DIGITIZATION OF CULTURAL HERITAGE

Copyright guidelines

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THE CREATIVE ARCHIVES´ AND USERS´ NETWORK

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I. INTRO

A. THE SUBJECT OF DRAFTING OF A COPYRIGHT GUIDE, TAKING INTO ACCOUNT THE EUROPEAN LEGAL FRAMEWORK

Cultural institutions, museums and archives are becoming more and more involved with digitization projects in order to ensure the sustainable archiving of cultural objects and to provide the best possible access to them. The digitization of printed literature, old books and paintings is usually accompanied by a considerable financial and technical investment.

During this process, digital images are generated, which are stored in the institute's archives. Then, the digitized objects should be made available to the public in order to ensure the widest possible distribution. The distribution channels can vary; for example, the objects may be made available on a website with or without restrictions on participant numbers, sent out via e-mail, or shared with users via a hyperlink. Often the digitalized objects are provided with licenses - e.g. Creative Commons -, in order to prevent commercial exploitation by third parties. However, regarding copyright law, it is important to note that 'licensing' is only possible if there is a 'right by digitization'. Furthermore, public domain works are also affected by digitization projects. Those are works whose term has already expired.

It is important to note that, despite increasing harmonization at both an EU and an international level, copyright remains largely a matter for the individual nation states. There is, of course, a global regulatory network, especially concerning copyright law.

In many cases, it is necessary to eliminate any misunderstandings, highlighting problems and identifying areas where action can be taken to create greater legal clarity around the issue of 'rights'. Obviously, this is a difficult undertaking. A complex legal system, such as copyright law, which can be different in every state, and which has recently been transformed through digital change, needs to have guides developed that can be quickly understood, directed and acted upon by all parties.

Surveys in archival practice have shown that there is often a lack of knowledge, misinformation or other factors around matters relating to copyright. Once the underlying legal text has been wrongly interpreted, it is extremely easy for this misinformation and confusion to spread. It is also difficult to comply with the law if budgetary resources are lacking: rights holders must be sought and found, and license fees paid.

B. EXPLANATION, RELEVANCE AND STRUCTURE OF THE EXAMINATION STEPS

The individual examination steps are mainly based on the principles of copyright law. At this point, it should be stated that each case must be assessed individually, and finally, the national and international courts have to make individual case-by-case decisions. A clear line of demarcation cannot exist either within the context of questioning or between the individual examination steps.

The continuous examination of the individual steps is not possible without basic knowledge of copyright law. Therefore, the individual examination steps should not be carried out in isolation from the explanatory legal frameworks and texts.

This guideline paper aims to inform and support the legal and practical aspects of copyright law. It should give basic information on copyright, and provide a structure for the examination of copyright issues in digitization projects.

II. GUIDELINE SHEET

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III. CULTURAL ASSETS AS MATTERS OF COPYRIGHT

A. WHAT IS THE SUBJECT MATTER OF COPYRIGHT?

The first step is to examine whether there is any copyright protection at all. If there is no copyright protected 'work' present, the relevant 'object' may be copied, digitized, disseminated, publicly reproduced or used more generally. It is therefore important, as an initial step, to examine whether there is any copyright protection in place at all. The specific conditions for a copyrighted work depend in the first instance on the copyright laws of the individual country in which the work is being undertaken. The Berne Convention for the Protection of Literary and Artistic Works, adopted in Bern in 1886, has been joined by most countries of the world and provides a framework for enforcing the protection of works and the rights of the author.

Article 2 (1) Berne Convention

(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

However, even though the Court of Justice of the European Union (CJEU) has set out some prerequisites around copyright protection, national copyright law must be consulted in the first instance to find out whether a particular cultural asset can be protected. In tandem with this it is also necessary to take into account wider European requirements, such as requirements put in place by the CJEU.

Copyright protection for computer programs is governed by the EU Software-Directive[1], which requires proof that individual works are indeed the intellectual creation of the author. These requirements are relatively small according to European law and the concept of originality above all is essential for copyright protection.

✓ *What is protected by copyright?*

Currently, there is no general regulation in EU copyright law which specifically governs the originality requirement. However, the definition of originality in Article 1 of the Software-Directive has served as a model for the same provisions in the conceptual framework for other regulations concerning specific work categories.

> *Article 1 Software-Directive*
>
> *Object of protection*
>
> *…*
>
> *3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.*

If the object reaches the requested level of originality, it can be considered as a copyright protected work. Works without originality are not protected by copyright.

[1] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

> Copyright is liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation.

Gradually the standard of the vertical harmonization concerning computer programs, databases and photographs has been extended horizontally 'to all kinds of works' covered by EU copyright law.

The categories of works specifically protected are governed by national law and as it stands today, the prescriptions and requirements of eligibility for protected works in the national copyright laws are essentially open.

In principle, copyright protection does not depend on any formalities: the overarching requirement - in all jurisdictions - is that the act of creation and the need for originality are essential in order to gain protection.

✓ *Is registration required for copyright protection?*

> No, in this context, the Berne Convention has played a decisive role. The Convention grants protection independently of the fulfillment of any formalities. Since the Berne Convention has joined most countries, this has been a crucial function in all international copyright law.

Article 5 (2) Berne Convention (1971)

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

✓ *Does copyright protection require any kind of fixation?*

> In most of the European countries there is no fixation required in the sense that there does not have to be any material form of the expression of an idea.

✓ *Are ideas protected by copyright?*

> No, generally there's no copyright protection for mere ideas.

Creation usually follows the formation of a certain idea and no protection is guaranteed for ideas alone; the idea must first be transferred into a physical form. For example, in Austria, it is the 'form of thought that has taken shape', which must be at the same time perceptible to the external world. The Berne Convention has reserved the right to question whether a physical manifestation of the work must be present in order to protect works of literature and art. In the eyes of Austrian legislators, for example, this physical manifestation is a necessary requirement for copyright protection.

However, according to the principles of the Berne Convention, the copyright protection arises irrespective of whether the invented melody or the scientific text is written down on paper. Additionally, it must be an 'intellectual' creation which indicates a complex performance of the human mind. Intellectual creations are the results of a thought process. This is not necessarily restricted to long-drawn-out thoughts but also spontaneous creations of works, and these sparks of inspiration can enjoy copyright protection. As a work must be the result of a human thought process, creations of animals or machines cannot be protected by copyright.

Originality is a much-discussed element in the doctrine and has been subject to numerous decisions, causing other principles to emerge. In particular, the characteristic of individuality has emerged, not least as a result of the harmonization process, with regard to specifications of individual categories of work. There is, however, a lower limit for protection, especially since there is an unrestricted protection area.

B. DEFINITIONAL BOUNDARIES

1. Anonymous works

As already indicated, copyright protection has a time limit. The process of matching the end of the protection period with the time of death of the author fails in those cases in which the author is unknown or cannot be ascertained with sufficient certainty from the author designation. The Berne Convention already stipulates that protection for these anonymous works should begin to run from the date of publication. However, according to the Convention, the countries of the EU will not be required to protect anonymous or pseudonymous works if it is reasonable to presume that their author has been dead for fifty years.

> *Article 7 (3) Berne Convention (1971)*
>
> *In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.*

The EU has recently extended the duration to 70 years.

Article 1 (3) Term Directive

3. In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.

2. Official works

In the practice of cultural institutions, the question frequently arises as to whether official works are entirely excluded from copyright. For literary works, for example, the Berne Convention reserves the right to determine the protection of official texts.

Article 2 (4) Berne Convention (1971)

It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

3. Public Domain works

Intellectual creations that are no longer protected by intellectual property law - especially by copyright - can be used freely. The term 'Public Domain' that can be found in the Anglo-American legal system is similar, but not identical, to the definition for its use in European law. Thus, according to the prevailing opinion in continental Europe, it is not possible to dispense with copyright law in relation to Public Domain works. The

digitization of these types of works also raises the question in particular about whether this process re-creates its own copyright protection.[2]

4. Orphan works

Orphan works are works such as books, newspaper and magazine articles and films that are still protected by copyright, but whose authors or other right holders are not known or cannot be located. Orphan works are part of the collections currently held by European libraries, museums, archives, film and audio heritage institutions, and public service broadcasting organisations. The lack of data around their ownership has often been an obstacle in the process of digitization and making them available online.

The Directive 2012/28/EU[3] of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works sets out common rules on the digitization and online display of so-called orphan works.

Since the Directive contains exceptions and is particularly relevant in the field of cultural institutions, this is explained in the relevant chapter.

5. Out-of-commerce works

Sometimes the stock to be digitized will be out of print, or no longer available. So far, there are no regulations in European copyright law for out-of-commerce works. However, there is a proposal for a directive[4] which would provide appropriate rules. According to the proposal, 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.

[2] Chapter 3.
[3] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.
[4] COM (2016) 593 final, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.

6. Posthumous works

> *Art 4 Term Directive*
>
> *Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.*

7. Critical and scientific publications

> *Art 5 Term Directive*
>
> *Any person who, after the expiryof copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.*

IV. AUTHORSHIP

Authorship in general is not harmonized in EU copyright law. There are some regulations concerning specific areas such as computer programs or databases, which provide rules for licensing in employments, but generally, guidelines around authorship are provided by domestic national law.

✓ *Who is the author? Who is the right holder?*

In most EU countries, the author of a work is the natural person who created the work. The author does the intellectual work and owns the original copyright. This means that through the act of creation, only natural persons can acquire original copyright protection. This is why in most EU countries, legal entities themselves such as cultural heritage institutions are never granted original copyrights. However, if a photographer were to take pictures of cultural materials such as sculptures as an employee of a cultural institution, he would be the author of this new piece of work. As an author, he can license his works, either on an exclusive or non-exclusive basis. Creative Commons is an example of a license that is non-exclusive.

✓ *From whom do I need permission?*

Generally, cultural institutions need permission from all persons who are holding copyright and/or related rights to the work. If the present work is a derivative work, the consent of the original author as well as that of the editor is necessary.

Co-authorship is also possible. However, again, this depends on the national legal framework in place. In Austria, for example, on the one hand the prerequisite for co-authorship is that joint works do not have to be necessarily done at the same time. Thus, division of labor does not constitute an obstacle to the copyright process. On the other hand, it is recommended that contributions themselves constitute an original intellectual creation, going beyond mere suggestions or ancillaries, regardless of the extent or importance of the contribution.

Nonetheless, most of the contributions in the context of digitization processes at cultural institutions are a mere aid to wider activity. With this in mind, the nature and

intensity of the co-operation also depends on whether a fellow-worker of the assistants is to be answered in the affirmative. A mere auxiliary activity, such as the procurement, sifting and arranging of material, will usually lead to no co-authorship because of the absence of a creative contribution.

V. RIGHTS

This examination step is necessary to find out whether a particular operation affects the exclusive rights of the right holder. Exploitation rights are largely harmonized in the European Union and if one of these rights has been violated, penalties could be incurred. At this point the exclusive rights, which play a significant role in the context of digitization projects, are to be discussed and considered.

✓ *Is the intended use an exclusive right?*

> European copyright law is based on the principle that not all use should be prohibited. The copyright holder is assigned certain rights which, in principle, he may dispose of.

In addition to the exploitation rights for individual categories of works (for example computer programs, databases) as well as certain related rights, the InfoSoc-Directive provides explicit rules with regard to exclusive rights. For digitization processes, the right of reproduction, the right to communicate to the public and the right to distribute are particularly relevant. Exploitation rights have to be considered in a much broader context.

A. REPRODUCTION RIGHT

The most important right of exploitation in the case of digitization is the reproduction right. The Berne Convention already provides for an exclusive right to authorize reproduction.

Article 9 Berne Convention

Right of Reproduction:

1. Generally; 2. Possible exceptions; 3. Sound and visual recordings

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

The InfoSoc-Directive provides for a right for all categories of works to approve or prohibit duplication.

Article 2 InfoSoc Directive

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

If, for example, images are scanned, texts are digitized or uploaded, or other copyrighted works are downloaded, this basically constitutes an interference with the reproduction right. It is irrelevant whether the copy of the work is permanent or merely fleeting. The number of duplicates is also irrelevant. The creation of the first copy requires the consent of the copyright owner. Even the copying of parts of a work is prohibited without the consent of the author.

> The creation of a digital copy of a copyrighted work in principle is a breach of the reproduction right.

The holders of related rights are also prohibited from copying their works. Therefore, copying of photographs or protected databases is permitted only with the consent of the right holder.

B. RIGHT OF COMMUNICATION TO THE PUBLIC

If digital copies are to be made available on the internet, this also affects the exploitation rights. Even if objects of the cultural sphere were legally digitized, i.e. reproduced, this does not necessarily mean that the cultural objects can be made available to the public. The right of public communication is particularly relevant in this field.

Article 3 (1) InfoSoc Directive

Right of communication to the public of works and right of making available to the public other subject-matter

> *1. Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*

The right of communication to the public includes the making available right which regulates the right of interactive demand.

1. Making available right

Legal protection does not begin with the actual retrieval of a work or service.

> *Recital 23 InfoSoc Directive*
>
> *This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.*

2. Jurisdictional line of the ECJ

The European Supreme Court has, in a series of decisions, dealt with the right of 'communication to the public', which has qualified it as an autonomous concept of European Union law and, as a result, has drawn up criteria for its assessment by recourse to previous decisions, which, of course, affects individual national legal situations.

As the CJEU held, the concept of 'communication to the public' includes two cumulative criteria, namely, an 'act of communication' of a work and the communication of that work to a 'public'. The Court has, moreover, specified that the concept of 'communication to the public' requires an individual assessment. Thus, even in the case of digitization projects by cultural institutions, each act of exploitation must be assessed separately. A cultural institution makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give users access to a protected work. In doing this the users, without the intervention of the cultural institution, would not, in principle, be able to enjoy the broadcast work.

The concept of the 'public' is an essential one, which has manifested itself - in a different form - in national copyright law. The CJEU has specified that the concept of the 'public' refers to an indeterminate number of potential viewers, implying a fairly large number of people.

✓ *What does public mean?*

⇒ *'Public' refers to an indeterminate number of potential viewers, implying a fairly large number of people.*

C. DISTRIBUTION RIGHT

> *Recital 22 InfoSoc-Directive*
>
> *The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.*

✓ *Does an exhaustion-of-distribution doctrine exist in EU law?*

> Doctrine of exhaustion of distribution right
>
> The CJEU found that for the distribution right to be exhausted, two conditions must be fulfilled: first, the original of a work or copies thereof must have been placed on the market by the right holder or with his consent and, second, they must have been placed on the market in the European Union.

D. RIGHTS BY DIGITIZING

Apart from the rights already mentioned, which must be taken into account throughout the digitization process, it is necessary to examine whether rights are created during the digitization act itself. The question here is whether cultural institutions participating in digitization projects gain specific rights through the digitization activity. On the one hand, the creation of rights to digitized objects can lead to the formation of license agreements (for example, Creative Commons) on further uses. On the other hand, other owners who may have rights through digitization must also be taken into account. Some institutions are concerned that unrestricted reproduction and digitization of the works in their collections would be a loss of an important source of income; this is a compelling argument when set against the backdrop of the financial crisis and the fragmentation of the public funding to cultural institutions.[5]

✓ *Do cultural institutions have rights to their digitized objects?*

This question, too, of course depends heavily on copyright law in the individual nations. However from the European copyright framework, several conclusions can be drawn. When making digital copies of a two-dimensional (digital) scan, taking a photograph of a work of art - for instance a statue - or typing an analogous text into a data processing program, the reproduction right, as already stated, is affected, but issues around other rights can also arise. This chapter is intended to deal with the unique problem around the possible protection of copyright and/or related rights.

1. Photographs of 3D objects

As already stated, there are two elements to the protection of photographs. On the one hand, there is protection by copyright; on the other hand, protection can be provided - if the prerequisites of a (copyrighted) work are not provided – by the

[5] *Margoni*, The digitisation of cultural heritage: originality, derivative works and (non) original photographs, 3; which has dealt extensively with this scientific topic in this publication.

performance of a recording as a related right. It should be noted here that three-dimensional copyright-protected work can manifest in an image, but the image itself does not necessarily have to be a copyright protected work. As already explained, copyright protection requires a certain minimum degree of originality, according to current European standards. This also applies to photographs of three-dimensional works of art. When photographing three-dimensional objects, the photographer can use a number of creative methods to reflect the originality of the photographer's work, for example lighting, angles, perspective and positioning of the camera.

✓ *Does taking a photograph of a three-dimensional object create a new (copy)right?*

> Provided the photography is original, copyright protection can be assumed and aspects like lighting, angles, perspective or the positioning of the camera can be used to reflect originality. These aspects can be protected by copyright. In addition, protection may be provided as a related right, if this is considered in domestic national law.

2. Digital scans of 2D-objects

When digitizing two-dimensional analog templates (e.g. texts, images, graphics on paper), the design margin is less than when digitizing three-dimensional originals. In this way, it can usually be assumed that no original works are produced.

✓ *Is a new right created by scanning books, texts or images?*

> Copyright protection will normally be ruled due to lack of originality. Only technical reproductions are not protected by copyright. Protection may be provided as a related right, if this is considered in domestic national law.

3. Adaption of existing (public domain) works

A protection as a derivative work is also possible, if the work itself represents an original creative achievement.

Art 2 (3) Berne Convention

Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

Advice! In the case of the use of derivative works, which interfere with an exclusive exploitation right, it is necessary to gain the consent of the original author as well as that of the editor.

VI. EXCEPTIONS AND LIMITATIONS

The exclusive exploitation rights do not apply without restriction. As defined by European legislation in Recital 31 InfoSoc Directive, a fair balance must be safeguarded.

> *Recital 31 InfoSoc Directive*
>
> *A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.*

✓ *Is there a possibility of using a copyright-protected work without permission of the right holder?*

Yes, there are possibilities to use copyright-protected cultural material without the consent of the right holder. The European directives provide exceptions and limitations for certain areas.

A. INFOSOC DIRECTIVE

As already mentioned, both the reproduction right and the making available right are harmonized in the InfoSoc Directive. Both rights are affected in digitization processes. There are exceptions for both rights outlined in an exhaustive list in the directive.

> *Recital 32 InfoSoc Directive*
>
> *This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.*

⇒ *Advice! All the exceptions and limitations listed in the InfoSoc Directive in Art 5, besides temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process, are discretionary. Member states can decide themselves to establish which exceptions or limitation to allow or deny.*

> *Recital 34 InfoSoc Directive*
>
> *Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by*

people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

Recital 40 InfoSoc Directive

Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

1. Exception for digitization

Art 5 (2) InfoSoc Directive

Member States may provide for exceptions or limitations to the ***reproduction right*** *provided for the following cases:*

(c) in respect of specific ***acts of reproduction*** *made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for* ***direct or indirect economic or commercial advantage****;*

2. Exception for making available

> *Art 5 (3) InfoSoc Directive*
>
> *Member States may provide for exceptions or limitations to the **rights provided for in Articles 2 and 3** in the following cases:*
>
> *(n) use by **communication or making available**, for the purpose of **research** or **private study**, to **individual members of the public** by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their **collections**;*

B. ORPHAN-WORKS DIRECTIVE

In EU copyright law there is a directive which deals specifically with orphan works. As noted by the legislator, publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the member states, are engaged in large-scale digitization of their collections or archives in order to create European Digital Libraries. They contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass digitization of printed materials and for search and indexing enhance the research value of the libraries' collections. Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics that would otherwise have to manage with more traditional and analogue search methods.

✓ *What is an orphan work*

> A work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with Article 3.

Where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram may be used in accordance with this Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in Article 1(1) to carry out the acts of reproduction and making available to the public covered respectively by Articles 2 and 3 of Directive 2001/29/EC.

✓ *Which works does the Orphan Works Directive apply to?*

Orphan works are

- works that are published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;
- cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and
- cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

The Orphan Works Directive also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6. Member States may limit the application of this paragraph to works and phonograms which have been deposited with those organisations before 29 October 2014.

And the Orphan Works Directive shall also apply to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.

✓ *Which are the privileged institutions?*

⇒ *publicly-accessible libraries*

⇒ *educational establishments*

⇒ *museums*

⇒ *archives*

⇒ *film or audio heritage institutions*

⇒ *public-service broadcasting organisations*

that are established in the Member States, in order to achieve aims related to their public-interest missions.

✓ *What is a diligent search?*

> 1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.
>
> 2. The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State, in consultation with right holders and users, and shall include at least the relevant sources listed in the Annex.
>
> 3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.
>
> In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the right holder is established.

4. If there is evidence to suggest that relevant information on right holders is to be found in other countries, sources of information available in those other countries shall also be consulted.

5. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:

(a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;

(b) the use that the organisations make of orphan works in accordance with this Directive;

(c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;

(d) the relevant contact information of the organisation concerned.

6. Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market ('the Office') in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

✓ *What are the permitted uses of an orphan work?*

Permitted uses of orphan works

1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:

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(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

3. Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of identified authors and other rightholders in any use of an orphan work.

4. This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public- interest missions, particularly in respect of public-private partnership agreements.

5. Member States shall provide that a fair compensation is due to rightholders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made by the organisations referred to in Article 1(1) of such works and other protected subject-matter in accordance with paragraph 1 of this Article. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established.

VII. TERM OF PROTECTION

A. GENERAL REMARKS

Article 7 Berne Convention

Term of Protection:

1. Generally; 2. For cinematographic works; 3. For anonymous and pseudonymous works;

4. For photographic works and works of applied art; 5. Starting date of computation;

6. Longer terms; 7. Shorter terms; 8. Applicable law; "comparison" of terms

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous

works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Article 1 (1) Term Directive

The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author

and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.

B. CO-AUTHORSHIP

Article 1 (2) Term Directive

In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.

C. ANONYMOUS AND PSEUDONYMOUS WORKS

Article 1 (3) Term Directive

In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.

D. POSTHUMOUS WORKS

Article 4 Term Directive

Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection

of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

E. CRITICAL AND SCIENTIFIC PUBLICATIONS

Article 5 Term Directive

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.

VIII. CONCLUSIONS AND RECOMMENDATIONS

The digitization of the European cultural heritage is one of the main objectives of the European Union. In practice, it has often been shown that there are uncertainties around copyright law and its applications. This guide is intended to give an overview of the individual steps that should be taken during the process of digitizing cultural objects, while pointing out the cornerstones of the current European copyright law. Domestic national copyright laws vary considerably between member states of the EU. Despite the fact that there are two different legal systems in Europe (case law and civil law) a European copyright framework has been developed.

Cultural heritage institutions first have to figure out whether there is any copyright protection or protection by related rights. It is recommended, if in doubt, to consider copyright protection in the first instance. If the work is already into the public domain which means that the term for protection has already expired, the objects can be reproduced, digitized or made available for the public even for commercial purpose.

The duration of copyright protection is 70 years post mortem auctoris. In the case of joint authorship, the term is calculated from the death of the last surviving author. In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public.

In the EU, generally the person who created the work is the author and the original right holder. However, this issue is essentially dependent on the national nature of the copyright system. Whether an employer obtains rights to a work created by an employee in fulfillment of his obligation is decided either by the national law or by the contractual agreement.

Apart from the moral rights, which are not harmonized in the EU, the right of reproduction, the making available right and the right of distribution are eligible as exploitation rights. In particular, digitization, even of personal collections, constitutes an interference with the reproduction right.

Another focus in the digitization debate concerns the idea that rights can arise as a result of the digitization act itself. In the case of photography of three-dimensional

works, copyright protection will arise (in addition to protection as related right on photography where it is provided in national law). Mere technical reproductions, e.g. scans of books, will not meet the required level of originality. Protection may be provided as a related right, if this is considered in domestic national law. Protection as a derivative work is also possible, if the work itself represents an original achievement.

There are some specific exceptions in EU copyright law for the purpose of digitization of cultural heritage. For example, the InfoSoc Directive provides an exception for the reproduction right in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage. Although this exemption is optional, it has been implemented in all member states, with the exception of the Netherlands, where this it has only been part implemented. Furthermore, there is an exception for orphan works where they are made available to the public and reproduced for the purposes of digitization, making available, indexing, and cataloguing, preservation or restoration.

IX. PRACTICAL INPUT

A. CASE 1

The managing director X of a cultural institution C has the idea to create a database in which digitized postcards are archived, edited and provided with metadata. The postcards are from the 1970s. They contain photographs of buildings on the front as well as personal characteristics such as texts, names and addresses. Employee A of the institution, who scans the corresponding postcards, is commissioned for digitization and preservation. Employee B takes over the integration of the digitized postcards, the systematization and the archiving with metadata.

What are the copyright implications?

Based on the examination scheme of the guidelines, the following structure is recommended for the clarification of the copyright aspects.

1. Subject matter/work

First of all it must be established what level of protection each of the objects can be afforded. In the case of the absence of a copyrighted subject-matter in the following list, a further examination is unnecessary. The object can thus be used from a copyright perspective. However, if there is a protected subject of copyright, it is necessary to proceed according to the case review scheme.

a	*idea*	✗	generally not protected by copyright (see Chapter III.A.)

b	*postcards* - *photographs* - *buildings* - *text*	 ✓ ✓ ✓	 protected by copyright (possible protection as a related right) work of architecture/plans, models, drawings, views and usage concepts can be protected too can be protected as literature work
c	*scans/digitized objects*	✗	when scanning two-dimensional objects, as a rule, no original service can be assumed (Chapter V.D.)
d	*database*	✓	databases are protected by both copyright (originality) and neighboring law
e	*metadata*	✓	The text for metadata may be protected by copyright (In addition, they can be an indication of the individual character of databases)

2. Author/right holder

a	*postcards* - *photographs* - *buildings*	 ✓ ✓	 photographer/manufacturer of the photograph architect

	- *text*	✓	writer of the text
b	*database*	✓	database author (employee B) as well as database manufacturer as right holder (cultural institution C/managing director X)
c	*metadata*	✓	creator

3. Rights/uses

a	*photographs* - *scanning* - *inserting into database*	 ✓ ✓	 reproduction right reproduction right

4. Exceptions/limitations

a	*photographs* - *scanning* - *inserting into database*	Art 5 (2) c InfoSocD	'specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage' ➔ implementation in national law

B. CASE 2

The cultural institution A is the owner of historical biographies of renowned artists of the Victorian era. The books are still copyrighted. Therefore, the cultural institution A has granted the publisher permission to publish the digitized books on the Internet. The cultural institution B has no authority to do so. However, B links to the website of A. This is done for the benefit of the users, as the website of the B does not include any advertising, as it happens on the website of A.

Is this compatible with copyright law?

1. Subject matter/work

a	*books*	✓	

2. Author/right holder

a	authors of books	✓	copyright owner
b	publisher	✓	right holder
c	cultural institution A	✓	right holder
d	cultural Institution B	✗	no right holder

3. Rights/uses

a	*publication on website A*	✓	Art 3 InfoSocD making available for public on the internet
b	*publication on website B*	✓	Art 3 InfoSocD hyperlinking

4. Exceptions/limitations

a	*publication on website A*	×	Art 5 InfoSocD making available on website A
b	*publication on website B*	×	Art 5 InfoSocD hyperlinking on website B

5. License

a	*publication on website A*	✓	cultural institution A has permission
b	*publication on website B*	×	cultural institution has no permission

C. CASE 3

On a website, a virtual collection of historical pictures is operated with precise location, dating and tagging. The pictures are uploaded by private persons via the website of the virtual collection, specifying the place and time of the recording. These images are, in turn, made commercially publicly available on the website with permission of the private persons as the copyright owners. For this purpose, the virtual collection uses a topographic map, which it takes from the company X's website. There is no permission of the company X to use the topographic map.

Is this allowed by copyright?

1. Subject matter/work

a	*historical pictures*	✓	photographs
b	virtual collection	✓	database
c	topographic map	✓	maps can be protected by copyright as well

2. Author/right holder

a	*historical pictures*	✓	private person for each photograph
b	virtual collection	✓	copyright owner/author of database

			database manufacturer as right holder (related right)
c	topographic map	✓	creator of map company X as database manufacturer (related right -> *substantial investment?)*

3. Rights/uses

a	uploading/copying by private persons	✓	Art 2 InfoSocD reproduction right
b	making publicly available on the website	✓	Art 3 InfoSocD making available right
c	using the topographic map	✓	Art 2 and 3 InfoSocD reproduction and making available right

4. Exceptions/limitations

a	making pictures publicly available on the website	✗	Art 5 InfoSocD no exception for commercial use
b	using the topographic map	✗	Art 5 InfoSocD

			no exception for reproduction and making available right

5. License

a	uploading/copying pictures by private persons	✓	private persons as copyright owners gave their permission
b	making pictures publicly available on the website	✓	private persons as copyright owners gave their permission
c	using the topographic map	✗	cultural institution has no permission