



Economic and Social Impact of the Public Domain:

EU Cultural Institutions and the PSI Directive

Client:	European Commission
Project Officer:	Juan Pelegrin
Author:	Rob Davies – MDR Partners
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The project team consists of:

Rob Davies, MDR Partners (UK)

Martin Katuscak, Slovak National Library

Luiss Guido Carli University, Faculty of Law (Italy):

Emanuela Arezzo

Gustavo Ghidini

Rufus Pollock, Mead Fellow in Economics at Emmanuel College, Cambridge (UK)

Rightscom Limited (UK):

Mark Isherwood

Hugh Look

Sue Sparks

Tom Rivers, Rivers Consultancy (UK)

Paul Stepan, Austrian Society for Cultural Economics and Policy Studies (Austria)

Paul Torremans, University of Nottingham, Faculty of Law (UK)

Mikko Välimäki, Turre Legal (Finland)

Contents

1	<i>Executive Summary</i>	5
1.1	Methodology	5
1.2	Key findings	5
1.3	Conclusions	7
2	<i>Introduction and terms of reference</i>	9
3	<i>Report structure and study methodology</i>	11
3.1	Structure	11
3.2	Study methodology	12
4	<i>Summary of survey findings</i>	14
4.1	Levels of awareness of the Directive	15
4.2	Costs and benefits	15
4.3	Pricing and charging	18
4.4	Transparency of charges	21
4.5	Purposes of charging	22
4.6	Volume of transactions	22
4.7	Level of income	23
4.8	Number of staff	27
4.9	Licensing	27
4.10	IPR management	28
4.11	Discovery of cultural information	31
4.12	Responses from re-users	32
5	<i>Important contextual issues raised during the study</i>	33
5.1	The public domain	33
5.2	Public-Private Partnerships	35
5.3	The cultural economy	39
6	<i>Other issues raised by the study</i>	41
6.1	Professional principles	41
6.2	The public task	42
6.3	The status of archives	44
7	<i>Conclusions</i>	45

<i>Annex 1: Case Studies</i>	<i>50</i>
<i>Annex 2: HLEG-DL Sub-group</i>	<i>55</i>
<i>Annex 3: List of survey respondents</i>	<i>59</i>
<i>Annex 4: List of face-to-face interviews</i>	<i>60</i>
<i>Annex 5: References</i>	<i>61</i>

1 *Executive Summary*

This study relates solely to Work Package 4 – EU Cultural Institutions and the Public Sector Information (PSI) Directive¹ of the Public Domain Value Study. It is focused on the readiness and appropriateness of Europe’s cultural institutions to adopt the principles and provisions of the Directive on PSI Re-use and to be brought within its formal scope.

1.1 Methodology

For this study, a questionnaire was initially e-mailed to a wide selection of cultural institutions, mainly at national level. There were 25 respondents, followed up by 9 telephone interviews and eleven personal interviews with key staff of major libraries, archives and museums in four major cities: Berlin, London, Paris and Prague. A separate questionnaire was also compiled, targeted to “demand-side” organisations and their associations: the response rate for this was very low, but has been followed up subsequently by further telephone interviews and a case study. These are presented as three case studies in Annex 1 to exemplify approaches being taken by a Member State, a cultural institution and a body representing re-users of cultural information, respectively.

1.2 Key findings

Whilst there is little doubt that PSI held by the cultural sector has a significant potential value for re-users, **the advantages** of including **cultural heritage institutions within the scope of the Directive** are currently **difficult to assess** and require further investigation over time.

Given the nature of the **cultural heritage institutions** and their collections, an **extension of the scope** of the Directive would be **perceived to have practical and financial disadvantages**. These **disadvantages** relate to the **administrative infrastructure and associated costs** needed to **manage requests** of their large holdings, many of which are subject to third party copyright (with the possibility of diverting resources from other activities), and other cost issues such as the **licensing of third party rights** or the **effect** on existing **Public Private Partnerships (PPP)**.

¹ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

Cultural institutions are widely committed to **providing free access to end users** (general public, scholars and researchers). However, cultural institutions are inclined to **regard commercial re-use** as a separate matter for which they should be reimbursed and in some cases as a potential significant income generating source. **76% of respondents** in the report offer **free access to their content** for end users, while the remaining **24% make some kind of charge** for accessing at least some of their content. It should be noted that **32% of respondents charge for licences to re-use content**, showing a tendency among some cultural bodies to distinguish between access and (commercial) re-use in their charging policies.

Reported **balances of income over cost** from **enabling re-use** are **mainly small or negative**. **Income** is mainly intended to **support essential statutory costs** and **some innovation**, in the face of restricted budgetary provision. **Image libraries** are probably the current **most widespread** form of **commercial activity** undertaken by cultural institutions. Although this area of activity cannot be characterised as a big business, the **potential loss** of these **revenues** and the **probable absence of budgetary compensation** remains a **fear** for many large cultural institutions.

The **current exclusion** of content held by **archives in particular**, which is clearly PSI in its most central meaning, from the scope of the Directive, on the grounds that it is held by a cultural institution, appears to **pose a risk that some valuable PSI might not be made available for re-use**. A very large amount of digital content is held by cultural institutions but is not easily available for re-use. The work of initiatives such as **Europeana** is drawing attention to the need for **effective measures to “unlock” it**, making it **freely available as part of the public domain or on a licensed basis**.

There is a **relatively common** – but not universal - **understanding** among cultural institutions of the central meaning of the term **“public domain”** and of works that come within it. This is articulated as meaning those works which are not subject to copyright protection. Proportions of collections considered to be in the public domain vary considerably and range from 10% to 50% to 90%.

Many **cultural institutions** have embarked upon **major digitisation efforts** in order to make use of the **opportunities the new digital environment offers**. Funds for digitisation and availability of cultural content in Member States are in short supply. **Public Private Partnerships (“PPP”)** have therefore **come into play** as an alternative approach. While these arrangements have enabled a considerable amount of material to be made available on-line, some major PPP,

e.g. those for “mass digitisation” have the potential to restrict access and re-use by imposing specific re-use conditions on the cultural institutions involved and to that extent to “privatise” public domain content in the digital environment.

1.3 Conclusions

- The **benefits** for including **cultural heritage institutions** under the terms of the Directive are **modest** at current levels of activity;
- Many **cultural institutions** are concerned that a consequence of **coming within the scope of the Directive** will **impose higher costs** on a relatively small income base;
- The **costs of licensing** or **enabling re-use** appear in many cases to **exceed the income generated** raising the question whether **free access would provide greater economic value and stimulate more re-use**;
- **Loss of revenues** relating to image libraries and/or other sources of income combined with a **probable absence of budgetary compensation** remains a **fear for many cultural institutions**;
- The **provisions** of the Directive regarding **transparency of pricing** and **anti-competitive practices** are **not as yet uniformly understood** or **adhered to** among European cultural institutions;
- Should **cultural institutions be brought within the scope of the Directive** there may be grounds **for concern that sustainable PPPs**, the development of which is a potentially important strand of EC-supported policy toward digitisation in the cultural sector, would need **to rely quite heavily on the need to incentivise private sector partners by exclusive deals**;
- The **re-use licensing** requirements of the Directive represent a **major hurdle** because the number of cultural institutions which run extensive content licensing services is **relatively small with staff numbers** usually between 1-5 FTEs;

Cultural Institutions and the PSI Directive

- The **potential benefits** of coming within the scope of the Directive have **not yet been articulated** to most decision makers in the cultural field;
- There is a **case for increasing the economic value gained from cultural information** through activities such as **greater commercial re-use**. Further work to determine in more empirical terms the possible outcome of such a step could well be justified;
- **Guidance** will be required as to **whether image libraries** or other services provided by **cultural institutions fall within or outside the public task**;
- **Guidance on specific types of PSI held by cultural institutions** might be beneficial in **improving the current blanket provision** switching somewhat from institutions to **types of content**;
- The **perceived practical and financial disadvantages** for cultural institutions with the **extension of the scope** of the Directive to the cultural sector **should not be allowed in the longer term to outweigh the possible advantages to the wider economy, industry and society**. Therefore this **situation will clearly need to be monitored** over the **next few years** in the quite **possible event that large scale digitisation** combined with **enhanced information technology for accessing content** creates conditions where **competition factors** in relation to **re-use** become more evident.

2 *Introduction and terms of reference*

This study relates solely to Work Package 4 – EU Cultural Institutions and the Public Sector Information (PSI) Directive of the Public Domain Value Study, for which the contractor is Rightscom Ltd. It is focused purely on the readiness and appropriateness of Europe’s cultural institutions to adopt the principles and provisions of the “Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information” (“the Directive”) and to be brought within its formal scope.

In December 2003, the EU adopted the Directive, which aimed to put in place a framework for the conditions governing re-use of PSI in order to ensure fair, transparent, proportionate and non-discriminatory conditions for the re-use of such information and to achieve a minimum level of harmonisation between Member States. Its general purpose is to stimulate a growing market in added-value products and services based on PSI re-use.

Article 13 of the Directive requires the Commission to review the Directive and to communicate the results to the European Parliament and the Council, together with any proposals for modifications. The review clause requires the Commission to address the scope of the Directive. In practice this means the Commission has to analyse whether cultural establishments, education and research organisations and public service broadcasters, currently excluded from the scope, ought to be covered by the Directive. The results of the current study are required to inform this review.

Under Article 2 of the Directive, certain types of content are exempted from the scope of the Directive, including: “*documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres*”. Other exemptions under Article 2 relate to access, secrecy, educational and research organisations and intellectual property rights of third parties.

Recital 4 of the Directive affirms that “*the public sector collects, produces, reproduces and disseminates a wide range of information in many areas of activity, such as social, economic, geographical, weather, tourist, business, patent and educational information*”. Given that the Directive is aimed specifically at information with high value and re-use exploitation potential, this exemption could be seen as running counter to its central vision. Institutions in the

cultural sector do indeed hold highly valuable content and information. The cultural sector has been identified as a catalyst for creativity, growth and jobs (KEA, 2004)².

Among the content types held or created by cultural (or “memory”) institutions which may be considered valuable for re-use under the terms of the Directive by the holder institutions which responded to the survey conducted by this study are:

- Any published item as well as unpublished material in the public domain;
- Public records and archival documents of many kinds (church records, census records, government minutes);
- Bibliographic data (metadata) e.g. catalogues, national bibliographies, database;
- Photographs and images (including those of objects and artefacts);
- Ancient, rare, printed books, manuscripts, fine prints, drawings, etc;
- Periodical articles (perhaps in electronic file formats);
- Newspapers and magazines;
- Sheet music;
- Maps and plans;
- Engravings;
- Single sheet documents;
- Posters and postcards;
- Audio (music and other recorded sound); and
- Ethnographic descriptions.

Collections of some National Libraries (e.g. Poland) can increasingly be photographed or filmed on library premises by or for the press, TV, films and monographic publications.

The extent of material which cultural institutions generate themselves (and could be considered PSI as a result) has been restricted to certain limited, although important categories (including metadata and databases). However, there is now a growing participation by cultural institutions in the creation of content associated with Web 2.0 and social networking activities. This sometimes incorporates user-generated annotation. Some key market re-use areas mentioned in the survey responses include publishing and facsimile reproduction and repurposing for learning and tourism. There is also growing recognition of underexploited demand in the area of family history/genealogy.

²http://ec.europa.eu/culture/keydocuments/doc873_en.htm#bad_nodepdf_word/economy_cult/executive_summary.pdf

In conclusion, a very large amount of digital content exists but is often not easily available for re-use. The work of initiatives such as Europeana under the Digital Libraries Initiative is drawing attention in terms of introducing effective measures to ‘unlock’ this for re-use, on a freely available basis as part of the work of the public domain or on a licensed basis. The question therefore is posed, given that cultural information may be seen for practical, social and economic purposes as closely related to other forms of information “*collected, produced, reproduced or disseminated by the public sector*”, what might the main arguments be for including or excluding it from the scope of the Directive in future and what appears to be the force of these arguments in practice?

The work undertaken by this study is therefore to analyse evidence and opinion for and against the current remit of the Directive in this respect and to assess what actions, if any, could be taken to change it and what the impact of such actions would be. The study has sought to gather views and data, mainly from the cultural sector itself but also from actual and potential re-users, which will indicate whether or not the time is right to consider bringing this sector within the scope of the PSI Directive.

3 ***Report structure and study methodology***

3.1 **Structure**

Section 4 summarises the findings of its survey work according to a number of key indicators, including: levels of awareness of the Directive within the cultural sector and among re-users of cultural information; costs, benefits and barriers associated with bringing cultural institutions within the scope of the Directive; pricing and charging practices; staffing issues and licensing.

Section 5 assesses the relevance and impact of number of several key contextual issues: the Public Domain, Public Private Partnerships (PPP) and the cultural economy are then discussed.

Section 6 describes three specific issues raised during the course of the study, namely professional ethics, the public task and the status of archives.

In Section 7, a series of conclusions are drawn from the foregoing evidence.

Three short case studies case studies are presented as Annexes to exemplify approaches being taken by a Member State, a cultural institution and a body representing re-users of cultural information, respectively.

3.2 Study methodology

The outcomes sought from the sequence of research described below are to enable the project to assess and present the consensus of opinion within the cultural sector regarding its readiness for inclusion within the provisions of the Directive on PSI re-use, to summarise the perceived strength of the core arguments for and against this and to relate these arguments to quantitative and case-based evidence relevant to current practice and potential, taking into account where available the views of re-users

Following a period of desk research carried out in March 2008, a questionnaire was compiled and tested, targeted to national librarians, national museums, national archivists and a selection of local and regional cultural institutions' directors. This was circulated during April and May 2008.

The questionnaire was initially e-mailed to a wide selection of cultural institutions using the mailing list of the Europeana.Net (about 80 participants) and EuropeanaLocal projects (30 participants), both of which cover cultural institutions across different domains (libraries, museums, archives and audio-visual archives) at the national and local/regional levels respectively, in all 27 Member States and Norway. With the support of the Council for European National Libraries (CENL) the questionnaire was also emailed to its membership list of some 46 National Libraries, which fall within the remit of the Council of Europe, overlapping to some extent with the Europeana.Net list. The co-operation of European representative associations for museums and archives in distributing the survey was also sought, but with limited response.

There were 25 respondents to the survey, representing:

- 17 National Libraries;
- 1 National Archive;
- 3 public libraries;
- 2 cultural heritage portals;
- 1 regional cross-domain agency responsible for strategies in relation to libraries, museums and archives; and

- 1 regional archive.

Following an initial analysis of the survey response, further questions to respondents were identified for the purposes of clarification. In June and July 2008, follow-up by telephone using several linguistically competent researchers in the study team was undertaken. Responses to 9 such interviews have been received, providing additional information on specific issues or assisting a more detailed level of understanding.

Finally, during July and early August 2008, eleven personal interviews were conducted with Directors and key staff of major libraries, archives and museums or their representative bodies. These interviews were clustered in four major cities: Berlin, London, Paris and Prague and were selected to counteract as far as possible the previous lack of response from the museums and archives sectors. They have included:

- 4 national/federal archives;
- 3 major museums and/or their national representative bodies;
- 1 cultural portal provider;
- 1 further national library;
- 1 major municipal public library; and
- 1 ministerial working group.

The face-to-face interviews followed a similar format to the survey questionnaire but enabled a more in-depth approach, including post-interview follow-up where necessary.

A separate questionnaire was also compiled, targeted to “demand-side” organisations and their associations, including the Federation of European Publishers (“FEP”), the PSI Alliance³, national associations representing re-users of cultural information and individual companies with a potential interest in the re-use of cultural information. The survey was also sent by email to the entire private sector subset of the ePSIplus stakeholder database (some 693 organisations) at that time. Only seven responses have been received including those of the two representative associations named above.

³ The PSI Alliance is an association of private Public Sector Information re-users across the EU. It was established in January 2008. Over 15 organisations representing over 200 companies are behind the organisation. The goal of the PSI Alliance is to encourage the public and private sectors to work together effectively, to ensure that PSI can assume its proper role as a key contributor to a vibrant, information-driven European economy.

While this appears to indicate a low level of private sector interest in issues related to the re-use of cultural information at present, caution should be exercised in interpreting these results for example as demonstrating a lack of cultural content suitable for re-use or as a reason for underestimating the potential for re-use of cultural information. Low levels of response to surveys aimed at PSI re-users have been a regular feature of several other recent data collection exercises. Neither is the problem of “survey fatigue” confined to PSI re-users.

In all, contact was made with some 43 interlocutor bodies (25 survey respondents from the cultural sector, 11 additional interviews and 7 responses from private sector re-users or their representative associations). This is summarised in the diagram below.

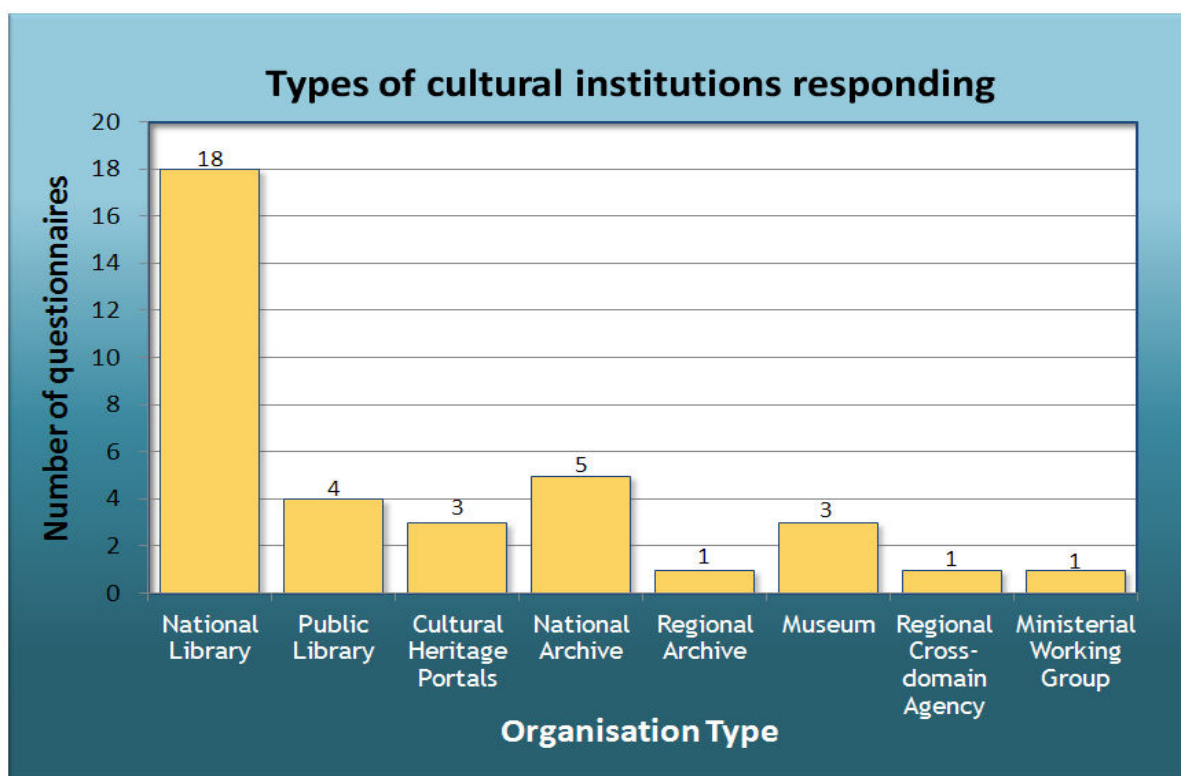


Figure 1 – Responses to questionnaire by type of institution

4 Summary of survey findings

This section of the report summarises and where possible quantifies the data obtained from responses to the specific questions in the surveys. The sample size for this purpose is 25, although significant further qualitative comment and interpretation has been introduced from the personal interviews.

4.1 Levels of awareness of the Directive

Only 16 respondents (64%) to the public sector questionnaire were aware of the Directive. From these, one (a National Library), was not aware that cultural institutions are excluded from its scope. The personal interviews corroborated the view that a high proportion of national and federal level institutions are aware of the Directive and its implications, at least superficially, but there is a much lower level of awareness of the Directive at regional and municipal level⁴ and among cultural portal providers.

4.2 Costs and benefits

Many of the concerns expressed by cultural institutions supposed a high level of obligation to provide content when requested by re-users and consequently an automatically increased administrative burden if cultural institutions were under the scope of the Directive. It is therefore important to consider what the Directive actually stipulates in assessing the validity of these concerns.

Article 3 of the Directive (General principle) provides that “*Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out the Directive*”. Where possible, these are to be made available through electronic means.

Article 5 of the Directive (Available formats) states that “*...public sector bodies shall make their documents available in any pre-existing format or language...*” but makes clear that this does not imply an obligation for them to create or adapt documents in order to comply with the request, nor an obligation to provide extracts from documents where this would involve “*disproportionate effort, going beyond a simple operation*”. Recital 9 further states that in effect the Directive does not contain an obligation to allow re-use of documents and that the decision whether or not to authorise remains with the Member States or the public sector body concerned.

4.2.1. COSTS

Respondents’ main concerns about potential *cost barriers* associated with coming under the scope of the Directive related to a mixture of processing and supply costs, support costs, legal (rights-related) costs and their consequent adverse effects on the sustainability of

⁴ An exception was the City Library in Berlin.

digitisation programmes and the provision of public facing offerings. These costs were described variously as:

- Processing costs (14 respondents, 56%) and content-related costs, such as:
 - > deployment and maintenance of customer-oriented delivery systems;
 - > dealing with metadata and data structuring;
 - > portal development;
 - > the need for comprehensive digitisation programmes, as “without digitisation there is very little content that can be made available”; and
 - > “a big economic impact e.g. due to unregistered objects which would have to be made accessible, which is quite impossible under the present financial conditions”.
- Legal and administrative costs associated with: (13 respondents, 52%)
 - > identifying whether a document or information is in the public domain;
 - > negotiating with rights holders;
 - > legal processing; and
 - > establishment of adequate licensing regimes and supervision of their execution (5 respondents, 20%).

Institutions which already combine very large collections with a substantial existing exposure to and infrastructure for re-use requests, such as the British Library and the Swedish National Archive, were perhaps the most fearful of the consequences of coming under the Directive. The perception was that in terms of the need for expansion of services and the obligation to respond that coming under the Directive implies, the ability to manage supply in an affordable manner combined with downward pressure on charges would be compromised. For example, The British Library noted that *“Most cultural heritage organisations that run some sort of services do so on a close to break-even basis – sometimes at a loss, sometimes at a marginal profit – and any marginal profit is simply ploughed back into the organisation. The negative effect [coming under the Directive] would have on the ability of cultural sector organisations to offer sustainable access to its collections and to pay for innovation, particularly in the digital environment, would be considerable, given that funding to cover these activities is likely not to be forthcoming from government”*.

A substantial proportion of respondents (10, 40%) were fearful of a rise in costs related to a perceived obligation under the Directive to respond to an increased number of requests from

re-users and the associated problems of rights clearance. The strength of this perception was borne out in personal interviews. The extent to which it would prove to be true is a significant factor in terms of the conclusions of this study.

In conclusion, it appears that many cultural institutions are afraid that a consequence of coming within the scope of the Directive will impose higher costs on a relatively small income base which might itself be reduced as a consequence of perceived obligations under the Directive. However, the strength of obligation imposed by the current Directive in this respect may not be as great as supposed by some cultural institutions.

4.2.2. BENEFITS

Respondents from cultural institutions to the survey and interview work carried out in this study were in the main cautious about the advantages of being incorporated within the scope of the Directive. Seven respondents (28%) did not articulate any benefit or thought there would be none. One National Library expressed concern about the consequent loss of the ability to choose freely the conditions under which its documents can be re-used.

The benefits of coming under the scope of the Directive, where perceived, were inclined to be generic in nature. Among them:

- The potential for increasing the economic and market value and visibility of cultural institutions (20 respondents, 80%). Also mentioned were:
 - > greater awareness of opportunities; and
 - > the potential to participate in funded cross-sectoral projects and initiatives;
- The incentive to digitise their collections in order to meet the needs of re-users (3 respondents, 12%), although one thought that this benefit could only be realised if digitisation activities received a higher level of support from governments;
- The opportunity to begin to charge re-users in order to provide an income for the institution to cover the costs of digitisation, legal work etc. (at least 2 respondents, 8%);
- The greater harmonisation of prices and more awareness-raising on free or low cost pricing of information generated with public money (one respondent);
- The creation of innovative co-operation models between the public and private sector (one respondent). However, the respondent commented that public and private partnerships must complement each other in such a way that both parties

- can achieve their targets better and be based on values that both parties can be committed to;
- Enhanced opportunities for cross domain research and education on all levels (schools, universities) and enhanced opportunities for all interested in European cultural heritage (one respondent); and
 - The benefits of PSI being available free through public libraries as a support service for business innovation, rather than as content for actual products and services based on re-use (one major public library).

Two respondents (8%) saw themselves as already broadly compliant with the Directive in practice and foresaw no change as a consequence of coming under its formal scope. These and similar perceptions appear typically to be prevalent in countries where either the extent of state subsidy to budget and policy are sufficient to support free access and/or where a significant level of demand from re-users has not emerged.

In conclusion, the potential benefits of coming within the scope of the Directive have not yet been articulated to most decision makers in the cultural field. There may well be a case for further work to establish and define these benefits and to seek to demonstrate that they outweigh costs in a way that is meaningful to those involved in the implementation of cultural services.

4.3 Pricing and charging

Lowering charges and improving transparency are key concerns of the Directive. Article 6 (Principles governing charging) provides that *“...where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment”*. The matter of determining what constitutes a reasonable return on investment has been a subject of debate in the context of the review of the Directive alongside the question of whether a move in the direction of charging based on “marginal costs” principles would be preferable. Recital 14 indicates that where charges are made they should pay *“...due regard to the self-financing requirements of the public sector body concerned, where applicable”*.

Article 6 specifies, *“...charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector*

bodies involved". Recital 14 adds to this, stating that charges made according to the principles of Article 6, "...constitute an upper limit to the charges, as any excessive prices should be precluded". Further encouragement to low or no charges is provided by the same Recital: "...the upper limit for charges set in this Directive is without prejudice to the right of Member States or public sector bodies to apply lower charges or no charges at all..." and "...Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents".

Many respondents acknowledged that predicting the exact extent of rising demand and associated cost (in terms of staff and support) in the face of lower prices and other forms of compliance with the Directive is difficult. Some institutions thought that the Directive would not make much difference to them and would only imply a continuation of what they normally do. However, a larger number felt that they would no longer be in control of digitisation policies which would become more demand-driven and that they would need to change their internal structure and extend their services as a result of the Directive.

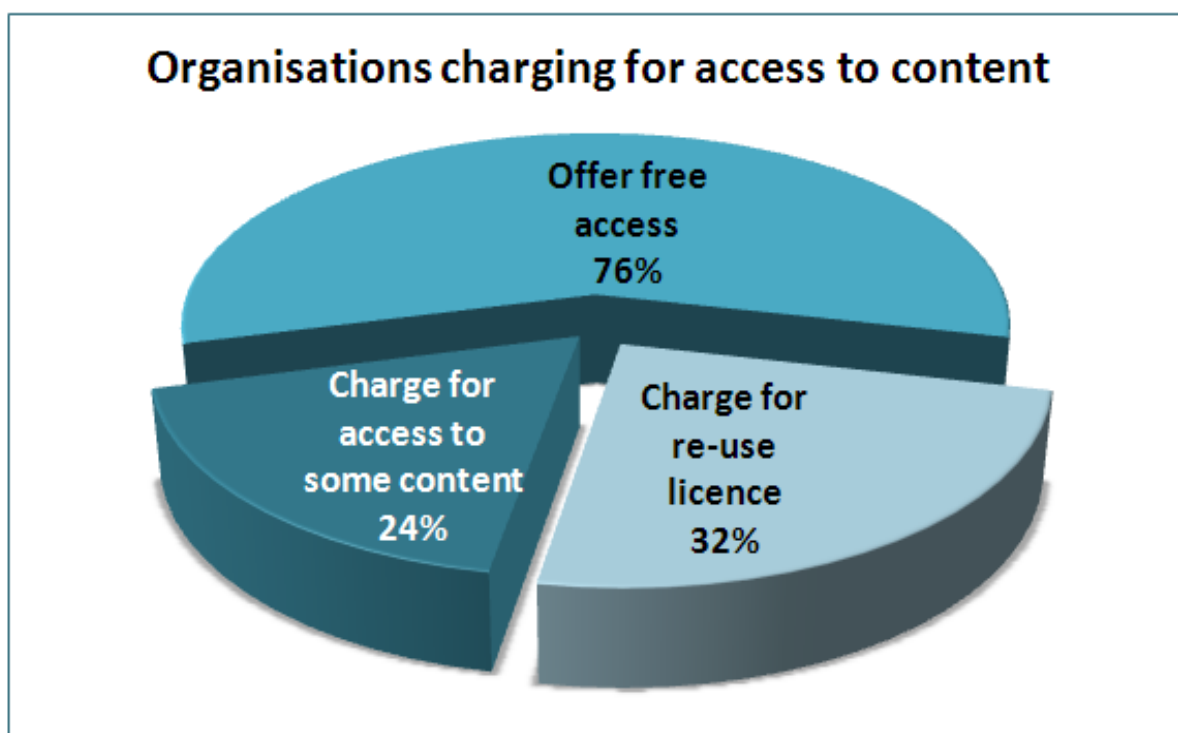


Figure 2 – Types of charging for access to content.

As shown in Fig 2, 76% of respondents offer free access to their content for end users, whilst the remaining 24% make some kind of charge for accessing at least some of their content.

However, 32% of respondents charge for licences to re-use content, showing a tendency among some cultural bodies to distinguish between “ordinary” use and commercial re-use in their charging policies.

This area of discussion represents a parallel with the continued difficulty throughout the PSI area, of persuading governments of a school of thought which underlies the Directive: namely that no or low charges for PSI lead to higher tax revenues, better market growth, higher service quality and more customer choice than if public sector bodies commercialise their activities. With acceptance of that argument would go the corollary that public institution budgets should therefore be compensated for loss of the direct revenues which were gained through charging or PPP. Few cultural institutions interviewed currently view it as a realistic possibility that either Ministries of Finance or Culture could be persuaded to compensate budgets directly. One important feature of the European approach to the re-use of cultural information (and PSI more generally) is that it is common practice to distinguish, often sharply, in terms of prices charged (or free access provided) by individual users or for education and research, on the one hand and those charged to commercial customers for re-use, on the other.

The Directive does not prevent such a distinction with Recital 19 in fact stating that although *“Conditions for re-use should be non-discriminatory for comparable categories of re-use. This should, for example, not prevent the exchange of information between public sector bodies free of charge for the exercise of public tasks, whilst other parties are charged for the re-use of the same documents. Neither should it prevent the adoption of a differentiated charging policy for commercial and non-commercial re-use”*.

There is thus little emulation of the principle of the “federal model” used in the USA which does not distinguish between individuals and businesses in this context, but regards all as citizens who may benefit equally from taxpayer-funded activities. Quite frequently this distinction is embodied in national laws, with varying inflections. Examples of this in survey responses from individual countries were that:

- No royalties must be paid for the copies made by a natural person for private use and for teaching or scientific research purposes or made by a public institution for improvement purpose;
- Preferential tariffs apply for re-use in research or education; and

- ▶ Copies of documents without copyright restrictions, when re-used for commercial purposes, have to be charged for to distinguish between individual research use on the one hand (covered by copyright exceptions) and re-users on the other.

In conclusion, whilst cultural institutions are widely committed to the principle of providing free access to direct end users (general public, scholars and researchers), they are inclined to regard commercial re-use as a separate matter, for which they should be reimbursed and in some cases to view it as a significant potential income generator.

4.4 Transparency of charges

Article 7 (Transparency) provides that “...*any applicable conditions and standard charges for the re-use of documents held by public sector bodies shall be pre-established and published, through electronic means where possible and appropriate*” and that “*on request, the public sector body shall indicate the calculation basis for the published charge*” as well as what factors have been taken into account in calculating any atypical charges.

In terms of transparency of pricing, among the 40% of respondents who do charge for use, all 10 said that they charge according to a tariff published on the web but 5 (20%) said that they also charged as a result of negotiations with individual re-users. One respondent also took into account unpublished internal pricing tariffs (between revenue generating units of the same organisation).

Article 10 (Non-discrimination) further requires that if documents are re-used by a public sector body as input for its commercial activities which fall outside the scope of its public tasks, the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users. In addition: “...*public sector bodies shall ensure that applicants for reuse of documents are informed of available means of redress relating to decisions or practices affecting them*”.

There is also a tendency in the cultural sector to require re-users to reveal what they are going to do with the information and to charge accordingly. Very often, however, cultural institutions do not have the capacity to track or monitor this in practice. There would be a considerable risk that interventions of this kind by public sector bodies would contravene the provisions of the Directive regarding non-discriminatory practices

In conclusion, it does not appear that the provisions of the Directive regarding transparency of pricing and anti-competitive practices are as yet uniformly understood or adhered to among European cultural institutions. Being brought under the scope of the Directive would require significant further awareness-raising activity supported by effective case building in support of behavioural change.

4.5 Purposes of charging

Seven respondents (28%) said that their main reason for charging was to support revenue and meet statutory/essential costs, 5 respondents (20%) indicated that it was for enabling digitisation and 3 respondents (12%) indicated that it was for funding new activities. Five survey respondents (20%) cited more explicit reasons:

- To fund sustainability and cover costs of making the service available to users in the first place – increasingly digital;
- To fund the costs associated with the fact that the cultural sector is increasingly becoming an online publisher which has many attendant costs;
- To fund the technical costs of producing a copy;
- To cover processing costs and the costs for the data carrier;
- To meet general costs, although this helps only marginally⁵;
- To set a value to the PSI content delivered and somehow to prevent users from requiring a huge amount of work by asking for things they might not use.

In summary, a significant number of cultural institutions regard charging as an important means of meeting their essential/statutory costs and to a lesser extent of funding innovation.

4.6 Volume of transactions

Where National Libraries such as those in the UK, Austria and Portugal do have active arrangements to license use or re-use, the usual number of transactions appears to be in the range of 1,000 to 2,500 per year. In the UK these transactions relate to any historically published item as well as unpublished historical material that are generally literary in nature as well as images. In Austria the focus is more on photographic reproduction services (digital copies in JPEG format) and similarly in Portugal the main type of transaction relates to the re-use of images where the transaction volume rises to 4,000 per year. Where catalogue records are licensed for re-use, quantification is inclined to differ. For example, the German

⁵ If the charges were to make a more substantial contribution they would have to be set higher than can be justified.

National Library licenses about 70 million data sets per year. There is little evidence that significant numbers of applications for re-use are refused.

4.7 Level of income

Amounts of income derived from charges to re-users were not always established (e.g. they are not disaggregated from other reproduction services) but where known were estimated as follows⁶:

Organisation	Income	Sources of Income
The British Library	€12,000,000	Mainly, this figure includes any historically published item as well as unpublished historical material, generally literary in nature as well as images. The figure excludes document supply activity. It is estimated that 50% is from licensing which includes a mixture of bibliographic data, content from digitisation projects and third party re-using including early English literature. The other 50% relates to images and picture reproduction.
Swedish National Archive	€700,000	The income is from Svensk arkivinformation in Ramsele ⁷ (SVAR) and is primarily for the re-use of genealogical material such as church records, census records and the like, as well as digital images and databases.
German National Library	€700,000	This income is only from the re-use of structured bibliographic metadata on the National Library's holdings. Other German and European libraries primarily purchase this bibliographic catalogue data. All bibliographic data is in the public domain. Re-use of unstructured data is free of charge but re-use of structured data is charged for with tariffs applying related to the type and format of the data.

⁶ The figures have been converted at August 2008 exchange rates and rounded.

⁷ SVAR is the department dealing with production and distribution of archival information in the form of microfiche and digital media to facilitate research and teaching.

Cultural Institutions and the PSI Directive

Organisation	Income	Sources of Income
BnF (France)	€295,000	All content in the library is made available for re-use, including the content of Gallica (the name of the BnF Digital Library), images, bibliographic records, sound recordings and books. The exception is material with copyright restrictions or materials that are too fragile to allow easy access. The best estimate is that approximately 90% of this income comes from the re-use of text, images and sound recordings and 10% from the re-use of bibliographic records.
Austrian National Library	€230,000	This figure includes only income from the picture archive and includes licensing, digital services and analogue prints.
BNCF (Italy)	€100,000	This income is in respect of only 36 transactions for which charges were made. It relates to manuscripts and ancient books (mainly published as facsimile reproductions)
National Library of Poland	€40,000	Generally all their holdings are available for re-use, However, there are some restrictions on specialised collections of precious treasures such as early printed books, manuscripts, fine prints and drawings. In these cases the library can only sell digital copies, if they are available.

The above noted organisations have different policies and practices in terms of re-use and thus what makes up the income figures from PSI re-use varies significantly across organisations. For example, the German National Library only makes available for re-use structured bibliographic metadata on library holdings. In the case of the Austrian National Library's reported income figure, it applies only to the re-use of content from the picture archive. Other organisations' income figures are based on much more comprehensive re-use applying to most holdings with some exceptions applying to holdings with copyright restrictions or materials with restricted handling due to preservation needs. In the case of SVAR it is important to note that there is a difference between search aids that are free of charge and the different products (digital images) that are provided after payment of a subscription fee. The subscription system makes it possible for customers to subscribe for certain amounts of time (e.g. a

year or a month or a week). During these subscription periods the customer can use as many types of digital material as they wish. However, usage is not measured so this system does not make it possible to break down the use by type of content. The number of digital images published and accessible to the public via the subscription system is, for 2006, 7.5 million images and, for 2008, 20 million images. There is no data available for 2007 due to technical work being carried out on the website during the period.

Moreover, across these organisations, there is no standardised administrative record keeping system in place for re-use activities (for financial data or other data such as staff time/cost or amount of re-use). Nor is there any requirement for standardised European reporting on re-use activities, for example in terms of a break down of income against different types of holding (by digital object type or data sets). It is also the case that the administrative financial record keeping systems are not designed to identify in detail the types of content being re-used (such as by digital object type and data sets) and the income generated from them. Thus, it is not straightforward to breakdown these income figures by content type and mainly only general descriptions of what makes up these income figures is available and in most cases these figures and breakdowns are best estimates. Nevertheless, these figures are indicators of income from re-use and they provide a general understanding of which source or re-use type the income is derived from.

Reported balances of income over cost (staff costs) from re-use activity are mainly small or negative. Several organisations reported that it is difficult to estimate how many staff (FTE) there are working on re-use activities. This is because often staff have diverse duties with some but not all work related to re-use activities. The German National Library reported that all staff are involved in making available the bibliographic data and thus it is not possible to identify only those direct staff costs connected with re-use. The Austrian National Library also noted that it is difficult to identify staff costs pertaining only to re-use. This is because re-use requests result in staff spending time on additional activities. This is because their policy is that, when a request for digitisation is received that applies only to part of a manuscript (such as only for 40 pages), the library routinely completes digitisation of the complete manuscript that might be 100 pages long. This is in order to have a complete digital copy and thus some staff time is for re-use activities and some for library related needs.

The British Library's reported estimate of surplus from this activity⁸ (including its image library service), amounts to €2 million which is derived from income of €12 million against costs of €10 million. This surplus represents about 2% of its total budget and is therefore highly valued. Since the library had received no budget increase since the time of the original Directive, the level of confidence that increased public funding would be available based on recognition of compliance with the Directive (and any consequent loss of revenue) was not high.

The National Library of Poland is required to operate services for re-use on a "break-even" basis taking into account the costs of its 3.5 staff and any other overhead costs related to making re-use possible, and thus their income from re-use only covers costs. The German National Library reported that they are not allowed to make a profit from re-use activities. However, the Swedish National Archives service requires a subsidy from the Library's budget of some €1.9 million. The only data available as to the break down of this amount indicated that 28% comes from state subsidy, 35% from subscription income, 35% from other types of subsidies and 2% from other income. It was reported that this subsidy figure decreased in the subsequent year for which these figures were provide which is mainly attributed to less in the other types of subsidy category. The BnF apparently has a subsidy of some €3.75 million (which is an estimate from the BnF's Department de la Reproduction). In these two cases, the subsidy is calculated by reference to how much the estimated staff costs exceed the re-use income.

In these circumstances, where the costs of licensing re-use appear to exceed the income generated, the fundamental question is raised as to whether free access would provide greater economic value, thereby stimulating more re-use. However, the answer to this question needs to take into account the extent to which the licensing of cultural content would in any case require administrative (or end-user) activity to clear third party or unknown rights and to what extent therefore the case for some level of public subsidy could be justified.

No evidence was discovered that these questions have yet been investigated in a systematic way and further work to this end may be needed.

⁸ At least amongst the survey respondents.

4.8 Number of staff

The number of cultural institutions that run extensive content licensing services appears relatively small. The number of staff employed by national institutions responding to the survey to support the preparation and licensing of content for re-use is mainly in the range 1-5 full-time equivalents (FTEs). Exceptions include the British Library, which employs 38 people to deal with re-use requests⁹ and. The Swedish National Archive employs some 70 FTEs and the Hungarian National Szechenyi Library 16 FTEs in this area of work. Several institutions expressed a concern that higher staff costs would be incurred under the scope of the Directive. For example, The British Library estimated that about 10 more FTE might be required to meet a higher level of demand under the Directive.

4.9 Licensing

Relatively few cultural institutions have yet implemented licensing regimes in the context of re-use. Various reasons are cited for this, including that:

- No licences are issued, for example, because access is free or copyright has been waived or no content is available for re-use;
- There is insufficient content available and/or a lack of demand from re-users;
- There are less formal regimes in existence, for example, a letter of consent with no exclusive rights is used;
- Individual licence agreements are provided in different forms, for example, for publishing or personal use but not in electronic form (as at the National Libraries of Hungary and Poland); and
- Licensing of material deposited with copyright owned by other institutions is done in agreement between copyright holder and customer.

Applications for a licence or to seek re-use are most usually made by paper, electronic mail or via a website/portal with phone numbers. In some cases (e.g. National Library of Spain) use is underpinned by quite complex provisions concerning the number of copies which may be taken per format¹⁰ without charge, before a pricing regime becomes operative.

⁹ Notably, it is estimated that 90% of these are requests for content outside the public domain for example recent research results.

¹⁰ These include media such as audio, microform, books or their parts, photographs and newspapers.

Some of the bigger suppliers for re-use have however introduced electronic licensing regimes, for example:

- The British Library's picture library provides licences electronically if the image download option is used. Other licences used are mainly internal standard licences; and
- The Swedish National Archive provides licences electronically. Charges are made on different levels: annually, monthly, weekly, 3 hours etc.

The Directive's approach to licensing is defined in Article 8 (Licences) and allows for considerable flexibility: *"...public sector bodies may allow for re-use of documents without conditions or may impose conditions, where appropriate through a licence, dealing with relevant issues...these conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition"*. Where licences are used however it provides that Member States must ensure that standard licences for the re-use of public sector documents, which can be adapted to meet particular licence applications, are available in digital format and can be processed electronically and that all public bodies should be encouraged to use the standard licences. In practice, the level of implementation of formal or standard licensing regimes by PSI holders of all types in Member States remains at a modest level.

Only a few major cultural institutions are as yet equipped to deal with issuing licences for re-use in the manner required by the Directive. A significant level of change and associated costs would be entailed were they to seek to do so, although the adoption of "click-through" models possibly involving voluntary schemes such as Creative Commons licences (which are in any case quite widely supported in the cultural sector) has support and appears to be worth further investigation.

4.10 IPR management

Possibly the preponderant concern expressed by this study's interlocutors in cultural institutions related to the costs inherent in the identification of third-party rights holders, in order to enable copyright clearance and licensing for re-use. The *High Level Expert Group on Digital Libraries, Sub-Group on Public Private Partnerships* ("HLEG-DG Sub-group") report confirms that for book digitisation, the biggest project challenge of all proves to be copyright clearance. The intellectual property rights ("IPR") of every potential right holder

have to be considered. In many cases, they have to be contacted individually for permission to digitise their work.

Article 1 and Recital 22 of the Directive apply to this issue but do not on the whole address the problem described, mainly stating that it does not apply to documents for which third parties hold IPR and that the obligations imposed by the Directive should apply only insofar as they are compatible with the provisions of international agreements on IPR.

A very high proportion of the holdings of “documents” and other content collected and held by libraries, museums and archives are protected by territorial copyright laws. Legal exemptions affecting library materials enable them to be copied digitally for preservation purposes, accessed for educational and research purposes etc. Clearing rights for the purposes of re-use can often be a complex issue and a time-consuming activity from which relatively few items are restricted on the grounds of age. EU law stipulates that for books, maps and pictures copyright term is life plus 70 years. Thus, if an author of a book published in 1900 lived until 1939, the work would still be in copyright. In digitising historical out-of-print books it may be necessary to refer back to the 1860s. It is a matter of intense debate as to whether copyright legislation needs to be revised and simplified and a new balance found for the digital era. The cultural sector includes many proponents of such a need.

Views and practices on licensing among cultural institutions vary considerably. For example, the survey response of the Royal Library of the Netherlands emphasised that *“...to have the right to license information, you have to have IPR in it. A library does not own these rights in its collection. Exceptions may be original photographs taken by the library's own photographers of out of copyright objects in the collection, or databases in which the library has substantially invested. However, in the latter case, the library still does not own rights in the individual items in the database, so that it cannot exploit/license its database right without the consent of the right holders of the works in the database”*.

In digitisation or licensing for re-use, institutions need to consider whether a work has fallen into the public domain or, alternatively, is still protected by copyright or by related rights. Since copyright follows the principle of territoriality, the corresponding analysis must be conducted in accordance with all the relevant jurisdictions of the countries in which either digitisation, access or re-use take place. New rights may also arise in connection with the process of digitisation, for example through professional work done in the semantic tagging

environment, indexing algorithms and metadata, in relation to database law or where moral rights such as Authors' Rights exist to protect the rights of civil servants, as in France¹¹. Institutions considering re-use need to establish who owns any such rights that may be created and how third parties, including employees and contractors, may exploit them.

The proportion of archival collections that may be available for re-use varies greatly. Archives usually organise and perceive the documents they hold initially as parts of files, collections, deposits or "fonds" which may contain both PSI and content subject to third party copyright and for which the rights are complex and time consuming to analyse for the purposes of re-use. There are also cases when PSI is a part of a whole to which personal data protection legislation applies.

Because of the immense hybridity of content rights, many archival institutions are concerned about the potential administrative burden of becoming subject to the Directive. Several major institutions have established significant capacities to deal with requests for re-use, which are dealt with personally and on case-by-case basis. For institutions with very large collections, the capacity needed could be very large, if this approach is maintained.

Copyright law in the USA is often held to be somewhat clearer than in Europe. Even so, the American Association of Law Libraries believes the average permission takes 12 hours to research and chase¹². When authors can't be identified or found, the materials are known as orphan works. According to one estimate by the British Library, a minimum of 40% of all copyright materials ever produced are orphan works and this situation is exacerbated by the explosion in self-publishing on the internet.

The process of copyright clearance during the current digitisation of works that are mostly out of copyright is serving to underline the need for secure frameworks within which public and academic institutions can go forward with digitisation initiatives that might include more

¹¹ According to French law moral rights attach to works created by civil servants in the course of their professional duties or according to instructions they have given. However, some limitations exist in that rights to communicate their creation to the public are limited by the statutory rules that apply to civil servants, they cannot oppose the modification of their creations by their employer, unless the modification is prejudicial to their honour or reputation and they cannot exercise their rights to refuse and withdraw their publications without prior consent from their employer.

¹² <http://www.iwr.co.uk/information-world-review/news/2221418/scan-deliver>

recent works. Guidance about exceptions and grey areas is being developed but copyright clearance may be a laborious task for some time to come.

Current initiatives at EU level in the context of the public domain such as the *Digital Libraries Initiative: Agreement between Cultural Institutions and Right Holders on Orphan Works*¹³, the Arrow project and further investment in the automation of rights expression are an important contribution. In several countries, (e.g. the German museums sector) serious consideration is being given to the use of Creative Commons style licences for cultural information, in addition to other areas of PSI. Although a growing professionalism is evident in terms of clearing IPR, simplification appears to be necessary in terms of enabling sustainable licensing approaches, which would support re-use. It may otherwise be difficult to allay the concerns of cultural institutions in terms of the costs associated with rights clearance for re-use.

4.11 Discovery of cultural information

Article 9 (Practical arrangements) stipulates, “...*Member States shall ensure that practical arrangements are in place that facilitate the search for documents available for reuse, such as assets lists, accessible preferably online, of main documents, and portal sites that are linked to decentralised assets lists*”.

The cultural sector in general may be seen as one of the sectors most likely to comply with the Directive in terms of this requirement. Cultural institutions individually or in collaboration offer numerous effective search services for the discovery of content that may have the potential for re-use, such as:

- Traditional library catalogue and digital library facilities including metadata, enabling searching and browsing copies of available digital material;
- Databases in specialised subjects e.g. art;
- Databases of archive corpuses with pictures;
- Databases of museum collections;
- Trusted digital repositories with metadata linking to content;

¹³

http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=4145

Cultural Institutions and the PSI Directive

- National and regional portals with the metadata of objects from cross-domain sources archives, libraries, museums including thumbnails and incorporating search engines; and
- Major single domain portals such as the TEL service.

There is a comparatively low level of recognition in the cultural sector of the key terminology around “asset registers” used in the Directive. The cultural sector does not in the main speak in terms of Information Asset Registers (“IAR”) but of catalogues, repositories, digital libraries and portals. Nevertheless, the ambitious plan to build a cross-border Europeana service under the European Digital Libraries Initiative may also have significant implications for the discovery of content for re-use.

In particular, the creation of a network of OAI-PMH compliant metadata aggregations across Europe which can potentially be harvested or otherwise ingested through means such as specific APIs and RSS/ATOM holds enormous potential for exposing tens of millions of items of cultural content for discovery and re-use. In this area, the cultural sector potentially can contribute considerably to the consideration of effective discovery infrastructures for other PSI sectors.

4.12 Responses from re-users

Although the number of responses from the private sector “demand-side” was somewhat limited, those received indicate that the private sector does not see strong reasons to differentiate cultural information from other types of information gathered by the public sector. Cultural information is seen as having a high re-use value. It is essential, for example, for the tourism industry to have a well-developed system of access to cultural information in order to develop services. The perception of one respondent was however that cultural information was already more “open” than any other type.

The Federation of European Publishers (FEP) limited its response to the consultation on the review of the Directive mainly to the topic of encouragement for bringing culture under the scope of the Directive, since it was the most relevant issue for its members: “...*material in the public domain contained in cultural establishments such as museums is also a source of information used by publishers to create new works. For example, art book publishers often need to re-use public domain pictures or images and in some cases publishers have experienced difficulties when wishing to re-use these works*”. It was suggested in interview that the prices charged by museums are often high and can prevent publication.

However, in encouraging the bringing of culture within scope, FEP drew specific attention to the need to ensure:

- Clear differentiation between public domain material and that where rights attach to third parties;
- Avoidance of exclusive arrangements; and
- Avoidance of public sector competition with private sector “offers”.

The case study at Annex 1 expands on this by describing the current views of a major industry association, the Creative and Media Business Alliance (“CMBA”) in this context.

One respondent pointed to an interest in accessing and digitising some hundred (maybe thousands) of directories held by various libraries or archives, but that this interest had not been pursued because cultural institutions are outside the scope of the Directive. There was a concern that re-using such assets is in many cases a source of income for the institutions and that unfair competition would be a foreseeable outcome. Another respondent suggested that problems may be more related to issues such as a lack of competency and reliable technical solutions in libraries and other cultural institutions and different formats of information held in different institutions.

It is probable that types of demand for re-use of cultural information will change and expand in the near future, involving the emerging requirements of a variety of service suppliers for the integration of cultural information and its metadata including those operating in areas such as mobile phone operation and manufacturing, satellite navigation and mapping/direction services; travel and tourism; genealogy; music and local government. Future strategies to promote re-use will need to take account this new potential.

5 *Important contextual issues raised during the study*

5.1 The public domain

Community law and the laws of its Member States lack a definition of the public domain as such. There is a common understanding among cultural institutions (made explicit by 13 survey respondents, 52%) of the central meaning of the term “public domain” and of works that may be defined as in the public domain, as meaning those that are not subject to

copyright protection. Broadly speaking, this means published literary, musical and artistic works by authors who died before 1939 are now in the public domain

Some respondents took a broader view of what constitutes the “public domain” from their perspective. This can perhaps be equated with the general and explicit concern of institutions in the cultural sector to provide access to users without cost and by this means to ensure that access to cultural information is widespread and equitably available. The concept is usually extended to a (sometimes legally-defined) commitment to give access to everyone to the bibliographic data that is created.

The concept of preservation of access for future generations was also cited in several survey responses. Most cultural institutions see their responsibility towards the public domain as to provide access to public domain works. Frequently, these concepts are extended to the principle that public domain documents are made available to the public without any form of discrimination and free of charge, in both analogue and where available digital form. Proportions of collections considered to be in the public domain according to survey respondents vary considerably and range from 10% to 50% to 90%.

Recent European Commission public statements in this area have indicated a number of key positions, for example:

- Content which is in the public domain in analogue form should also be in the public domain when in digital form;
- The need to resist any threats to public domain content resulting from public sector commercialisation (including PPP); and
- The maintenance of as wide a public access to content as possible, as indicated by recent agreements with publishers regarding the establishment of minimum “due diligence” arrangements for establishing rights on “orphan works” and increasing the quantity of “out of print” content available, although national legislation is required to embody these agreements in law.

Although the wording of the Directive does not really encourage such a distinction, a question may perhaps be raised as to whether commercially published content which was previously subject to third party copyright but which has now fallen out of copyright into the public domain should truly be seen as the same thing as PSI (information generated as part of taxpayer funded public sector activity) and consequently as a high priority for inclusion within the scope of the Directive.

It is however clear that, despite the declared positive intention of the HLEG-DG Sub-group toward the Directive (see Section Annex 2: HLEG-DL Sub-group below) many library and museum professionals in particular are not clear how the Directive is directly relevant to the content they collect as a result of their core activities.

5.2 Public-Private Partnerships

There is no hard and fast definition of Public-Private Partnerships (“PPPs”) either. In general they may be seen as: partnerships between the public sector and the private sector for the purposes of designing, planning, financing, constructing and/or operating projects which would have been regarded traditionally as falling within the remit of the public sector. Infrastructural projects such as roads and bridges are prime examples.

PPPs can however take a number of forms. The spectrum of possible PPPs extends from businesses almost entirely controlled by the private sector, at one end, to those almost entirely controlled by the public sector, at the other.

In the context of the cultural sector, many cultural institutions have embarked upon major digitisation efforts in order to make use of the opportunities the new digital environment offers. Funds for digitisation and availability of cultural content in Member States are in short supply in general and, with increasing public spending restrictions PPPs have come into play as an alternative approach. Some private firms co-operate with public institutions in their digitisation efforts in exchange, for example, for “in kind” benefits such as webspace for advertising. While these arrangements have enabled a considerable amount of material to be made available on-line, some major PPP arrangements, e.g. those for “mass digitisation” have the potential to restrict access and re-use by imposing specific re-use conditions on the cultural institutions involved.

Major technology providers such as Google and Microsoft (as well as some smaller commercial organisations) have demonstrated the value embedded in the content held by cultural institutions through their initial willingness to invest in “mass digitisation” projects in the form of PPPs with cultural institutions, most especially a number of large libraries. This form of cooperation is in general terms supported by the European Commission. Its HLEG-DL Sub-group has confirmed that this approach is one important means of meeting the cost

of the large-scale digitisation (which may, among other things, be seen as an important precondition for growth in the market based on re-use).

Organisations such as The British Library and the Bibliothèque nationale de France, for example, have digitisation projects underway on numerous fronts. In the case of the British Library, these include: 19th century English literature, 19th century newspapers, archived sound recordings, manuscripts from Central Asia and UK theses. The activities form part of a number of national and international projects and have attracted the support of different funders and partners such as the higher education Joint Information Services Council (“JISC”) in the UK. Many such projects that been launched have no obvious commercial economic value, but high research value. However, the British Library does not hide the fact that one of the aims of its digitisation projects is to generate income from products with market appeal that can be exploited commercially.

One perhaps significant recent shift in position involves the recently-announced decision of Microsoft, one of the major early mass digitisation funders, to wind down its digitisation initiatives and related search services, including library scanning and in-copyright book programmes. In doing so, it has commented that the best way for a search engine to make book content available will be by crawling content repositories created by book publishers and libraries, with those with a commercial interest or public mandate taking advantage of newly available lower-cost digitisation technologies to create these repositories¹⁴.

The provisions of the Directive which are most relevant to the practice and principles of PPP are those related to Article 11 (Prohibition of exclusive arrangements): *“...the re-use of documents shall be open to all potential actors in the market, even if one or more market players already exploit added-value products based on these documents. Contracts or other arrangements between the public sector bodies holding the documents and third parties shall not grant exclusive rights”*.

However, this is qualified within the same Article to the extent that where an exclusive right is necessary for the provision of a service in the public interest (or, as stated in Recital 20 for the creation of a service in the “general economic interest”) the validity of the reason for granting such an exclusive right is to be subject to regular review, and in any event, reviewed

¹⁴See <http://www.iwr.co.uk/information-world-review/news/2221418/scan-deliver>.

every three years¹⁵. It is also required under Article 11 that exclusive arrangements established after the entry into force of the Directive are transparent, made public and respect competition rules. Existing exclusive arrangements that did not qualify for the “public interest” exception were to be terminated at the end of the contract or in any case not later than 31st December 2008.

Responses to the survey for the current study indicated that in addition to large-scale digitisation instances (such as those reported as case studies by the HLEG-DL Subgroup Study on PPP), 5 respondents (20%) of survey respondents have forms of PPP underway or in planning. These included the following, each reported by a single respondent:

- “Co-productions” between a federal archive and publishers;
- Digitisation of microfilm and the digitisation of parts of historical files held by a regional archive for genealogical research, the content being made available for a fee online at the private supplier’s website, with a copy of the result being delivered to the archival institution;
- A National Library which is working with an international company to establish a large digitisation project;
- The GSU project, Genealogical Society of Utah, that is cooperating with Svensk Arkivinformation i Ramsele (“SVAR”) in order to digitise church-records; and
- DigiArkiv and Genline, two companies that have specialised in selling archival information on the web. Most of the original archival information comes from regional archives in Sweden.

Other institutions expressed willingness to enter into PPP in exchange for the right to use the result and/or with shared costs.

Among the business models under discussion or in practice by individual survey respondents were:

- Partnerships in which the main arrangements are the exchange of goods but enable the private partner to sell rights through their website;
- Funding of digitisation in return for reuse of digitised materials in research projects etc.; and

¹⁵ Here, Recital 20 exemplifies the case where no commercial publisher would publish the information without such an exclusive right.

- Free use at national level but available "for a fee" at international level¹⁶.

On the whole these arrangements have sought to maintain the principle of free access for the end user to public domain and public sector material. In certain circumstances, however, some conditions are being imposed for access and re-use of "digitised" public domain material. These range from establishing some fees to recoup some of the cost to the establishment of deals between cultural institutions and private firms for certain type of access and re-use conditions of this material. This tendency, if perpetuated, could lead to public domain material becoming somehow "privatised" in the digital world through restrictive access and re-use conditions.

The final report of the High Level Expert Group on Digital Libraries, Sub-group on Public Private Partnership (the "HLEG-DL Sub-group"), published in May 2008 is supportive of the important role of PPP in helping achieve the European Commission's strategy for digitisation, online accessibility and digital preservation of Europe's collective memory.

The report has identified a number of case studies to exemplify good practice in digitisation based on PPP. Some of these case studies involve services which provide access to a mixture of materials which are in-copyright (with rights cleared or identified) and out of copyright. The various business models involved are described, whereby the private sector partner provides, for example:

- Software and technical support free of charge; or
- A resource discovery solution that the institution would not have been able to develop on its own without significant investment.

An acceptable level of shared cost appears to have been sought and in several instances achieved in the cases described. There also appears to be consensus on the concept that simply making a digital copy of a work in the public domain does not change its public domain status, in either the analogue or the digital environment. The HLEG-DL Sub-group report recommends that cultural institutions should aim to abide by the principle of the Directive, although it does not at this stage explicitly support extending the scope of the Directive to include cultural institutions.

¹⁶ It should be noted that this approach could be against EU law.

5.3 The cultural economy

The Commission's study on the Economy of Culture in Europe, published in 2004, highlighted the direct¹⁷ as well as the indirect¹⁸ contribution of the cultural and creative sectors towards the Lisbon Agenda. It concluded that the (broadly defined) cultural sector:

- Turned over more than €654 billion in 2003;
- Contributed to 2.6% of EU GDP in 2003;
- Grew in terms of value added by 19.7% between 1999-2003; and
- Employed, in 2004, at least 5.8 million people, which is equivalent to 3.1% of the total employed population in Europe.

In its discussion, the study's authors commented:

"Seeking to justify public intervention in the cultural sector is often regarded as a betrayal. Traditionally it has been believed that the value of investment in culture could not be questioned – it should not be an economic issue because culture is deemed to be a non-profitable sector that should be isolated from market mechanisms. On the basis of "art for art's sake" arguments as well as because culture enlightens people, reflects our past and is constitutive of our identities there is an obligation to support it... And yet, at a time when the public purse is shrinking, it is wise to look at the reasons for supporting culture – on top of the "art for art's sake" arguments.... Such an approach is the subject of criticism as it forces cultural organisations to justify their public funding. However, it serves as an interesting exercise to identify the multiple social, economic and political benefits brought by culture to both individuals and the community".

The study goes on to reflect that whereas the management of the private sector is aiming at creating value for its shareholders and employees, the management goals of a public sector organisation are less evident and to refer to arguments that the job of a public sector executive is to find and create opportunities for "public value" i.e. a success irrespective of

¹⁷ That is in terms of GDP, growth and employment.

¹⁸ That is the links between creativity and innovation, the links with the ICT sector, regional development and attractiveness.

any financial value or individual material achievement. This “public value” is ascribed by citizens in terms of public interest: what they would like the public sector to deliver and the way they would like it to be delivered. In the case of the cultural sector, this may involve consideration of the political and social value to the local, national or European community as well as the value to the economy (developing skills and contributing to economic growth).

The most recent attempt to estimate the economic value of cultural PSI through re-use remains the PIRA study of 2000 which calculated that, in terms of “European Investment Value”, across the European Union as a whole, governments invested in PSI to the tune of about €9.5 billion each year. Some countries spent significantly more than others, for example Sweden in particular put more than twice as much of its GDP into PSI, compared to the average proportion. In every EU country, the largest single component of the PSI investment total was the geographical sector, constituting over 37% of the total investment in PSI in France, 41% in Sweden and over 57% in the United Kingdom. Cultural information, including museums and libraries made up the next largest sector, ahead of statistical services, company information, intellectual property rights information, legal and tourism information and official produced publications.

However, in calculating the estimated economic value of this investment, the proportionate returns on investment in cultural information appeared to be much lower. Whereas the central total estimate of the value of PSI was €68 billion per annum, the economic value of cultural heritage information was estimated at €3.9 billion, placing it behind geographic information (€36 billion), industries exploiting social and economic data (€11.7 billion) and company information (€9.4 billion).

Taken at face value, this suggests that there is a case for seeking to examine the possibility of increasing the economic value from cultural information through activities such as greater commercial re-use. The question that arises is whether bringing cultural institutions under the Directive under current conditions would be likely to have this effect. Further work to determine in more empirical terms the current baseline and the possible outcome of such a step could well be justified.

6 *Other issues raised by the study*

6.1 Professional principles

In some countries there is significant concern with specific cultural sensitivities and the potential for “misuse”, among professionals in cultural institutions, perhaps especially in the archives sector. France provides a specific example where the concept of maintaining sufficient control over re-use in order to prevent misuse of content and data which may be sensitive (in terms of the consciousness and perceptions of national communities) is a matter of significant concern. This relates not only to legal provisions such as data protection or privacy but also touches upon a desire for a professional framework (which does not however yet exist). In some circumstances it also is inclined to confer a special status upon cultural information which has been created for “scholarly” or “scientific” reasons, which may sometimes militate against its active consideration in the context of availability for re-use.

Whilst on the whole, this does not adversely affect the right of individuals to access archival copies it is considered a matter of greater concern where re-use and diffusion is greatly facilitated by the Internet (e.g. through the combination or “mashing-up” of information that may be considered inappropriate in relation to nationally sensitive matters). It is perhaps also arguable that such concerns are affected to some degree by the existence in France of moral rights such as the Authors’ Right for public servants in information created by the public sector.

In other countries this type of concern about re-use is far less prevalent. Archivists in Germany and the UK for example are more inclined to the view that information should be treated neutrally and that the responsibility lies with the (re)-user rather than the professionals in the memory institutions. More broadly, antipathy towards the idea of “public” information being used by third parties to make a profit is possibly higher in the European cultural sector than in many other PSI sectors.

The provisions of the Directive in this area are mainly limited to Article 1.4 that deals with privacy and data protection. This “...leaves intact and in no way affects the level of protection of individuals with regard to the processing of personal data under the provisions of

Community and national law, and in particular does not alter the obligations and rights set out in Directive 95/46/EC”.

6.2 The public task

Were cultural institutions to be brought within the scope of the Directive, the question would arise as to which, if any, of its major re-use activities falls outside the public task. There is much discussion not only of the need to define more clearly the public task in the context of PSI re-use, but also recognition of the difficulty of establishing a “pan-European” definition and even of identifying specific statements of the public task in a given national or institutional situation, especially in such a way that enables necessary developments in the public sector task over time (e.g. in line with technical innovations).

Recital 9 describes activities falling outside the public task as those which “...will typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market.....”.

The position in France is again interesting in this respect. PSI has a legal definition there which is “...all information produced by the public administration as a result of its work”. The scope may therefore include archives. However, archives are considered to be in the cultural sector regardless of the subject matter of the archive and therefore not covered by the PSI Directive. As such archives are the responsibility of the Ministry of Culture and Communication. The transposition of the EU Directive in France was through the “Ordonnance of June 6th 2005” which modified the “Ordonnance No. 78-753 of July 17th 1978”. This law related to the improvement of the relation between the administration and the people and guaranteed “citizen access to public documents”, on request, and not for commercial use. This was placed under the control of the “Commission for Access to Administrative Documents” (CADA), attached to the Prime Minister’s Office. The modification of the 1978 law has mixed together text relating to access and re-use. It enforces principles of equal conditions for re-use, of public non-exclusive licences, of maximum charges and of proportional royalties. The new CADA therefore deals with access and re-use. It is an authority of mediation between administration and re-users.

A Working Group has been established recently by the Ministry precisely to clarify the role of the cultural sector in terms of the Directive (see Case Study at Annex 1). This has led to a provisional definition, which is:

- Two major revenue-earning cultural agencies, the Réunion des Musées Nationaux (“RMN”), which has an extensive image collection, and, the Institut National de l’audiovisuel (“INA”) are identified as operating outside the public task. They compete with at least two major private sector image libraries and seek to maintain their charges at a “market level” so as not to undercut their competition. It is argued that public sector budgets are not sufficiently high to enable these agencies to operate within the public task i.e. to continue their collecting activity and to make their content available for use at low or no cost. It argues that there is a need to maintain comprehensiveness of access to the patrimony in this area and that this could not be guaranteed without the activities of these agencies;
- Other cultural content is subject to complex rights issues and systems need to be set in place by institutions to negotiate these on a case by case basis where re-use is requested; and
- All other content that does not fall into these categories is available free.

The greatest economic value is considered to exist in the first of these tiers.

Image libraries are possibly the largest revenue-generating activity for cultural institutions across the EU (with the possible exception of museum shops and retail activities), although consolidated data is not available. Libraries, archives and museums all run image library services. The supply of images of artefacts is in particular a major business area for museums. Whilst important for the financial well-being of many large institutions, it is not clear that these activities are defined as part of their public task. Were this to be agreed as the case, the Directive would not apply to them.

It is often the case that a distinction is made between the supply of standard-resolution images without charge or at low cost and high-resolution images that may be ordered by re-users at a commercial price through an image library. Where re-user complaints on the subject of pricing of cultural content are made, they most frequently refer to the costs of images through these services. Some anecdotal reports suggest that current business models are under threat primarily from the diversification of content sources available on the Internet.

It should be noted in this context that many of the original artefacts that are made available in this way are in the public domain and no longer covered by copyright. The danger with high-resolution images only being available for re-users at commercial prices is that this can limit third party access and re-use of the material. This potentially represents the risk of public domain material becoming “privatised” in the digital world through restrictive access and re-use conditions.

In any consideration of bringing image libraries under the scope of the Directive, it would be relevant to provide if possible general guidance as to whether image libraries or other services provided by cultural institutions fall within or outside the public task or at least what criteria might be used to determine this.

6.3 The status of archives

In some countries of Europe, national and regional archival services are the responsibility of Ministries other than culture (most frequently the Ministry of the Interior or its successor).

In Germany the Federal Archive reports to the Chancellery and collects information from all Federal Ministries, whilst the State Archives fulfil a similar role at State level. Their responsibility includes the collection of documents in relation to a very wide variety of subject matter and public authorities. Whilst there is a very good case for clustering libraries, museums and archives together as “memory institutions” (and it is clear that archives play a key role in cultural initiatives such as Europeana), the current exclusion of that archival content which is clearly PSI in its most central meaning (information created or held by public bodies) from the scope of the Directive, on the grounds that it is held by a cultural institution, appears to pose a risk that some valuable PSI might not be made available for re-use.

Archives at municipal and regional level are perhaps more likely to be “cultural” in nature. They are also likely to contain a more hybrid mixture of public and private deposits or collections of local relevance. In France the national Patrimony Database has now been decentralised from a central agency of the Ministry of Culture and Communication to local authorities and work is proceeding on how to handle rights issues.

The City Library of Berlin has significant responsibilities for maintaining a collection of multimedia government and legal information, supported by legal deposit that it in fact makes available for re-use. It also holds address books up to 1945 that have been valuable in

tracing people of Jewish origin. These special collections are part of its public task and a major source of information on Berlin.

It is perhaps noteworthy that some national archives (e.g. in the Czech Republic) appear to be exemplars of compliance with the Directive, charging dissemination costs according to a clearly published tariff¹⁹ and with their main operations funded from public budgets. However, the Czech National Archive is the responsibility of the Ministry of the Interior and acknowledges little affinity with the cultural sector.

A possible implication is that exclusion of the whole sector of “cultural institutions” from the scope of the Directive may require further consideration. It is arguable that in the event of continued exclusion from scope, the “institutional” definition should be refined somewhat in order to ensure that major content sources which are clearly PSI in its core sense (information without third-party rights generated by government administrative activity) should be made available for re-use under the Directive.

7 *Conclusions*

The question whether **cultural heritage institutions** should be included within the **scope of the Directive** is complex. In general, **cultural institutions represent a hybrid sector, collecting material of which a high proportion involves third-party rights**. They generate comparatively little new PSI. The **benefits** of subjecting them to the regime of the Directive appear on balance to be **modest** at current levels of activity, although it is probable that the **value of cultural information will rise** in the context of new technology-driven developments in and around digital libraries.

Many **cultural institutions** are concerned that a **consequence of coming within the scope of the Directive** will impose **higher costs on a relatively small income base** that might itself be reduced as a consequence of perceived obligations under the Directive. A particular **barrier** is a **concern that the obligation to respond to re-use requests will lead to heavy processing costs**, including **identifying and dealing with rights holders**. However, the possible extent of

¹⁹ See www.nacr.cz/sua/legis/repro.htm

this increase in demand is in practice unknown and the Directive may currently contain sufficient safeguards for public sector bodies in terms of non-obligation, to enable any such pressure to be managed.

Reported **balances of income over cost** from enabling **re-use** are mainly small or negative. **Income** is mainly intended to support **essential statutory costs and some innovation**, in the face of restricted budgetary provision. The **costs of licensing or enabling re-use** appear in many cases to **exceed the income generated** raising the question **whether free access would provide greater economic value and stimulate more re-use**. However, the extent to which the **licensing of cultural content** would in any **case require administrative (or end-user) activity to clear third party or unknown rights** needs to be taken into account.

Whilst **cultural institutions** are widely committed to the **principle of providing free access to direct end users** (general public, scholars and researchers), they are inclined to **regard commercial re-use as a separate matter**, for which they **should be reimbursed** and in some cases to **view it as a significant potential income generator**. **76% of respondents offer free access** to their content for end users, whilst the remaining **24% make some kind of charge** for accessing at least some of their content. However, **32% of respondents charge for licences to re-use content**, showing a tendency among some **cultural bodies to distinguish between “ordinary” use and commercial re-use in their charging policies**.

Image libraries are probably the most widespread form of commercial activity. It is arguable that their activity is typically conducted outside the public task. Loss of these revenues and income from other sources, and a **probable absence of budgetary compensation** remains a **fear** for many **cultural institutions** about being brought within the **scope of the Directive** (although it is not absolutely necessary that the current provisions of the Directive on pricing and charging would in fact have this effect). In general, although **this area of activity** cannot currently be **characterised as a big business**, it is often **perceived as critical to the sustainability of activities carried out by cultural institutions**.

It does not appear that the **provisions of the Directive regarding transparency of pricing and anti-competitive practices** are as yet **uniformly understood or adhered to among European cultural institutions**. Being brought under the scope of the Directive would require significant further awareness-raising activity supported by effective case building in support of behavioural change.

Only a **few major cultural institutions** are as yet equipped to **deal with issuing licences for re-use** in the manner required by the Directive. With a few exceptions, **the number of cultural institutions that run extensive content licensing services is relatively small** with staff numbers usually between 1-5 FTEs. A **significant level of change and associated costs would be entailed** were they to seek to do so, although the adoption of “click-through” models possibly involving voluntary schemes such as Creative Commons licences (in any case quite widely supported in the cultural sector) has support and appears to be worth further investigation. Although a **growing professionalism** is evident in terms of clearing IPR, **simplification appears to be necessary** in terms of enabling sustainable **licensing approaches** that would **support re-use**. It may **otherwise be difficult to allay the concerns of cultural institutions in terms of the costs associated with rights clearance for re-use**.

Conversely, the **potential benefits of coming within the scope of the Directive have not yet been articulated to most decision makers in the cultural field**. **16 respondents (64%)** to the public sector questionnaire were **aware of the Directive**, mainly national level institutions. There is a much lower level of awareness of the Directive at regional and municipal level and among cultural portal providers. There may well be a case for **further work to establish and define these benefits** and to seek to **demonstrate that they outweigh costs** in a way that is meaningful to those involved in the implementation of cultural services.

There is a case for seeking to **examine the possibility of increasing the economic value gained from cultural information through activities such as greater commercial re-use**. However, it is **not clear whether bringing cultural institutions under the Directive under current conditions would have this effect**. Further work to determine in **more empirical terms** the possible outcome of such a step could well be justified, taking into account **the potential of emerging markets for cultural information** such as mobile phone operators and manufacturers; satellite navigation and mapping/direction services; travel and tourism; genealogy; music and local government.

Encouragement is to be drawn from the recommendation of the **HLEG-DG Sub-group on PPP that cultural institutions should aim to abide by the principles of the Directive** and should seek to avoid exclusive arrangements in establishing PPPs. However, **the positions of most respondents** to this study from the cultural sector on the whole represent a somewhat **more conservative view**.

Should **cultural institutions be brought within the scope of the Directive**, there may be **grounds for concern that sustainable PPPs**, the development of which is a potentially important strand of EC-supported policy toward digitisation in the cultural sector, **would need to rely quite heavily** on the need to **incentivise private sector partners by exclusive deals**, drawing especially on the exception described in Article 11.2 (allowing exclusive arrangements in exceptional circumstances where they are time-bound). If such arrangements are necessary and conducted within the scope of the Directive they could have an unpredictable and possibly adverse impact on the main intention of the Directive to minimise exclusive deals to an irreducible core. They might in effect turn Article 11.2 into a perceived “loophole” across other PSI sectors.

In any consideration of bringing cultural institutions under the scope of the Directive, it would be relevant to provide if possible **general guidance** as to **whether image libraries or other services provided by cultural institutions fall within or outside the public task or at least what criteria might be used to determine this**.

One **disadvantage of cultural institutions remaining outside the scope of the Directive** is that **valuable PSI held by archives may not become available for re-users on the terms that it specifies** (although in reality many if not all national archives, whichever Ministry they respond to, appear in most cases to abide by the spirit of the Directive). **Guidance on specific types of PSI held** by cultural institutions such as archives but generated by other public sector bodies may be helpful in **improving the current blanket provision** with the emphasis in this context **switching somewhat from institutions to types of content**.

The ambitious plan to build a cross-border **Europeana** service under the **European Digital Libraries Initiative** and the consequent creation of a network of **OAI-PMH compliant metadata** aggregations across Europe which can potentially be harvested or otherwise ingested through specific APIs and RSS/ATOM **holds enormous potential for exposing tens of millions of items of cultural content for re-use**. The cultural sector potentially can make a significant contribution to the consideration of effective discovery infrastructures for other PSI sectors.

Overall, whilst there is little doubt that **PSI held by the cultural sector has a significant potential value for re-users**, the **advantages of including cultural heritage institutions within the scope of the Directive** are currently **difficult to assess and require further investigation over time**. The **practical** and financial disadvantages to the sector, given the nature of its institutions and their collections, **should not be allowed in the longer term to outweigh the**

possible advantages to the economy, industry and society. This situation will clearly need to be monitored over the next few years in the quite possible event that large scale digitisation combined with enhanced ICT for accessing content creates conditions where competition factors in relation to re-use become more evident.

Annex 1: Case Studies

Member State case study: Ministry of Culture and Communications Working Group, France

In order to implement the Directive, the Ministry of Culture and Communication has established a working group on the dissemination and re-use of cultural public data which is putting forward recommendations to be validated by the Minister of Culture and Communication.

These recommendations seek to be faithful to the spirit of the Directive and are aimed at boosting the dissemination and re-use of cultural information held by the government. The objective is to maximise the presence, availability and use of cultural data on public networks, to increase awareness and use of original works, venues of cultural events and public dissemination of francophone cultural information, validated by competent French scientists, for artistic, educational and scientific purposes.

The realisation of this principle requires:

- Reuse on other sites of any kind;
- Availability by individuals in the context of personal and group practices; and
- Increased availability on ministry sites and institutions, primarily www.culture.fr.

The solutions proposed:

- Creating an office to develop tools to help owners of cultural data. This office will centralise requests from third parties and put in place the legal strategy and tariff applicable to the dissemination and reuse of public data;
- Encouraging data holders to entrust missions to re-use agencies, specifically Réunion des Musées Nationaux ("RMN") and Institut National de l'Audiovisuel (INA);
- Establishing the principle of a "one stop shop" for funds co-managed or co-produced; and
- Promoting the re-use of public data with cultural IPR.

The report seeks to go beyond the Directive because it offers solutions in terms of orphan works.

There is also regime for services and cultural organisations. In the legal framework, French law establishes the principle of a right to use public information by any third party with the exception of some public information such as information involving IPR of third parties.

In contrast, cultural organisations may establish a derogation. The scheme may prohibit the re-use of certain information. It is intended to determine the re-use of public information according to the following requirements:

- Conditions associated with “parenthood”;
- Conditions for enrichment-related data concerning the return of meta-data indexing, translations, scanning; and
- Conditions related to the risk of harmful practices.

Cultural Institution case study: The National Archives, UK

There are three principal types of cultural sector body excluded from the scope of the PSI directive: museums, libraries and archives. They are very different:

- Libraries contain almost exclusively works that are either out of copyright or that are in third party copyrights. A library rarely owns the copyright in any of the books it holds;
- Museums and art galleries are much the same as libraries, except that there is a marginally greater chance that an institution will have acquired some or all of the rights of an artist; and
- Archives are quite different in that while many of the documents they hold could be the copyright of the parent body, the nature of an archival record is such that it will, in the majority of cases, be impossible to isolate those materials.

The National Archives is like most other archival institutions. It holds:

- Records that are copyright of the Crown or that have been acquired by the Crown;
- Records that are copyright of institutions which created records but which are not Crown bodies;
- Records that are copyright of an indeterminable number of copyright owners, including private individuals, companies and overseas governments; and

Cultural Institutions and the PSI Directive

- Relatively few documents (largely older maps and photographs) in which copyright has expired under UK law.

It is a basic principle of archive administration that the records must be preserved as far as possible using the same arrangement as was used by the creating institution. The purposes are to preserve not merely the history of the issues dealt with by the records but also the history of the creating institution, and to enable the continued use of finding aids created by that institution. As a result, the records of a single institution, such as the Board of Trade, might contain:

- Minutes of the governing body, in this case the Board of Trade itself;
- Papers considered or received by that governing body;
- Letters sent out by that body and its staff;
- Letters received by that body; and
- Accounts for the expenditure of that body.

In the seventeenth and eighteenth centuries in some institutions it was usual to arrange these kinds of records into discrete series, but by the nineteenth century virtually every body created files on particular subjects, arranged in chronological order as material was created or received, which might contain elements of all of those series. With files of this sort, which constitute the bulk of records held in archives, some of the contents of almost any individual file would be outside the scope of the Directive because it is in third party copyright. It would be confusing and unhelpful in the extreme for users to be told that any licence required under the Directive could cover only certain elements of that file (and thus only part of the story) and it would be a significant burden on archival institutions to be required to advise on the identification of scattered material in its own copyright.

At The National Archives:

- Crown-owned copyrights in unpublished materials are all waived, so that licensing is not in any event required;
- Users are advised that it is their responsibility to identify materials in third party copyrights, to identify and trace the present rights owners and to obtain permission for use; and
- The commercial reproduction of facsimile images of any materials held by the institution is subject to licensing by the Image Library, on the same model as similar licensing by museums, irrespective of any copyright subsisting in it.

Re-user case study: The Creative and Media Business Alliance (CMBA)

CMBA <http://www.cmbaalliance.eu/> is an informal coalition comprising trade associations and individual companies active in the advertising, broadcasting, film, music and publishing sectors. It was launched in November 2004 to give the sector a strong and united voice at the level of the European Union. The CMBA notably calls upon the European Commission, the European Parliament and the 27 EU Member States to focus on the creative and media businesses in their joint efforts to foster innovation, growth and employment in the Information Society.

Its membership includes: Association of Commercial Television in Europe (“ACT”); Bertelsmann; Canal+ Groupe; European Association of Communication Agencies (“EACA”); EMI; European Newspaper Publishers’ Association (“ENPA”); European Publishers Council (“EPC”); European Federation of Magazine Publishers (“FAEP”); Federation of European Publishers (“FEP/FEE”); International Federation of the Phonographic Industry (“IFPI”); International Video Federation (“IVF”); Lagardère; Mediaset; Motion Picture Association (“MPA:); Reed Elsevier; Sony BMG Music Entertainment; Sony Computer Entertainment; Sony Pictures; The Walt Disney Company; Time Warner; Universal Music Group International; and, Warner Music International.

The CMBA’s written response to the questions posed by the European Commission in its Public Consultation on “Public Sector Information – PSI Raw Material for New Information Services and Products” emphasised the need for careful steps in the event of broadening the scope of the existing Directive, while respecting the added value that copyright protection brings to the creative sectors.

CMBA supports in principle the widening of the scope of the Directive to include cultural establishments, education and research organisations and public service broadcasters. It urges the Commission in the event of any expansion of the scope, to underline the importance of respecting the wishes of rights holders of copyright works and the protection of intellectual property rights in general. As long as copyright protection is respected, the information held by these institutions would provide the raw-material for further business models to develop.

The latter is seen as a very crucial point as a major part of material held in cultural establishments (e.g. libraries and archives) is not created or produced by those establishments. Instead their collections consist of material protected by copyright. Commercial or non-commercial re-use of others' material is out of scope of the cultural establishments' mandates and subject to license agreements directly with the rights holders. The same applies to a great extent to educational organisations (e.g. schools).

CMBA believes works that might be held by publicly funded cultural institutions such as libraries and museums (which is the definition of PSI by the current Directive (i.e. excluding works in copyright)) should be excluded from copyright and database rights, as it is in the US and this should be made clear to all public authorities which hold re-usable data. If information were provided free of charge, then copyright would not be an issue. The dangers inherent in public sector bodies retaining IPR in PSI can be significantly neutralised by imposing fair trading rules on the licensing of data.

In more general terms the CMBA response points to:

- Wide agreement that the present Directive established sound conditions at the time for effective dissemination and re-use of public sector information:
- The wide margin for interpretation available to Member States in implementing the Directive, as a continued barrier to the smooth functioning of the market related to PSI re-use;
- The issue of timing and in particular the phrase "within a reasonable time limit" (Article 4, paragraph 1) as a barrier, due to the possibility of subjective interpretation and the consequent risk to value and the business-models of re-users, especially where those models are based on "dynamic data" types; and
- The principle of not exceeding cost recovery in supplying data to the commercial user should be promoted (again based on the US Federal Government model. If this is not acceptable by all Member States or not applicable to specific information provided by small scale public bodies, CMBA supports the concept of PSI being sold at commercial prices, provided that the pricing is reasonable, non-discriminatory and transparent.

Guidelines designed to produce a more effective implementation would be welcomed but its general preference would be for much clearer legal obligations on licensing, pricing, publication of asset lists and accessibility. This should be linked to an efficient monitoring

mechanism to ensure the proper functioning of the market; especially for licensing, pricing and accessibility issues and to deal with anticompetitive behaviour.

In addition to the above, the CMBA feels that the Directive should be much clearer about charging policies and be more specific about what is expected by a “reasonable return on investment”. Independent regulatory oversight at national level should be a requirement of compliance together with easy access to dispute resolution.

Annex 2: HLEG-DL Sub-group

The final report of the High Level Expert Group on Digital Libraries, Sub-group on Public Private Partnership (the “HLEG-DL Sub-group”), published in May 2008 is supportive of the important role of PPP in helping achieve the European Commission’s strategy for digitisation, online accessibility and digital preservation of Europe’s collective memory.

“Whilst libraries, archives, museums and galleries have preserved this collective memory and have experience of resource discovery and user requirements, private partners can bring to the table funding, technology, software and expertise required for large-scale digitisation. By working together public access can be enhanced...New creative endeavours can be inspired or result from access to digitised cultural heritage materials, whilst learning and tourism can also benefit”.

The report has identified a number of case studies to exemplify good practice in digitisation based on PPP. Several of them are based on experiences in North America. Some of these case studies involve services which provide access to a mixture of materials which are in-copyright (with rights cleared or identified) and out of copyright. The various business models involved are described, whereby the private sector partner provides, for example:

- Software and technical support free of charge; or
- A resource discovery solution that the institution would not have been able to develop on its own without significant investment.

An acceptable level of shared cost appears to have been sought and in several instances achieved in the cases described. There also appears to be consensus on the concept that simply making a digital copy of a work in the public domain does not change its public domain status, in either the analogue or the digital environment. The HLEG-DL Sub-group

Cultural Institutions and the PSI Directive

report recommends that cultural institutions should aim to abide by the principle of the Directive, although it does not at this stage explicitly support extending the scope of the Directive to include cultural institutions.

Perhaps the main relationship of the Directive to PPP in the cultural sector concerns Article 11 and the provisions on the avoidance of exclusive arrangements in order to ensure competition in the PSI re-use market (see above). In this context, the HLEG-DG Sub-group report recommends clearly “...*exclusive arrangements for digitising and distributing the digital assets of cultural institutions are to be avoided*”.

Three levels or types of exclusivity are identified in the report:

- Exclusivity of partners, whereby partnering with one organisation precludes partnering with another (none of the case studies used in the report reflect this position);
- Exclusivity of content, whereby the partnership prevents the public-sector institution digitising its copies of the content with another private-sector provider, in order to protect the commercial interests of the first partner; and
- Exclusivity of search access, whereby PPPs involving search engine providers in the financing of the digitisation of content may limit search on the resulting digitised copies to specific search services to prevent them from being indexable by other search engines. This does not prevent other search engines from making their own digital copy of the content to make it searchable through their own platform, but would prevent them from crawling and indexing the digitised copies made, for example, in the context of the Google-Michigan partnership, one of case studies.

The report is also explicit about the conditions that it perceives to be necessary for PPP that should:

- Be a formal, transparent and accountable partnership;
- Not establish exclusive agreements that are not time-limited;
- Operate within the framework of applicable copyright and intellectual property law; and
- Clearly state the ownership of such rights after digitisation.

However, the report’s further conclusion is that avoidance of exclusive rights should be “...*balanced with the need for the PPP to provide the level of incentive for private partners to*

engage in digitisation and making available the assets of cultural institutions". Where exclusive arrangements require restrictions to users' access and use in order to make the digital content available at all, these restrictions should only apply for a time-limited period. The interpretation in practice of the provision within Article 11.2 for exceptional circumstances to allow exclusive deals as necessary in the public interest and the frequency of their deployment appears to be centrally relevant to the current study and to the case for bringing cultural institutions within the scope of the Directive.

Whilst the conclusions of the HLEG-DL Sub-group provide significant encouragement to the potential for increased re-use of cultural information and compliance with the spirit and key terms of the Directive, there is a need to address certain issues which might need to be clarified before the scope of is expanded in this direction. There is an apparent possibility, indicated in several of the HLEG-DL Sub-group case studies, that in order to realise all the potential advantages of digitisation outlined in the HLEG-DL Sub-group report, cultural institutions, whilst "aiming to abide by the principles of the Directive" may in practice need to draw very frequently on the flexibility provided by Article 11.2 by making an exclusive arrangement qualified by the time-based review provision.

A consequence of this, on the assumption that the overall spirit and intention of the Directive is to improve the competitive environment and to reduce exclusive arrangements to an irreducible minimum, could be to render the intention of Article 11 somewhat less meaningful in its application to cultural institutions. In this specific context a source of further concern may be that the HLEG-DL Sub-group report argues, quite understandably, for arrangements that help ensure the sustainability of PPP in the longer term. This may raise further uncertainties about the impact that such an approach may have on the need to renew initially time-bound exclusive agreements.

The HLEG-DG Sub-group report concludes that, although it is "early days" it is clear that PPPs are not yet widespread within the cultural sector in Europe. Most respondents to the survey for the current study have no such arrangements. In addition to other factors, market size issues have so far precluded a high level of private sector interest in Member States that do not hold content in major global languages such as English, French, German and Spanish.

The report recommends that public institutions actively engage with private institutions as an option to achieve mass digitisation projects but that partners must fully consider their own unique objectives and circumstances before doing so. A contribution to the report made on behalf of the archives sector affirms general interest in PPP, although they are not yet generally practiced, but with more caveats. Paid-for business models are unusual and archives see protecting public domain content as critical to their mission. Many archives have used private companies to achieve digitisation on a commercial, arm's-length basis ("outsourcing") as opposed to a partnership, although it is seen as often more economic and effective for archives to invest in the technology and staff resource required than invest resources in partnerships. Genealogy projects are seen as being potentially well-suited to PPPs but as yet underexploited. The archives sector was of the view that exclusive agreements are not appropriate unless they have been established for a time-limited period through an open tender process.

One of the case studies, although arguably drawn from a different sector also currently excluded from the scope of the Directive (that is, public broadcasting archives) draws upon the work of Institut National de l'Audiovisuel (INA), which receives 60% of its income from the French government and earns the remaining 40% through commercial activities for professionals, operating a major digitisation and preservation and search/discovery programme for its broadcast archives. The type of arrangements described would, if conducted within the scope of the Directive need to be clearly justified (as they may well be) within the provisions of Article 10.

A need for flexibility in achieving digitisation appears to be a very strong concern of the sector as expressed by the HLEG-DL Sub-group report. In reflecting a general sensitivity and widely opposing views regarding the commercialisation of public domain content through digitisation, the HLEG-DG Sub-group comments upon the differing conditions in Member States whereby, for example:

- Some governments may offer significant investment for digitisation projects resulting in less need for commercial business models to fund projects. The HLEG-DL Sub-group argues that cultural institutions tend to attract government funding for digitisation in smaller countries with lower volumes of legacy content to be digitised, such as the new EU member states in Central and Eastern Europe;

- Some public sector institutions see it as their mission to protect state ownership of the cultural assets of the nation and do not allow them to be exploited for commercial gain; and
- Some cultural institutions view digitisation projects as providing an additional service (presumably both within and without their public task) which would not have been available to users without private-sector funding and that a fee to help cover the costs of digitisation is both justified and necessary.

On this basis, the report suggests that it is for cultural institutions to decide their own opinions on this point and act accordingly, while respecting a number of basic principles. The way in which the Europeana service, being developed under European Digital Libraries Initiative, serves as an access point in future for the commercial re-use of public domain content is an issue which may be of some relevance, whether culture is brought within the scope of the Directive or otherwise. Its current business plan envisages mobilising market-driven site revenues and the possibility of re-use arrangements with, for example providers of commercial services such as family history service providers, mobile phone operators or suppliers of directional “satnav” services.

In conclusion, given the existence of competition and procurement legislation in any case, there appears to be a need to consider carefully in the light of the adoption of the HLEG-DG Sub group arguments, as to whether either the cultural sector or the implementation of the Directive on PSI re-use in its wider “harmonisation” context would be strengthened by formal inclusion of the cultural sector within its scope.

Annex 3: List of survey respondents

Public sector bodies

National Library of Portugal

Bekes Megyei Konyvtar

Helsinki City Library

National Library of Austria

National Library of Germany

The British Library

National Library of Poland

Swedish National Archives
National Széchényi Libraryj, Hungary
National and University Library of Iceland
National Library of Spain
National Library of Norway
Bengt Wittgren, Sweden
National Library of Romania
Public Library of Varna, Bulgaria
National Library of The Netherlands (KB)
Bibliothèque Nationale de France
Regione La Marche, Italy
Slovak National Library
National Library of Denmark
National Library of Estonia
BNCF (Florence)
La Cité de l'architecture et du patrimoine, France
BAM portal, Germany

Re-users

Aksedo, Latvia
Panta Rhei Social Research Group, Hungary
Researcher Economic Information, Centre for Economic Research, Bulgaria
IUS Software, Slovenia
Kompass Verlag. Austria
Federation of European Publishers

Annex 4: List of face-to-face interviews

Paris

- Archives Nationales de France
- Direction de Patrimoine et de l'Architecture, Ministry of Culture and Communication
- Ministry of Culture and Communications Working Group
- Musée de Quai Branly

Prague

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- National Library
- National Museum
- National Archive

Berlin

- Institute for Museum Research
- Federal Archive
- City Library of Berlin

London

- The British Library
- The National Archive

Annex 5: References

- The Economy of Culture in Europe(KEA,, 2004)²⁰;
- i2010 European Digital Libraries Initiative High Level Expert Group on Digital Libraries Sub-group on Public Private Partnerships. Final Report on Public Private Partnerships for the Digitisation and Online Accessibility of Europe's Cultural Heritage. May 2008²¹;
- Commercial Exploitation of Europe's Public Sector Information (PIRA, 2000)
- Heritage wiped off the map as sat-nav puts motorists on road to ignorance. The Times, London, 29 August 2008²².
- i2010: Digital Libraries High Level Expert Group – Copyright Subgroup Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works
- The European Digital Libraries Initiative sector-specific guidelines on due diligence criteria for orphan works: Joint Report

²⁰ [http://ec.europa.eu/culture/key-](http://ec.europa.eu/culture/key-documents/doc873_en.htm#bad_nodepdf_word/economy_cult/executive_summary.pdf)

[documents/doc873_en.htm#bad_nodepdf_word/economy_cult/executive_summary.pdf](http://ec.europa.eu/culture/key-documents/doc873_en.htm#bad_nodepdf_word/economy_cult/executive_summary.pdf)

²¹ http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/ppp/ppp_final.pdf

²² <http://www.timesonline.co.uk/tol/news/uk/article4629602.ece>