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1. Abstract

The following analysis is aimed at identifying best practices on legal rules and contractual transfers of rights in the area of public sector works in different European Union countries. A particular attention is devoted to cultural institutions legal rules and practices as well. More precisely, this document focuses on three different levels of the public sector works production and circulation: i. legal rules on protectability of works, ii. legal rules and contractual practices on rights ownership, iii. legal rules and other practices implemented within the cultural institutions.

Please note that this deliverable was written on the basis of national responses to the questionnaire provided by the LAPSI 2.0 partners and that this list is not intended to be exhaustive. This deliverable mainly focuses on copyright, while the sui generis database protection will be further analysed at a later stage.

2. Introduction

Based on the answers of the current LAPSI 2.0 partners and building upon the results achieved and the information gathered during the LAPSI 1.0 project, some of the best practices could be identified. In particular, the LAPSI 2.0 network identified some best legal rules on the protectability of public sector information (PSI) eligible for copyright protection, some good and bad legal rules on rights ownership of PSI covered by copyright protection and some best practices on the transfer of such rights. In the area of cultural institutions the LAPSI 2.0 network identified some best practices as to the metadata exploitation, access and re-use to cultural content.

This document is therefore split into three parts. Each part is organized according to the following method: first, a brief comparative overview of the received answers is provided and the most interesting results are pinpointed out. Then an overview of the identified legislative, regulatory and contractual best practices in the specific area is included.

It is important to stress the fact that this list of examples is not by any means intended to be exhaustive. It is based on the current knowledge and research of the LAPSI 2.0 team members and there may be other “best practices” throughout the EU that deserve a place in the report. The LAPSI 2.0 team welcomes any feedback on these examples and will be happy to add additional best practices they are pointed to until December 2014.

3. Questions Asked

A Public sector works (The purpose of this part is to compare not just legal regimes but also the practical ways in which particular countries deal with works produced by public sector bodies.)

A.1 Please provide translations of statutory or other provisions of your legal system that, in terms of copyright, define the legal regime for works that are produced by public sector bodies (public sector works). If possible, please include the translation(s) of definition(s) of public sector works as well as provisions laying down their exemption from copyright protection (incl. neighbouring rights), limitations or any specific copyright regime. If applicable, please provide also translated definition of public sector databases and exemptions or limitations of *sui generis* rights.

A.2 Is there any other legislation or similar rules that define public sector works apart from the copyright provisions mentioned above? If so, please provide their translation and a brief description.

A.3 Please describe the scope of copyright definition of public sector works, i.e. specify what works are considered as public sector works. If there are multiple classes, please describe each of them separately. If there is also a specific definition of public sector database, please describe its scope as well.

A.4 Which of the works listed below are regarded as public sector works (please provide a detailed explanation in cases where the answer requires further clarification or is context-dependent)): court decisions, court files, texts of applicable statutes and other black-letter laws, statistical data created by a national statistical authority or by a similar body, commercial register data, content broadcasted on public TV stations, compulsorily published announcements of public procurement.

A.5 Please describe, in general, the copyright regime of public sector works produced directly by public sector bodies, i.e. what is the scope of their protection by copyright or neighbouring rights. In particular, please specify: whether such public sector works are exempt from copyright or neighbouring rights; whether there are any limitations of such rights; or whether there is any special form of copyright protection (e.g. Crown copyright). Also, please include an explanation of how this legal regime works in practice, i.e. what is the practical legal consequence of the fact that a public sector body creates public sector work? If there is specific legal regime for public databases, please describe it specifically.

A.6 What are the limits of implied copyright transfer of employment works in cases where such works are produced by employees of public sector bodies? What if an employment work becomes a public sector work?

A.7 Please describe the copyright regime of public sector works produced fully or in a part by third persons (i.e. in the case of contracted production of such works). In particular, please outline whether it is possible for public sector bodies to outsource production of public sector works and if so, the copyright rules for disposal in that case.

A.8 Is there any difference between the legal regime for domestic and foreign public sector works? If so, please explain it.

A.9 Please describe court or other cases where you consider the question of the interpretation of the scope or legal regime of public sector works to be particularly interesting or important within your jurisdiction. Please provide, for each case, a brief explanation of the facts, a summary of the legal issue and a summary of the interpretation adopted by the court.

A.10 Please describe, in free form, any examples of good or bad administrative or business practice in the handling of public sector works that is of particular interest or importance within your jurisdiction.

B Cultural institutions (the purpose of this part is to find out how datasets and digitized data from cultural institutions are made available in your jurisdiction)

B.1 Which cultural institutions would in your country currently fall under the scope of the revised PSI Directive?

B.2 What kinds of metadata produced by cultural institutions fall under the scope of the revised PSI Directive?

B.3 Which types of metadata produced by cultural institutions are in your country considered to be part of the public domain? If applicable, please provide a general explanation for examples.

B.4 Please describe examples of the forms of publication of metadata of cultural institutions, e.g. describe which datasets are published by public libraries, how the publication is produced technically (on a website, through FTP etc.), what licenses are used etc.

B.5 Please describe examples of the procedure and legal regime for the digitized content data of cultural institutions. In particular, please explain whether digitization is conducted by cultural institutions in their own capacity or whether it is contracted. Also, please explain how digitized data is used by cultural institutions and whether (and eventually how) it is made available to the public: including its availability for re-use.

B.6 Are there any rules apart from the PSI legal framework that would oblige or motivate cultural institutions to implement an open access regime in relation to the use of their metadata or digitized content?

4. Definitions

This document defines as public sector works all the public sector information (PSI) which is in principle eligible for copyright protection according to the copyright rules.

Public Sector Information ("PSI"): *"wide range of information that public sector bodies collect, produce, reproduce and disseminate in many areas of activity while accomplishing their institutional tasks."*

Public Sector Work ("PSW") : PSI that fulfills the national requirements needed by the national law to obtain copyright, neighbouring rights and sui generis database protection. Official texts are merely a sub-category of Public Sector Works.

5. Protectability of Public Sector Works

(Questions A.1 – A.4)

The first questions of the questionnaire are aimed at identifying the scope of protectable subject matter under copyright (and neighboring rights and the sui generis database protection) law. In particular the purpose is to understand whether national copyright (and sui generis database) rules indicate an exception as to the so-called public sector works and to what extent and under what conditions there exceptions may apply.

From the point of view of **international law** the Berne Convention does not impose its Members to protect or limit the protection of official texts. Art. 2(4) of the Berne Convention (BC) says that *"It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts"*. In other words, art. 2(4) BC contains one of the so called flexibilities that leave Member states free to grant an intensive protection at the local level, i.e. decide whether or not official texts should be protected.

At the **European level** the subject matter of copyright is not completely harmonized. This phenomenon concerns public sector works as well. The result of the merely partial harmonisation of originality is that not even the same works will be deemed as copyrightable (PSI specific or not). However the respective Directives impose the threshold of originality ("author's own intellectual protection") on the databases and software. As the answers to questionnaire indicated there is not a unique definition of the public sector work in the responding countries. As the questionnaire further showed the jurisdiction also differ as regarding the used terminology.

As the questionnaire showed **most of the participating countries** do not have a specific public sector works copyright protection regulation but do exempt the PSW to some extent

In theory, three different hypothesis could be identified.

i) No public sector work is considered as copyrightable since it is exempted from copyright protection: in this case national copyright laws generally introduce a broad exemption from protection.

ii) Some public sector works are protectable according to the copyright rules, but sometimes they are not: in this case national Acts introduce analytical and narrow ad hoc exemptions from protection.

iii) All the public sector works (including legal texts and official texts) are considered protectable exactly as all the other works of art: in this case no exemption from protection is provided by national laws.

5.1 Broad exemption from protection

This regime is characterized by general rules, that put all PSI - and therefore PSWs - in the public domain, no matter who created it and at which state it was transferred to the PSB. A broad exemption is usually characterized by an open-end clause defining the PSW as is the case in **Czech Republic** and **Poland.** These countries have one of the broadest definitions of PSWs and do not protect by copyright the widest amount of potentially protected works. In **Czech Republic** any copyrighted work may be exempted from copyright protection if it gains the “official status”. **Austria** also does not protect *“official literary works produced exclusively or mainly for official use“* by copyright. These works (except software) are treated as “freie Werke”, i.e. do not enjoy the copyright protection. **Norway** also provide for quite a broad exemption from copyright protection exempting *“proposals, reports and other statements which concern the public exercise of authority, and which are made by a public authority, a publicly appointed council or committee, or published by the public authorities”* and this also if the creation of PWS is outsourced by third parties. Similarly **Poland** exempts from copyright protection: “*any official documents, materials, symbols and logos*”. The term official documents is understood rather narrowly. It is said that official documents hold the following characteristics: *(i) they are prepared by PSBs within the scope of their official duties, (ii) they are in a legally prescribed form.* In contrast the term *official material* is understood broadly as *any material coming from PSBs in furtherance of their public tasks.* For example the Polish case law qualifies court experts opinions as “official materials” thus exempted from protection.

5.2 Narrow/analytical exemption from protection

Generally most jurisdiction do not exclude generally PSW from copyright rights protection. Only strictly specified list of public sector works that would be otherwise protected are exempted from the copyright protection as such. This specific list of PSW include: legislation (legislative acts), judicial decisions, administrative decisions and other PSWs.

Based on the jurisdiction the following PSWs are exempted from the copyright protection: **Germany** (“acts, ordinances, official decrees and official notices, as well as decisions and official head notes of decisions”), **Netherlands** (“decrees or ordinances issued by public authorities, or in judicial or administrative decisions”)**;** **Greece** (“official texts expressive of the authority of the State, notably to legislative, administrative or judicial texts); **Spain** (Rules arising from State Institutions at any level (national, Regional, Local or Public Sector), International Treaties, Court decisions, Constitutional bodies decisions, Legal documents produced by Law-making bodies without being laws and non-binding ruling from Judges, Projects, explanatory notes and memoranda for a better understanding of Public bodies performance) **Belgium** (“official acts of the government”), **Italy** (“texts of official acts of the State or of public administrations”), **Slovenia** (“official legislative, administrative and judicial texts”); **Latvia** (“regulatory enactments and administrative rulings, other documents issued by the State and Local Governments and adjudications of courts (laws, court judgements, decisions and other official documents), as well as official translations of such texts and official consolidated versions”); **Romania** (“official texts of a political, legislative, administrative or judicial nature, and official translations thereof”); **Denmark** (“Acts, administrative orders, legal decisions and similar official documents”); **Estonia** (“legislation and administrative documents (“acts, decrees, regulations, statutes, instructions, directives) and official translations thereof and court decisions and official translations thereof”); **Hungary** (“provisions of law, other legal instruments of state, administration, judicial or authority decisions, authority or other official announcements and documents, as well a standards and other like provisions made obligatory by legislative acts”); **Finland** (“Laws and decrees; resolutions, stipulations and other documents which are published under the Act on the Statutes of Finland (188/2000) and the Act on the Regulations of Ministries and other Government Authorities (188/2000); treaties, conventions and other corresponding documents containing international obligations; decisions and statements issued by public authorities or other public bodies; translations of the abovemenitoned documents made by or commissioned by public authorities or other public bodies); **Austria** (“According to § 7 UrhG laws, regulations, official decrees, official bulletins and announcements, decisions and official works created for principally official use are exempted from copyright protection”). In **France** the Copyright does not address this question, however it is assumed, that laws, decrees, administrative and judicial decisions are not copyrighted.

Regarding the other PSWs (i.e. official texts or other works produced by the PSB) than the indicated above are fully protected by copyright. Consequently, standard national copyright rules do apply, including the limitations of copyright (“private copying”, teaching exemptions, etc.). A standard protection also means standard duration of copyright term. Thus even fully protected PSWs are at some point (depending on the national legislation, but generally 70 years p.m.a.) in the public domain. However, in the following countries, a special “copyright light” regime applies. In **Netherlands** use of works made public by or on behalf of public authorities is free unless rights have been reserved. In **Germany** other official texts (including PSW not mentioned above) published in the official interest for general information purposes are also exempted from copyright protection. Such PSW however must be attributed and cannot be altered.

5.3 No exemption from protection

The **United Kingdom** with the Crown Copyright regime (with respect to the special provisions for Parliamentary copyright) protects all PSI, including official texts and metadata (if it reaches the needed threshold for protection), however only applies to information produced by central government departments and agencies. Other public sector bodies, such as local authorities, have their own copyright.

The content publicly broadcasted on public TV was identified as not being exempted from copyright protection/neighboring rights protection (explicitly in **Czech Republic**, implicitly in other countries).

5.4 Protection of foreign public sector works

(Question A.8)
Another important issue, namely the protection of foreign public sector works, was covered in the Question A.8. All of the responding states are parties to the Berne Convention thus the Art. 2(4) applies stating that *"it shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."* Further the national regime protection stated in Art 5(1) of the Berne Convention is applicable. Consequently, pursuant to the analyzed answers the regulation of foreign public sector works **in all participating countries** does not differ from the protection of national public sector works. (Explicitly stated so in the **Italian** Copyright Act, whose copyright exception in case of texts of official acts is addressed to both Italian and foreign States or PA's).

5.5 Case Law

(Question A.9)
The relevant case law on copyright and sui generis rights protection/exemption thereof or public domain issues of PSW *in concreto* is rather scarce or non-existent (**Czech Republic, France**, **Romania, Norway, Italy**).
On the other hand **Poland** seems to have a quite progressive judiciary approach to the public sector information. In its judgments the Polish Supreme Court ruled that any information related to PSB shall be considered as PSI and *„documents protected by copyright of third parties are also PSI regardless of how a PSB came into their possession"*. However, this implies obtaining a license for treating the PSW as PSI. On the other hand recent judgment by Constitutional court stipulated that internal opinions and memos able to give insights into the decision making process are not to be considered PSI, because those (in general) do not express the opinion of PSB.

5.6 Best practices

(Question A.10)
The last question in the first section of the questionnaire sought for best and other practices in IP, PSI and public sector works. Results are indicated, together with other identified best and other practices below.
Not many best practices have been identified in the answers to the questionnaire (**France, Czech Republic, Slovenia, Spain, Belgium, Norway**).
Even though the **United Kingdom** has (at least for the continental states) an unusual regulation protecting the public sector works produced by central government departments and agencies (Crown Copyright), this institute is not used for blocking of re-use, but merely for integrity check. The content as such is available under the Open Government Licence v2.0.
In **Romania** a relatively flourishing market in the re-use of court judgments has been identified. A needed prerequisite is the exemption from copyright of the text of the decisions. Even if the decisions are assorted by the respective courts (and the sui generis rights database protection may arise if the conditions are fulfilled) no sui generis database rights are exercised/asserted and thus this situation provides for free re-use and competitive market.

5. 7 Other practices

Other, not recommended, practices have been identified in **Czech Republic** where the public sector works/materials exempted from copyright protection are subject to exclusive agreements for publishing (Supreme Court decisions, mass transportation data and publication of Commercial Gazette).

Another problem is the thinly regulated to protectable PSWs re-use (**Latvia**). The respective PBS do not follow a common state general policy (as there is none) as regards to re-use and create ad hoc rules.

6. Transfer of rights

(Questions A.6 – A.7)

Further questions focused on the transfer of rights to public sector work. The area of interest covered the works produced by the employees of public sector bodies and works commissioned by third parties. Pursuant to the submitted answers this question differs significantly in the responding countries.

Most occurring practice regarding the public sector works created in the course of employment is that the economic rights are automatically transferred (or the right to exercise them) to the employer (**Czech Republic, Poland, Norway, France, Latvia**). This applies in the same way for the sui generis database rights with exception of Latvia where the matter is not sufficiently solved within legislation and if left to individual agreement. **Romania** opted for the broader protection of the employer – the rights are assigned only if it is contractually agreed upon and the assignment is also time limited to 3 years if not stipulated otherwise. In **Belgium** and **Spain** the regulation is either unclear or missing. Following the doctrine of the "Crown Copyright" in the **United Kingdom** works produced by employees of the Crown - such as employees of central government departments and agencies - are Crown Copyright. Such works can be assigned, but the Crown copyright status remains in place. In **Slovenia** the situation is a bit more complicated - legislation prescribes that if the contract does not provide alternate provision, copyright to all the works created by public servant belongs to the public servant again after just 10 years. Law therefore provides appropriate measures, but these are scarcely used by PSBs.

As regards to the works created by third parties for the PSB the regulation again diverges. Usually no specific provisions are provided for and thus the general copyright rules apply (**Czech Republic, Slovenia, Spain, United Kingdom, Poland, Romania, Latvia, Netherlands**). To allow for re-use of such public sector works a licence to do so is needed from the relevant copyright holder.

The situation is however slowly shifting towards standardised procedures altering the general copyright rules, but this is based on contract rather than law. Some of the PSBs in Poland already started to require economic rights to be assigned to them instead of the third party. In the Netherlands the central government uses standard terms of contract that also contain provisions on intellectual property in commissioned works. If the information is customised for the commissioning government, any rights in the work are transferred to the State. These standard terms only apply to parts of central government (excluding local governmental bodies or independent PSBs such as Cadastre). The information to what extent the standards are being used is however missing.

Extensive case law as regards to *access to PSWs* was identified in **Slovenia.** If the intellectual property rights to the requested information created by a third party were transferred to the public body the access to it cannot be denied on the grounds of IPR protection. If the rights however remain at the third party, such denial is justifiable and access is possible only in the form of seeing the information in person.

Situation may vary based on whether the transfer of all or some rights was made for the entire term of protection or for the limited amount of time. However these issues remain largely unresolved by both the legislation and national courts.

7. CULTURAL INSTITUTIONS

This section specifically focused on the cultural institutions and their treatment of public sector works, specifically metadata produce by them, access to metadata and incentives to make this PSW/metadata publicly available.

7.1 Cultural Institution as Public Sector Body
(Question B.1)

The implementation of the revised PSI directive as regards to the scope of application to the cultural institutions is rather uncertain or unclear (e.g. **Belgium, UK, Netherlands, Slovenia, Poland, Italy**). However, it could be anticipated, that all cultural institutions falling under the definition of "public (sector) bodies" as defined by the respective national law and case law will also fall under the scope of the revised PSI directive. Thus the public (state/municipality run) cultural institutions would be included (**Czech Republic),** including university libraries**.** In **Spain** these would (interestingly) include also institutions labeled so by the Collective Copyright Management Entities, such as:
- Collective Copyright Management Entities for Authors, mainly SGAE
- Collective Copyright Management Entities for Artists or Performers
- Collective Copyright Management Entities for Producers.

7.2 Metadata Produced by Cultural Institutions: access and re-use
(Question B.2-B.4)

None of the respondents indicated a specific regulation of metadata as such. Thus the general copyright or database sui generis rights are applicable, if the conditions for protection are met (individual/original work of authorship, substantial investment). Also none of the respondents reported a specific regulation regarding the **public domain** and metadata. As a result only information that is not copyrighted or otherwise protected under IP law (database rights) will fall into public domain.
Further if the metadata is produced in the pursuit of cultural institutions' public task the metadata will be treated as common (i.e. other) PSI/PSW and consequently same rules will apply as regards to access and re-use.

7.3 Digitalization and access platforms
(Question B.5)

Digitalization of content and its proper categorisation is the needed pre-requisite for the access and re-use of the respective metadata. In some countries digitalization is prescribed directly by law (**Romania**), while some countries tend to digitalization prescribed by ministerial recommendations or other forms of document of non-binding nature (**Poland**). Countries tend to provide the public with various rights to access and re-use of such data for research purposes, teaching purposes or any other private purpose, however the publication on the internet is not permitted (**Belgium**) or the content can be made available only on request (**Slovenia**). Certain countries struggle with identifying various content as public domain was identified (**Poland**), but it might not be an issue if there is a good will to actually make the content available to public.
Most of the countries are unavailable to undergo digitalization without external funding (project funding by various authorities, private beneficiaries). Also the work is scarcely performed directly by cultural institutions, but is largely provided by private

entities possessing the required skills and technology. These services are subjected to standard procurement procedure.

7.4 Incentives for Open Access to Metadata
(Question B.6)

Generally, only limited amount of motivational actions/rules promoting Open Access were identified the exemptions are mentioned infra as best practices.

7.5 Best practices

The **United Kingdom** leads the way in access to bibliographic metadata and re-use that are published as linked open data on http://bnb.data.bl.uk/. The users could make use of the following options: Linked Open BNB, Basic RDF/XML, MARC21 via Z39.50). The dataset is available under a Creative Commons CC0 1.0 Universal Public Domain Dedication licence. Similar progressive approach was taken by the **French** Bibliothèque Nationale de France that makes the catalogues open as linked open data under the Licence Ouverte. In other countries, the access to bibliographic metadata is merely in the pilot phase (as is the case e.g. in the **Czech** National Library of Technology). In **Slovenia** an extensive array of librarian centralized services has been identified however they only provide for access and not re-use for the metadata.

Digitalization prescribed by law for cultural institutions (**Romania**) and en bloc granting of research and educational license (**Belgium**) was observed as the identifiable best practice. Where the content cannot be published as a part of public domain, institutions should negotiate directly with copyright holders as was the case in **Poland**. Some of the institutions were able to convince authors and/or copyright holders to make the digitalized work available under the Creative Commons.

As regards to Open Access incentives the best practices include the **Spanish** Act No. 14/2011, for Science, Technology & Innovation (Ley 14/2011, de 1 de junio, de la Ciencia, la Tecnología y la Innovación) that promotes a delayed Open Access regime for state funded scientific publications and creation of Open Access green repositories. A complex approach to open metadata has been identified in the **United Kingdom** in the mandatory e-GMS (e-Government Metadata Standard) that is part of the wider e-GIF (the e-Government Interoperability Framework) that provides for specification of technical standards and interoperability rules. Another best practice (a legislative one) is **Slovenia** where a vast array of Open Access incentives even on legislative level. The Slovenian Research and Development Act (Zakon o raziskovalni in razvojni dejavnosti) specifies that research results must be publicly available; The Resolution on the National Research and Development Programme 2011-2020 anticipates Open Access to raw research data from publicly financed research and preparation of an action plan till 2014 as a basis for a national open research data policy.

7.6 Other practices

Suboptimal practices include the claiming of copyright, where there is no copyrightable subject (PSI) or the term of copyright protection has already passed. Such practices were identified in **Poland**, where the Ministry of Culture and National Heritage recommends the limiting of use and reuse of metadata and National Institute of Museology and Conservation of Collections (Ministerial unit on digitalization of national heritage) recommends securing copyright in digital copies of works from public domain. Another suboptimal practice includes the **French** misuse of the "cultural exception" to refuse opening up the data of the cultural institutions (Article 11 of French law on public sector information (Loi n° 78-753 du 17 juillet 1978).

In the area of digitization some of the institutions tend to claim the digitized content as their own copyrighted work (even if it is a public domain work). This was observed in **Poland** and perfectly illustrates that where the law is missing or remains unclear, good will or bad will can make a lot of difference as for the access and re-use. Bibliothèque Nationale de France (**France**) currently entered an agreement with two private entities to digitize a large number of documents. Details of agreement were not fully disclosed, but it is known that it contains clause granting these private entities exclusive rights to commercialize the digitized content over the 10-year period. This can be also scarcely perceived as a available best practice, given the overall state of affairs.

In **Belgium** the access to various digitalized historic documents are available via the *Belgica* (The Digital Library of the Royal Library of Belgium). Even though all the documents are available online and are considered as public domain, the "licence" to such content allows only "re-use" for the purposes of research, teaching or private use in any form whatsoever, except for the publication on the internet. Due to the limitations imposed even this practice can not be recommended as best.

8. CONCLUSION

The survey found out a plethora of approaches to PSWs ranging from quite strong protection (Crown Copyright) to quite a broad approach as regards to exempting the public sector works from copyright (**Poland**).

An ideal state would be to exempt the official works from copyright protection as such. In that case the rather complicated licensing issues would not arise. If this state of affairs is not achievable a possible (such is the case in the **United Kingdom**). This should probably apply *mutatis mutandis* to public sector databases. In the case of metadata held by cultural institutions again the most open licensing is advisable as this would also ensure the needed compatibility of Europeana. In the case of commissioned works the contracts should include clauses that will allowing the full further re-use by public sector bodies and further re-users. In the specific case of bibliographic metadata the progressive approach of publishing it as open linked data is again advisable as is the case in the **British** and **French** National Libraries that were also identified as best practices.