. 6, No. 3, pp. 174-178.
- 65 Macrez (2017), *ibid.*, p. 87 and Franck Macrez (2017), *The French Case: From Orphan Books to Out-of-Print Works (and Vice-Versa)*, CEIPI Research Paper No. 2017-14, p. 7, available at: <<https://ssrn.com/abstract=3116783>>.

the European Parliament addresses this issue:

In order to ensure that the licensing mechanisms established for out-of-commerce works are relevant and function properly, that rightholders are adequately protected under those mechanisms, that licences are properly publicised and that legal clarity is ensured with regard to the representativeness of collective management organisations and the categorisation of works, Member States should foster sector-specific stakeholder dialogue.

- 23 In this regard, the proposed reform would require **general publicity measures** on the use of out-of-commerce works for concluding an effective ECL between CMOs and CHIs.⁶⁶ Some Member States already have different transparency/publicity procedures for encoding such information in national public registers.⁶⁷ The DSM Draft Directive would consolidate and harmonise them under EU law, according to the following principles:

Member States shall provide that appropriate publicity measures are taken regarding:

- (a) *the deeming of works or other subject-matter as out of commerce;*
- (b) *the licence, and in particular its application to unrepresented rightholders;*
- (c) *the possibility of rightholders to object, referred to in point (c) of paragraph 1;*

*including during a reasonable period of time before the works or other subject-matter are digitised, distributed, communicated to the public or made available.*⁶⁸

- 24 Article 8(2) of the DSM Draft Directive would also require Member States to ensure that “**information** that allows the identification of works” covered by licences is made accessible **in a single online portal**. This database is to be **established and managed by** the European Union Intellectual Property Office (**EUIPO**), building upon previous EUIPO’s successful implementation of the EU Orphan Works Database.⁶⁹

-
- 66 Commission (2016), *supra* 8, Arts. 7(3) and 9. See also Principle 2(2) of the Memorandum of Understanding, *supra* 11 (requiring also that the digital library projects are “widely publicised”).
- 67 Commission (2016), *supra* 20, Part 3/3, Annex 9E, p. 130.
- 68 Commission (2016), *supra* 8, Art. 7(3). Parliament’s Amendment 69 replaced “reasonable period of time” by “at least six months”.
- 69 EUIPO (2017), *supra* 30, p. 37 (Conclusions: “The replies to the survey indicate that there is broad satisfaction amongst users with the overall experience of using the Orphan Works Database”).

Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the possibility of rightholders to object referred to in Article 7(1)(c) are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.⁷⁰

- 25 Finally, the **stakeholder dialogue** set up according to Article 9 of the DSM Draft Directive would be intended, *inter alia*, to ensure the effectiveness of publicity measures to safeguard rightholders referred. Apparently, the stakeholder dialogue might further define publicity measures' substantive and procedural requirements.

E. Do Third-Country Works Need to Be Excluded?

- 26 Finally, the proposal deals with the **effect of the new ECL mechanism over non-EU nationals** by providing that: "Paragraphs 1, 2 and 3 shall not apply to the works or other subject-matter of third country nationals except where points (a) and (b) of paragraph 4 apply."⁷¹
- 27 Apparently, this means that the provisions on the use of out-of-commerce works by CHIs do not apply to non-EU nationals unless: (a) the works were first published or broadcast in a Member State; or (b) for cinematography and audiovisual work, the producer is headquartered or habitually resides in a Member State.⁷²
- 28 The rationale for the exclusion of works of third-country nationals from the ECL mechanism is unclear. The ECL, as it is envisaged in the DSM Draft Directive, is not designed to be an exception or limitation to exclusive rights, as also recognized by dominant doctrine.⁷³ While Recital 26 refers to "reasons of

international comity", this reference remains obscure.⁷⁴ If the mechanism is not an exception or limitation, the three-step test would not apply and there is no issue with regard to the compliance with respective international obligations.

- 29 However, if the mechanism is construed as an exception or limitation, then it would be permitted by the international copyright norms only if it complies with the three-step test.⁷⁵ A group of countries party to the copyright treaties cannot agree among themselves to apply a level of protection below the level of protection guaranteed by the treaties to works originating from those countries.⁷⁶ In any event, even in this latter scenario, which is, as mentioned, residual according to the dominant doctrinal position, Title III, Chapter 1 of the DSM Draft Directive would be compatible with the three-step-test, especially in light of a balanced approach to its interpretation.⁷⁷ First, the proposal does provide

and Access to Information', Report for the Committee on Culture, Science and Education – Parliamentary Assembly, Council of Europe, Strasbourg, October 2009; extended version published in *Intellectual Property Quarterly*, p. 1 (at 10); Bernt Hugenholtz and Ruth Okediji (2008), *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Final Report, March 2008, p. 19, available at <https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf>.

- 74 Commission (2016), *supra* 8, Recital 26 (referring specifically to "international comity"). Jørgen Blomqvist, 'International Comity . . . or Triple Error?', *The 1709 Blog*, 31 January 2017, available at: <https://groups.google.com/forum/#!msg/1709-copyright-blog/cxj_fP4XKWg/tdNJ750yAwAJ> (discussing—and criticizing—the way in which international comity has been safeguarded by noting that "if the intention is that the Directive should match the points of attachment of the international Conventions and Treaties, as is suggested by the reference to 'international comity'", it errs by being both too generous and too restrictive).
- 75 E.g., Berne Convention for the Protection of Literary and Artistic Works, Art. 9; Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 13; Directive 2001/29/EC, *supra* 60, Art. 5(5). On the understanding of this test, see Christophe Geiger, Daniel J. Gervais, and Martin R.F. Senfleben (2014), 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law', Vol. 29 No. 3, *American University International Law Review*, p. 581.
- 76 Berne Convention, *ibid.*, Art. 20 and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Art. 58.
- 77 Christophe Geiger, Jonathan Griffiths and Reto Hilty (2008), 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law', *EIPR*, Vol. 4, pp. 489-496 (noting that all three components of the test should be considered together in a "comprehensive overall assessment" considering the threats that excessive levels of copyright protection pose to, *inter alia*, public interests, notably in scientific progress and cultural, social, or economic development). See also Bernt Hugenholtz and Ruth Okediji (2012), *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Final Report, 6 March 2008, Executive summary, p. 3 (noting that "limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or

70 Commission (2016), *supra* 8, Art. 8(3).

71 Commission (2016), *supra* 8, Art. 7(5).

72 Commission (2016), *supra* 8, Art. 7(4)(a-b) and Recital 26 (clarifying this interpretation of the provision).

73 See Silke von Lewinski (2004), 'Mandatory Collective Administration of Exclusive Rights – A Case Study on Its Compatibility with International and EC Copyright Law', *e-Copyright Bulletin*, January-March 2004, available at: <portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf>; and Christophe Geiger (2007), 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society', *e-Copyright Bulletin*, January-March 2007, available at: <portal.unesco.org/culture/en/ev.php-URL_ID=34481&URL_DO=DO_TOPIC&URL_SECTION=201.html>; Christophe Geiger (2009), 'The Future of Copyright in Europe: Striking a Fair Balance between Protection

for a special case dealing only with out-of-commerce works and CHIs. Second, the ECL mechanism does not collide with ongoing exploitation, and opt-out would be available for potential future exploitation. Again, rightholders legitimate interests should not be unreasonably prejudiced because works licensed under ECL would be used under conditions actually agreed upon by a significant part of rightholders. If this is the case, however, it would apparently be **unnecessary to exempt third-country works** and other subject matter.⁷⁸

- 30 Especially for languages widely spoken outside Europe, such as English, French, Spanish and Portuguese, it might be difficult to establish the place of first publication and impractical to establish the nationality of authors. Furthermore, at the moment of the first publication of some of the works, several of the EU Member States belonged to countries that do not exist anymore, and whose territory extended beyond the current EU.⁷⁹ In turn, this would actually leave in place considerable transaction costs that prevent digitisation projects today and motivate the present reform.⁸⁰ All in all, the proposal might drop the prohibition of using works of non-EU nationals.⁸¹

F. Conclusions

- 31 Obviously, the European Union has a strong understanding of the social and economic value that could be produced by taking European cultural heritage to the digital network environment. EU policy makers and institutions have set a multiple year agenda to that end,⁸² now further promoted

potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test”.); Christophe Geiger, Daniel Gervais and Martin Senftleben, (2014), ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’, *American University International Law Review*, Vol. 29, No. 3, p. 581.

78 Blomqvist, *supra* 74.

79 For example, Estonia, Latvia and Lithuania were a part of the Union of Soviet Socialist Republics (USSR) and Croatia and Slovenia a part of Yugoslavia.

80 CENL, *supra* 27.

81 This change was also supported by Amendment 63 of the Opinion of the Committee on the Internal Market and Consumer Protection (IMCO) of the European Parliament of 14 June 2017.

82 See, e.g., European Commission (2006), Recommendation 2006/585/EC of 31 August 2006 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation [2006] OJ L237/28; i2010 European Digital Libraries Initiative (2008), High level Expert Group, Copyright Subgroup, Report on Digital Preservation, Orphan works and Out-of-Print Works Selected Implementation Issues (18 April 2008); European Commission (2009), Communication, Copyright in the Knowledge Economy, COM (2009) 532; European Commission (2010), Communication, A Digital Agenda

by the DSM Strategy. The DSM Draft Directive does envision, *inter alia*, a number of synergic actions to facilitate preservation and access to European cultural heritage. Overall, on the issue of out-of-commerce works, the DSM Draft Directive should positively contribute to improving cross-border online access to the cultural heritage in Europe as this paper has highlighted already. However, in conclusion, some further suggestions can be made to strengthen the proposal and bring Europe closer to Pico della Mirandola’s dream of global instantaneous access to knowledge and culture.

- The extension of the notion of “out-of-commerce works” to **works never intended for commercial use** and to works that have **never been in commerce**, as well as the possibility to determine the **out-of-commerce status of a collection of works as a whole** should be pursued.
- **Sufficiency of general publicity measures** should be plainly spelled out. The Directive Proposal does not require Member States to create mechanisms ensuring that rightholders are actually and individually informed of uses of out-of-commerce works. Instead, according to the proposal, general publicity measures would be sufficient for using out-of-commerce works. Hence, the proposal overcomes some of the outcomes of the CJEU’s *Soulier* decision to the advantage of cultural heritage institutions.
- **The scope of the search** to establish the out-of-commerce status of works should be more clearly defined, as this is one of the crucial elements for the fruitful use of the mechanism by cultural heritage institutions.
- **Representativeness of collective management organisations** should be improved by considering alternative solutions where there are no CMOs—and no CMO is likely to be established in the foreseeable future—broadly

for Europe, COM (2010) 245 final; European Commission (2010), Communication, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020; 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 L299/5 (enabling the use of orphan works after diligent search for public libraries digitisation projects); Europeana: Think Culture <<http://www.europeana.eu/portal/>>; Accessible Registries of Rights Information and Orphan Works [ARROW] <<https://joinup.ec.europa.eu/document/accessible-registries-rights-information-and-orphan-works-arrow>> (creating registries of rights information and orphan works). The CJEU seem to support such an approach, see Judgment in C-117/13, *Technische Universität Darmstadt v Eugen Ulmer*, ECLI:EU:C:2014:2196 (11 September 2014) (stating that European libraries may digitise books in their collection without permission from the rightholders with caveats).

representative of rightholders in the category of works and of the rights in some domains (e.g., audiovisual and photographic).

- European Parliament's Amendments offers Member States to provide a **cut-off date** for determining out-of-commerce status of works. While cut-off dates provide for a simple practical criterion, establishment of different cut-off dates for different categories of works in different Member States might lead to undesired consequences.
- Non-mandatory (**back-up**) **exception** for the use of out-of-commerce works when collective licensing mechanisms are not available could offer an alternative to cultural heritage institutions in some Member States. However, the voluntary nature of this exception might further fragment the puzzle of copyright legislation in the EU. Therefore, if a new exception is to be introduced, it would be strongly advisable to make this exception **mandatory**, rather than voluntary.
- Since the **non-application of the mechanism for the use of out-of-commerce works to third-country works** creates transaction costs for European cultural heritage institutions—and since it is not required by the relevant international norms—it is recommended to extend the scope of the mechanism to cover third-country works.

32 The full implementations of the proposed actions—possibly with amendments suggested in this paper—would be essential to European innovation and cultural cohesion. It is vital that the relevant institutions do not depart from this agenda in the path leading to final implementation, but rather strengthen it as far as possible.

Acknowledgements

The positions in this paper do not necessarily reflect the opinions of all scholars working at CEIPI. This is the fourth in a series of opinions issued by the CEIPI on the Digital Single Market Copyright reform. See Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio (2017), 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: the Unneeded (and Unwanted) Reform', *EIPR*, Vol. 39, No. 4, pp. 202-210 (CEIPI Research Paper No. 2016-01, available at: <<https://ssrn.com/abstract=2921334>>); Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko (2017), 'The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction', *EIPR*, Vol. 40, No. 1, pp. 4-15 (CEIPI Research Paper No. 2017-09, available at: <<https://ssrn.com/abstract=3053983>>);

and Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko (2018), *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects*, In-depth analysis requested by the European Parliament's Committee on Legal Affairs, available at: <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA\(2018\)604941_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA(2018)604941_EN.pdf)>; (2018), 'Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?', *IIC*, Vol. 49, No. 7, p. 814.