

# **Copyright in the Digital Single Market & Cultural Heritage Institutions**

Paul Keller, DCHE group meeting, 14-11-2017 Luxembourg

# Mandate:

In line with the Europeana Advocacy Framework, Europeana advocates for changes to the DSM proposal based on a mandate approved by the Europeana Network.

Some member organisations of the Europeana Network have opted not to subscribe to the position expressed in this document, partly or as a whole. The Bibliotheque Nationale de France and the Spanish Ministry of Education, Culture and Sport have noted their dissent with the mandate.

The Federation of European Publishers and The International Federation of Reproduction Rights Organisations have noted that the some of the positions expressed defined in the mandate do not reflect their own position.



## TITLE III MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

### CHAPTER 1 Out-of-commerce works

#### Article 7

#### *Use of out-of-commerce works by cultural heritage institutions*

1. 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, provided that:
  - (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.
2. 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.

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 affect the out-of-commerce status of a collection as a

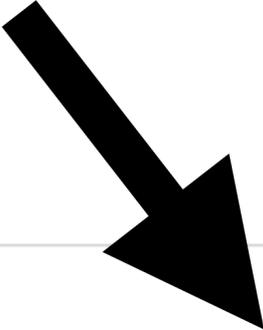


# Preservation (digitization)

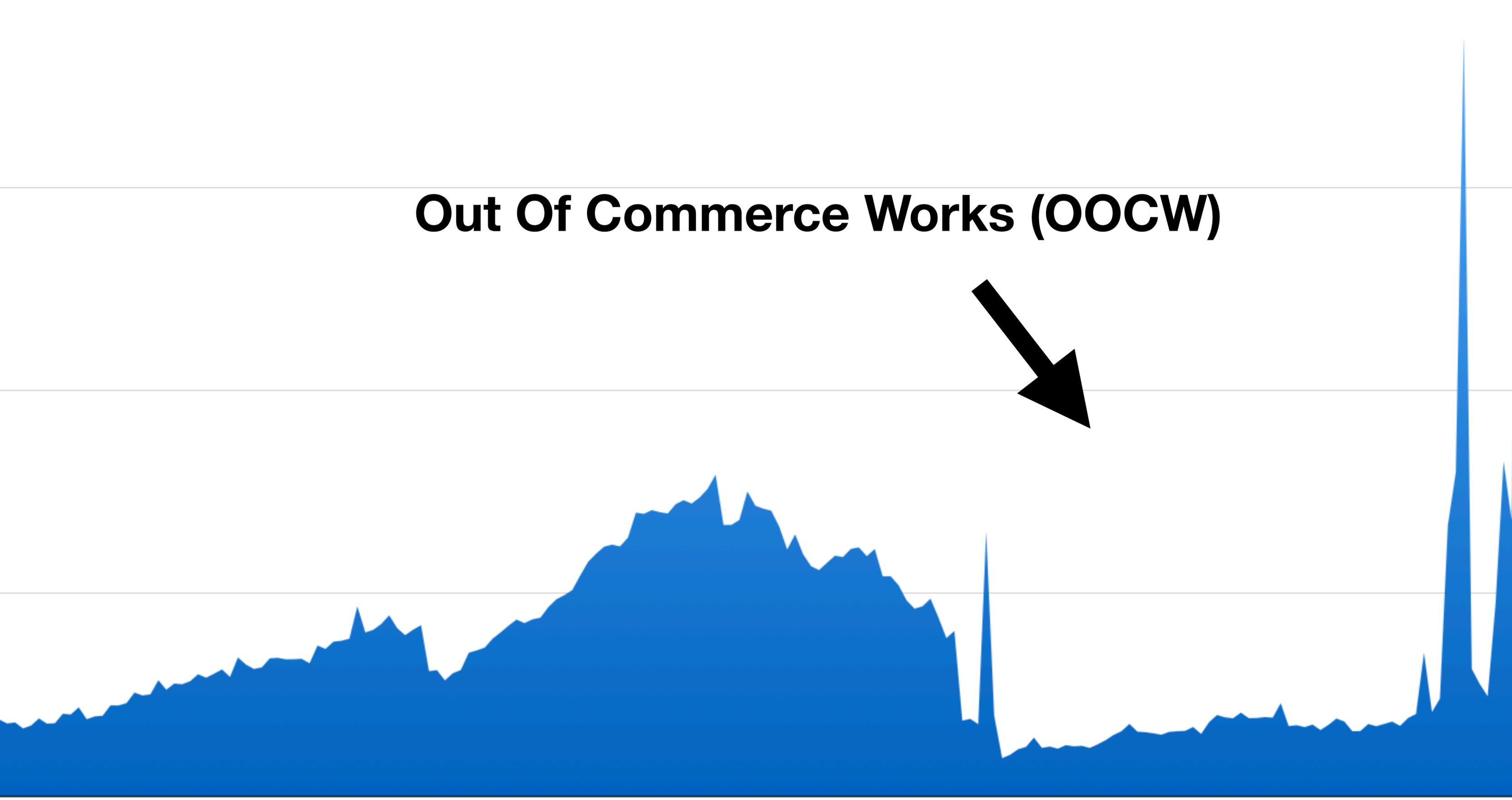
- We very much welcome the commissions proposal for a new mandatory exception that would allow cultural heritage institutions to make reproductions for preservation purposes, but we think limiting it to preservation alone is too narrow.
- From our perspective such an exception should allow all internal reproductions that cultural heritage institutions undertake as part of their public interest mission.
- At the very minimum it must explicitly include digitisation and allow the use of third party service providers.



# Out Of Commerce Works (OOCW)



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# Access to out of commerce works

- We very much welcome the fact that the commission has chosen to introduce the issue of access to out of commerce works in the scope of the directive proposal.
- We are however concerned that that the mechanism proposed by the Commission will have limited practical utility as it is unnecessary cumbersome.
- We are also concerned that the ECL based mechanism proposed by the commission will not provide a comprehensive solution that works across all sectors and types of works



# A comprehensive solution for OOCW

- In order for the directive to provide a comprehensive solution to the OOCW issue we propose to add a fall back mechanism in the form of an exception that allows cultural heritage institutions to make OOCW available
- Extended collective licensing should remain the primary mechanism for making OOCWs available. In sectors or for types of works where collective licensing does not provide a solution the an exception should provide a secondary mechanism.



# Fall-back mechanism

- The application of the exception should be determined by the member states in consultation with stakeholders.
- The exception should have the same beneficiaries and allow the same type of uses as the licensing mechanism proposed by the Commission
- The exception should be subject to the same opt out and publicity requirements as the the licensing mechanism proposed by the Commission



**Where are we now?**



# Parliament

- **Digitization:** The IMCO, ITRE and CULT opinions all contain provisions that would expand the scope of the preservation exception, in line with our position.
- **OOCW:** The ITRE and IMCO opinions and the JURI draft report have taken up the idea of a fall back exception.
- By contrast the opinions adopted so far contain only minimal usability improvements for the ECL mechanism



# Council

- **Digitization:** The recent compromise proposal by the Estonian presidency does not address our concerns
- **OOCW:** We appreciate the fact that the recent compromise proposal contains a number of substantial improvements that would make the ECL mechanisms more usable.
- The council version still lacks a fall back exception and will only provide partial solution to the problem of OOCW



# Council - Article 9a

- We welcome the addition of the new article 9a which would provide legal certainty for existing domestic ECL arrangements.
- From our perspective the need to provide legal certainty for domestic ECL arrangements does not take away from the need to provide a comprehensive EU wide solution for access to Out of Commerce works.



**We need your support**



# A solution for the whole cultural heritage sector

- The DSM directive needs to support the transformation of the whole public cultural heritage sector from analogue to digital. Both with regards to digitisation (Art.5) and making available of out of commerce works (Art.7)
- Unlike in other areas (such as education) **the interplay between licenses and exceptions is not a zero sum game here**. We observe real market failures that have traditionally justified exceptions.



**Thank you!**  
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