



The COMMUNIA International Association on the Public Domain is a network of researchers and practitioners from universities, NGOs and SMEs established in 10 Member States. Our mission is to foster, strengthen and enrich the public domain. To fulfill this mission, COMMUNIA and its members raise awareness in, educate about, advocate for, offer expertise on and research about the public domain in the digital age within society and with policy-makers, at the EU level and worldwide.

COMMUNIA ASSOCIATION POSITION PAPER ON DIGITAL SINGLE MARKET

The aim of this position paper is to respond to the call made by European Commission to open public discussion on digital single market and its expected shape in the coming years.

We fully agree with President Juncker that we need to “break down national silos in copyright”. As was noted by President Juncker in his opening statement, one of the challenges standing in front of the Digital Single Market is a modernisation of the copyright rules in the light of the digital revolution and changed consumer behaviour. We fully support this position, which considers copyright a fundamental regulatory mechanism for a modern economy.

The current system of IP protection is not only over-complicated, but also unclear to all its stakeholders. Thus one of the goals of this modernisation should be a simplification of rules, and in particular a harmonisation across Member States and jurisdictions. Typically, harmonisation is mentioned with regard to territoriality and market fragmentation that affects commercial content. We want to point out that it is just as important to harmonise copyright rules that create freedoms for public institutions, certain uses beneficial to society (for example, educational and research uses) or for individual citizens.

These issues are often, wrongly, seen as of secondary importance, because of the fact that they are exceptions, functioning largely in non-market environments. Yet in the context of the Digital Single Market it is necessary to point out that there is also significant economic potential related to these user freedoms - for example in areas related to education, research or health care, not to mention SMEs and entrepreneurs. Proper copyright exceptions and limitations lead not only to greater user freedoms, but are also themselves significant added value. A broadly understood public domain is in this aspect similar to Public Sector Information, which is well understood in Europe to be a raw material, on which added value is created through re-use (provided that we provide adequate reimbursement to right holders where necessary and protect privacy and personal data).

Due to a lack of such harmonised exceptions across Europe, we not only miss out on potential economic and social gains. Different legal rules between Member States lead to uncertainty for anyone attempting to engage in cross border activities. Massive open online courses (MOOCs) are but one example of educational enterprises that could benefit from greater legal clarity in this regard.

For those reasons, we urge the Commission to **expand and adapt current copyright exceptions and copyright limitations** so that they serve public benefit in the digital, online environment. Furthermore, we ask that **the Public Domain, a body of knowledge and heritage that can be freely used, is protected, strengthened and widened**. We also believe that an open provision that ensures flexibility with regard to digital technologies and social practices should be introduced to support innovative business and civic developments. The following pillars could be the base for Digital Single Market reforms:

1. **HARMONISATION OF EXCEPTIONS AND LIMITATIONS.** Europe should harmonise exceptions and limitations of the Copyright Directive among the Member States and open up the exhaustive list so that the user prerogatives can be adapted to ongoing technological transformations. The limited list of Exceptions and Limitations established by the Copyright Directive restricts the possibilities to adjust the copyright system to the rapid pace of technological innovation that shapes how we interact with copyright-protected works. This not only limits the abilities of citizens to gain access to our shared culture and knowledge but also imposes restrictions for innovative business models, and as a result, economic growth. In the absence of open-ended exceptions such as a fair use clause it is imperative that exceptions and limitations can be adjusted to the needs of society at large and innovative economic actors in particular.
2. **TERM OF PROTECTION.** The term of copyright protection should be reduced. The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility to our shared knowledge and culture. There is no evidence that copyright protection that extends decades beyond the life of the author encourages the production of copyright protected works. Instead, there is compelling evidence that the requirement to obtain permission for works by authors that have long died is one of the biggest obstacles for providing universal access to our shared culture and knowledge.
3. **REGISTRATION.** In order to prevent unnecessary and unwanted protection of works of authorship, full copyright protection should only be granted to works that have been registered by their authors. Non-registered works should only get moral rights protection. One of the unintended consequences of the near universal access to electronic publishing platforms is an increase in the amount of works that are awarded copyright protection even though their authors do not require or desire such protection. This extension of protection threatens to undermine the value and effectiveness of protection for works where copyright protection is necessary and desired..

4. **LEGAL UNCERTAINTY.** As a prerequisite for unlocking the cultural, educational and economic potential of the public domain, identification of works in the public domain should be made easier and less resource-intensive by simplifying and harmonizing rules of copyright duration and territoriality. The rules for establishing the duration of the term of protection of individual works have become so complex that it is almost impossible to establish with certainty whether a work is protected by copyright (including all neighboring rights) or whether it is in the public domain. This complexity in the system makes it very difficult to automatically calculate the status of a work. Two factors have contributed to this situation: the divergence of legislation between the different Member States, and a large number of (national) exception clauses. This situation can only be remedied by intervention on the European level, preferably by simplifying the rules and harmonizing them across Europe. The work on public domain calculators has highlighted the incredible complexity of copyright term rules which makes it very difficult to determine the copyright status of individual works. This means that one of the biggest obstacles to positively identifying public domain works (and thus unlocking their cultural, educational and economic potential) lies in the cumbersome process of determining the term of copyright protection.

5. **DIGITAL REPRODUCTIONS.** Digital reproductions of works that are in the public domain must also belong to the public domain. Use of works in the public domain should not be limited by any means, either legal or technical. The Internet enables the widespread re-use of digital reproductions of works of authorship whose copyright protection has expired. The public domain status of these works means that there is no owner of the works who can impose restrictions on their re-use. At the same time the owners of the physical works (such as heritage institutions) often feel that they are entitled to control over digital reproductions as well and that they can impose restrictions on their re-use. However, digitization of public domain works does not create new rights over it: works that are in the public domain in analogue form continue to be in the public domain once they have been digitized.

6. **PUBLIC FUNDING OF DIGITIZATION PROJECTS.** Digitization projects that receive public funding must at the minimum ensure that all digitized content is publicly available online. Allowing for the free redistribution of digitized content should be considered since it is beneficial for the sustainability of the access to digitized cultural heritage. When public funding is used for digitization projects it needs to be assured that the public benefits from these efforts. At the minimum this means that digital versions need to be available online for consultation by the public that has paid for the digitization effort. Public funding bodies should prioritize digitization projects that will increase the amount of our shared and culture that is available to the public. Memory institutions that receive public funding should consider making available digitized collections with as little restrictions as possible. Free availability of collections which includes the free redistribution and re-use of the digital artifacts will result in wider availability and reduce the risks inherent to centralized storage.

We would like to express our true devotion to support the above mentioned recommendations.

Since the European Commission encourages also sharing of graphical and multimedia elements, we would also like to submit a set of thematic postcards. Each one combines a treasure of European cultural heritage with one of our policy recommendations. The postcards are available at:

<http://www.communia-association.org/2011/06/14/new-policy-recommendations-postcards/>