



EUROPEAN POLICY BRIEF



RICHERS
RENEWAL, INNOVATION AND CHANGE:
HERITAGE AND EUROPEAN SOCIETY

RICHERS “RENEWAL, INNOVATION AND CHANGE: HERITAGE AND EUROPEAN SOCIETY”

Digital Copyright Framework
The move from analogue to digital and new forms of IPR

JUNE 2015

INTRODUCTION

RICHERS is a research project funded by the European Commission within the 7th Framework Programme in the domain of Socio-economic Sciences and Humanities. Its main objective is to reduce the distance between people and culture, recalibrating the relationship between heritage professionals and heritage users in order to maximise cultural creativity and ensure that the whole European community can benefit from the social and economic potential of cultural heritage.

RICHERS is about change; about the decentering of culture and cultural heritage away from institutional structures towards the individual; about the questions which the advent of digital technologies are demanding that we ask and answer in relation to how we understand, collect and make available Europe's cultural heritage.

The last two decades have witnessed significant changes to the ways in which European cultural heritage is created, used and disseminated. With the advent of the internet, the increasing use of social media, the digitisation of collections and the widening access to images, and the use of mobile devices has raised questions around ownership, authorship and access to cultural heritage. Intellectual property rights (IPR) in general and copyright in particular impacts on how cultural heritage is produced and consumed, developed, accessed and preserved in this digital world. New practices, such as collaboration and co-creation of cultural heritage change how we engage, alter, communicate and participate in cultural heritage and require appropriate responses via copyright law for the digital economy.

The RICHES project addresses the challenges that these digital cultural practices pose to existing copyright law and argues for new perspectives on the intersections between copyright and rights to culture and cultural rights to support these new transformative practices for the future.

This policy brief is for:

- European policy-makers

and

- European cultural heritage institutions

This policy brief is mainly for European policy-makers because the human rights obligations described below are addressed to, and place obligations on, states. We have included European cultural heritage institutions as addressees of this policy brief because they occupy significant roles in the changing cultural heritage landscape within Europe, and have much to gain in developing strategies that place cultural rights first and which use the copyright that they own to achieve these ends. Other copyright stakeholders within the European cultural heritage milieu would also benefit from re-thinking their approach to cultural heritage based on the principles recommended in this policy brief.

This policy brief describes how European policy-makers and European cultural heritage institutions should develop European copyright policies and strategies for the cultural heritage sector using the rights to culture and cultural rights as guiding principles. The impact is to lay emphasis on *inter alia* access to culture, cultural integrity and cultural communication and to develop ways in which copyright can support those goals.

The aim of this policy brief is to persuade European policy-makers and cultural heritage institutions that cultural heritage should be seen as a resource (via the human rights framework) before being considered an asset (via the IPR framework) but that the two frameworks should be used to complement each other to fulfill cultural rights. When developing copyright policies and strategies within the cultural heritage sector, the starting point should be to ask how the rights to culture and cultural rights as found in the international human rights framework can be fulfilled when making decisions on copyright, whether through the development of the law, or in relation to institutional strategies. Copyright, in other words, should be used as a tool to fulfill these cultural rights.

This policy brief thus offers a way of thinking about copyright that is designed to reflect the changes wrought in and on the cultural heritage sector by digitisation and can be used as an impetus for change in law and in practice. Leadership from European policy-makers and institutions could reap significant rewards in this sector and at this time of important social, economic and technological change.

EVIDENCE AND ANALYSIS

Copyright policy, law and practice at international, European and domestic levels forms a highly contested and often highly political space. Policy constantly shifts, depending on the particular goal of the moment, the law at all levels is continually under review, and those whose practice meshes with copyright find it challenging to navigate the opaque boundaries of the law and find few 'hard and fast' answers to copyright conundrums.

The purpose of this policy brief is not to contest this framework, but to find ways to work within it by using the copyright system for the benefit of the European cultural heritage sector, of European cultural heritage institutions, and of the users and creators of cultural heritage within Europe.

The starting point is to recognise that cultural heritage can be thought of in two ways by policy-makers and cultural heritage institutions. It can be thought of as an asset belonging to the nation or institution, or it can be thought of as a right or heritage belonging to the community or group.

These perspectives are not mutually exclusive, but give useful points of reference when developing copyright policies and strategies.

Where the starting point is to think of cultural heritage as an asset, then, within the legal framework, it is generally first considered through the lens of copyright. When this is the case, culture becomes commodified. In other words, culture becomes bound up in notions of private property, ownership and control. If, on the other hand, culture is first considered as a right or heritage belonging to the community, then it is looked at first through the lens of human rights, notably the rights to culture and cultural rights. When this is the case, emphasis is placed on public goods, access and cultural communication. Copyright can be used as a tool to attain these goals. In offering an alternative perspective on IPR for the future, this policy brief advocates the second approach.

An example will illustrate the point.

Many museums currently have active strategies to digitise objects from their collections. Some museums then view a prime purpose of these digitised objects as being assets of the museum that can potentially generate revenue. When that is the case, museums turn to copyright to protect and control these digital objects making them available to the community using licenses specifying what can and cannot be done with the object, and often seeking payment in return for use.

Other museums take, as their overriding strategy, access to and widespread use of their digitised objects by the community. When this is the case, museums use copyright as a tool to ensure that those digital objects are and remain open for use by the community. To achieve these ends some museums will use open licences such as one of the creative commons (CC) licences. These licences use copyright to ensure that the object to which they are attached is available for use by all, often only requiring that the owner of the copyright (such as the museum) be attributed by the user. An example is the CC-BY licence. Other licences include the public domain licence which, where legally possible, dedicates the digital object to the public domain.

As noted above, these are not mutually exclusive strategies, but the example serves to illustrate the point of how copyright can be used to attain the desired goals.

The human rights legal framework

The rights to culture and cultural rights are most clearly articulated in the international human rights framework and are also present in the European human rights framework. For illustrative and space purposes reference will be made here only to the International framework.ⁱ

Three United Nations Educational Scientific and Cultural Organisation (UNESCO) Conventions have been relied on in developing this strategy: the 1972 Convention for the Protection of the World Cultural and Natural Heritage; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

For cultural heritage to fall within the terms of the Conventions, two criteria should be met:

Cultural heritage is some form of inheritance that a community or people considers worth safekeeping and handing down to future generations.

Cultural heritage is linked with group identity and is both a symbol of the cultural identity of a self-identified group (a nation or people) and an essential element in the construction of that group's identity.ⁱⁱ

If cultural heritage falls within these parameters, the advantage is that obligations are then placed on states that have signed up to the Conventions to protect, respect and fulfill the rights to culture and cultural rights. References to these rights are to be found both in the UNESCO Conventions as well as the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

Cultural rights

Cultural rights focus on respect for and protection of cultural diversity and integrity. In terms of content, the important elements that contribute to the realisation of cultural rights include:

*Moral rights, collective cultural identity, cultural integrity, cultural cooperation, cross cultural communications, and intercultural exchange.*ⁱⁱⁱ

In addition the 2012 UN Human Rights Commission report on the right to enjoy the benefit of scientific progress and its applications recommended that:

States ensure freedom of access to the internet, promote open access to scientific knowledge and information on the internet, and take measures to enhance access to computers and internet connectivity, including by appropriate internet governance that supports the right of everyone to have access to and use information and communication technologies in self-determined and empowering ways;

This is important given the extent of the digitisation of Europe's cultural heritage and the new ways in which cultural heritage users access, interpret, preserve and communicate it.

A Right to Culture

The UDHR Article 27 provides that:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits

and that:

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This idea of, on the one hand, rights to participate in culture and, on the other, rights to cultural artifacts is developed in the ICESCR Article 15 by virtue of which states must ensure that everyone has the right:

(a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Comment No 17 (2005) of the UN Sub-Commission on Human Rights states, on the interrelationship between the obligations in Article 15, that the rights protected are not coextensive with intellectual property rights, although intellectual property rights can be deployed as tools to secure protection of the rights in Article 15.

POLICY IMPLICATIONS AND RECOMMENDATIONS

When considering reform of European copyright law, policy-makers should have as their first consideration, how the rights to culture and cultural rights are implicated by the present state of the law, and how they might be (better) fulfilled by any reform. While it is not possible to give definitive examples of how the recommended strategy should be implemented, as that will depend on a range of variables in any given scenario, two examples can be given of how the recommendations could be applied in practice in Europe.

E-lending

The ability to access and read books is important for the rights to culture and cultural rights. In addition, books play a central role in the rights to education and freedom of expression, among others. Within Europe, libraries pay fees to collecting societies in order to be able to lend books to the public. However, the Rental and Lending Rights Directive does not cover e-books. Libraries thus have to negotiate with publishers around the terms and price for e-lending. Studies have shown that where e-books are available, many people increase the numbers of books that they buy and read^{iv} thus promoting the fulfillment of the rights outlined above. When reviewing the Information Society Directive with a view to law reform, policy-makers should consider the proposals made in this policy brief as a catalyst to consider ways in which e-lending could be facilitated, while recognising the legitimate interests of authors and rights-holders, and mould the exceptions and limitations to copyright accordingly. While changes in the law may be subtle, they are likely to look different to changes that might have been introduced had the starting point been to view the property rights in the book as paramount.

This absence of e-lending from the Rental and Lending Rights Directive is also indicative of the extent to which digitisation is fundamentally altering our cultural heritage landscape, and challenges the ways in which copyright operates within that landscape.

Museum copyright in digitised objects

Museum strategies in relation to asserting copyright in digitised objects provide a second example. State-funded museums occupy a conflicted position in relation to their digitised collections: on the one hand, they would like to make them as widely available and reusable as possible; on the other hand, government policies often require institutions to contribute to their own financial costs. One way in which museums seek to meet these ends is through licensing access to and re-use of these digital objects even though the underlying object may be in the public domain. One strategy for exerting that control is to claim that copyright subsists in the act of digitisation that brought the digital object into being. On this point, recent case law from the Court of Justice of the EC is unclear as to whether it would support such an argument: it is one of the 'fuzzy' edges of copyright law. European policy-makers could clarify the law in this area. In addition, European policy-makers and museums could commission new research into the economic and social consequences of making access to and use of digital objects available for 'free'. At present, the position is a confused one: some research suggesting that 'free' access and use of digital objects results in increased income to museums through, inter alia, higher visitor numbers and spend in museum shops; other research questions these findings.

Summary

These are just two examples of the types of strategies that might be developed by European policy-makers and by cultural heritage institutions, including museums within Europe where the starting point for thinking about change is the fulfillment of the rights to culture and cultural rights within the cultural heritage sector. Such strategies place the fulfillment of these cultural rights as the guiding principle, and use copyright as a lever to fulfill those goals while balancing the legitimate interests of copyright authors and owners. Overall, shifts in emphasis may be nuanced, but can underpin changes in law and practice to reflect the transformations wrought by digitisation on our cultural heritage, and the ways in which users now engage with and in the sector.

This policy brief is part of a European culture of change and lays the foundation for re-thinking issues around copyright law and cultural heritage in a digital age. It can be used as a catalyst for a shift in thinking about copyright law wrought by the digitisation of cultural heritage and to enable European policy-makers and cultural heritage institutions to implement it in practice.

RESEARCH PARAMETERS

Desk research and the analysis of the findings of a questionnaire and two case studies were undertaken in preparing the underlying research for this policy brief.

Extensive in-depth desk research was undertaken on existing European IPR law, current legislation on copyright law and Human Rights law as articulated in the UNESCO Conventions. Research was undertaken on the impact of digital technology on how cultural heritage is produced and consumed, accessed and preserved. The challenges posed by new technologies and new practices in the co-creation of cultural heritage raised questions and identified gaps with current IPR law and highlighted the need for re-thinking the intersections between cultural heritage, copyright and human (cultural) rights in the digitised era.

A questionnaire on IPR law was designed and distributed to partners of the RICHES project to gain an insight into their attitude to existing IPR law and into their understanding of the relationship between IPR law, copyright and digital technology. The data gathered contributed to formulating the research questions, highlighted the need for appropriate IPR laws for the digital economy and supported the argument for re-thinking cultural heritage and IPR within a Human Rights framework.

Two European case studies, both contextualised within the shift from analogue to digital, were chosen to demonstrate how the recommended legal framework in relation to cultural heritage, copyright and human (cultural) rights are played out in practice. These consisted of a series of interviews with two of the RICHES project participants:

- Case Study 1 – RICHES Task 4.2: *Co-creation and Living Heritage for Social Cohesion* was concerned with collaboration and the co-creation of cultural heritage when consumers become (co-)producers. Joint authorship raised legal and economic concerns around innovation and creativity and issues of IPR rights, obligations, ownership and exploitation.
- Case Study 2 – RICHES Task 6.1: *Digital Libraries, Collections, Exhibitions and Users* addressed the debate between a ‘closed’ copyright policy and a ‘human rights’ approach in accessing, preserving, communicating and participating in cultural heritage in a digital age. This highlighted the debate between access to culture on the one hand and the privatisation of culture on the other through the ownership and control of culture by cultural heritage institutions. In addition, it raised the question as to how to reconcile the right of users to freely participate in, and have access to, culture with institutional dominance in the control and protection of cultural products and cultural policy driven by economic factors.

PROJECT IDENTITY

PROJECT NAME

RICHES: Renewal, Innovation and Change: Heritage and European Society

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BUDGET

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WEBSITE

RICHES website: <http://www.riches-project.eu/>
RICHES blog on Digital Meets Culture: <http://www.digitalmeetsculture.net/riches/>

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Use the hashtag #richesEU to join the RICHES Project community on Twitter.
Subscribe to the RICHES Project YouTube channel: www.youtube.com/richesEU

FURTHER READING

RICHEs Booklet, <http://www.digitalmeetsculture.net/wp-content/uploads/2014/04/RICHES-Booklet.pdf>

D2.2 Digital copyrights framework (http://www.digitalmeetsculture.net/wp-content/uploads/2015/02/RICHES-D2.2-Digital-Copyrights-Framework_public.pdf) – Common framework of understanding for the RICHES project in relation to the law of copyright (and performer's rights) and its importance for digital cultural heritage, cultural working practices that embrace co-creation as the norm and cultural heritage that is transformed from analogue to digital.

V. Bachi, A. Fresa, C. Pierotti, C. Prandoni, 'The Digitization Age: Mass Culture is Quality Culture. Challenges for cultural heritage and society', Digital Heritage. Progress in Cultural Heritage: Documentation, Preservation, and Protection (5th Euromed International Conference Proceedings), 2014, DOI: 10.1007/978-3-319-13695-0_81 (http://link.springer.com/chapter/10.1007/978-3-319-13695-0_81)

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R. Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', Annual Review of Law and Social Science Vol. 5: 393-412

A. Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science", Human Rights Quarterly, 35 (1), 143-175

P K. Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework', 40 U. C. Davis L. Rev. 1039 (2007)

P K. Yu, 'Ten Common Questions About Intellectual Property and Human Rights', 23 GA. ST. U.L. Rev. 709 (2007)

UNESCO Conventions

- 1972 Convention for the Protection of the World Cultural and Natural Heritage
- 2003 Convention for the Safeguarding of the Intangible Cultural Heritage
- 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

Human Rights Declaration and Covenants

- Universal Declaration on Human Rights 1948 (UDHR)
- International Covenant on Civil and Political Rights 1966 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)

Human Rights Council

- Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, 'Copyright policy and the right to science and culture', 28th Session, 24 December 2014. A/HRC/28/57

ⁱ For a discussion on the international, European and some domestic regimes see UN General Assembly, 21 March 2011. A/HRC/17/38. Human Rights Council, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the independent expert in the field of cultural rights, Farida Shaheed.

ⁱⁱ J. Blake, 'On defining cultural heritage', I.C.L.Q. 2000, 49(1), 61-85

ⁱⁱⁱ R. Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', Annual Review of Law and Social Science Vol. 5: 393-412 p 394

^{iv} Library eBook Survey hosted by OverDrive and American Library Association (ALA). Available at: http://blogs.overdrive.com/files/2012/11/ALA_ODSurvey.pdf.