

Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of Commerce Works

Whereas:

(1) The scope of these principles are books and journals which have been published for the first time in the country where the Agreement is requested, and are to be digitised and made available by publicly accessible cultural institutions as contained within Art 5.2 (c) of the European Union Directive 2001/29/EC¹

(2) “Agreement” for the purpose of this document, means a written understanding that leads to a collective licensing scheme. This is without prejudice to individual agreements with the rightholders.

(3) For the purpose of this document “rightholders” refer to authors of literary and artistic works and publishers.

(4) Considering that the large-scale digitisation and making available of Europe's cultural heritage contained in the collections of publicly accessible cultural institutions is in the public interest as well as in the interest of the cultural and creative sector.

(5) Being aware that the creation of such “digital libraries” has to respect the moral rights of the authors, as well as the intellectual property rights of authors and their assignees.

(6) Recognising that the rightholders shall always have the first option to digitise and make available an out-of-commerce work.

(7) Recommending that the Agreement covers embedded images in literary works, whilst having regard to the fact that efficient electronic identification of images is not yet developed.

(8) Recommending that embedded images are dealt with within the same Agreement as the literary work in which they are contained by the collective management organisation for visual works or the collective management organisation which is mandated to represent visual works.

(9) Recognising that legislation might be required to create a legal basis to ensure that publicly accessible cultural institutions and collective management organisations benefit from legal certainty when, under an applicable presumption, the collective management organisations represent rightholders that have not transferred the management of their rights to them.

¹ 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

(10) Recommending that Member States, in keeping their international obligations, may give effect to the key principles mentioned below in accordance with their national legal mechanisms and collective licensing traditions.

(11) Calling on the European Commission, to the extent required to ensure legal certainty in a cross-border context, to consider the type of legislation to be enacted to ensure that publicly accessible cultural institutions and collective management organisations which enter into a licence in good faith applying these key principles are legally protected with regard to licensed uses of works of rightholders who have been presumed to be within the scope of the licence.

The undersigned participants to the Stakeholder Dialogue agree to the following guiding principles:

DEFINITION

For the purpose of the dialogue on out-of-commerce works, a work is out of commerce when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).

The method for the determination of commercial availability of a work depends on the specific availability of bibliographic data infrastructure and therefore should be agreed upon in the country of first publication of the work.

Principle No. 1 – Voluntary Agreements on Out-of-Commerce works

1. Agreements for the digitisation and making available of out-of-commerce works contained in publicly accessible cultural institutions, which are not for direct or indirect economic or commercial advantage, are to be negotiated on a voluntary basis amongst all relevant parties including authors and publishers ("contracting parties"). These contracting parties shall define the scope of the Agreement and applicable remuneration for rightholders, which should be defined by mutual consent.
2. The contracting parties shall agree on the type and number of works covered by the Agreement and on the fact that these works are out of commerce. The determination by the parties of whether a work is out of commerce or not shall be conducted according to the customary practices in the country of first publication of the work. Each Agreement shall stipulate the steps that have to be taken in order to verify whether a work is out of commerce.
3. Without prejudice to existing exceptions and limitations in the copyright legislations of the Member State in which the publicly accessible cultural institutions are located, each Agreement shall define commercial or noncommercial uses and shall specify which uses are authorised.

4. Each Agreement shall stipulate the author's right to claim authorship of the work, to acknowledge this authorship when known, and the author's right to object to any distortion, mutilation or other modification of his work. The author's right to object to other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation, shall also be safeguarded.

Principle No. 2 – Practical Implementation of Collective Agreements

1. Licences for works that are out of commerce will only be granted by collective management organisations in which a substantial number of authors and publishers affected by the Agreement are members, and appropriately represented in the key decision making bodies.

2. Each digital library project shall be widely publicised so that all stakeholders whose rights and interests might be affected can decide whether or not to participate in the project in full knowledge of its scope; and communication to rightholders shall be made sufficiently in advance of any scanning or use.

If the scope of the Agreement includes translations, a specific procedure should be undertaken in order to reach the rightholders in translated works.

3. It is recommended that represented rightholders are notified individually by rightholders organisations and collective management organisations.

4. For the purpose of such an Agreement, where a rightholder whose work was first published in a particular Member State has not transferred the management of his rights to a collective management organisation, the collective management organisation which manages rights of the same category in that Member State of first publication shall be presumed to manage the rights in respect of such work. In order to benefit from this presumption the collective management organisation shall make its best efforts to alert rightholders in question in accordance with information procedure methods agreed upon with organisations representing rightholders in the country where the collective management organisation is based. The rightholder organisations will commit to assist the collective management organisation in the work to alert authors and publishers.

5. Rightholders shall have the right to opt out of and to withdraw all or parts of their works from the licence scheme derived from any such Agreement.

Principle No. 3 – Cross Border Access to Digital Libraries

1. If the scope of an Agreement entered into pursuant to Principle No. 1(2) and No. 1(3) includes cross-border and/or commercial uses, the collective management organisation may limit its licence of works that are out-of-commerce to those of represented rightholders.

2. Where a licence between a collective management organisation and a publicly accessible cultural institution implementing an Agreement which includes in its scope cross-border and/or commercial uses, should rely on the presumption referred to in Principle No. 2(4), a specific procedure should be considered in order to reach the rightholders who are presumed to be represented and whose works are used frequently or intensively. It shall be a matter to be agreed between the parties concerned to decide if and when to set specific procedures and to define the relevant parameters and arrangements.

3. Subject to Principle No. 3(2), the presumption set out in Principle No. 2(4) shall also apply to acts of use of the work covered by the licence which occur in a Member State which is not the Member State in which the licence was agreed.

Brussels, 20 September 2011

Signatories:

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Association of European Research Libraries (LIBER)

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Conference of European National Librarians (CENL)

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European Bureau of Library, Information and Documentation Associations (EBLIDA)

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European Federation of Journalists (EFJ)

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European Publishers Council (EPC)

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European Writers' Council (EWC)

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European Visual Artists (EVA)

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Federation of European Publishers (FEP) 5

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International Association of Scientific, Technical & Medical Publishers (STM)

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International Federation of Reprographic Rights Organisations (IFRRO)

As witnessed by:

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Michel Barnier

Commissioner for Internal Market and Services