

# LAPSI

The European Thematic Network on Legal Aspects of Public Sector Information

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## **LAPSI POLICY RECOMMENDATION N. 5** **THE PROPOSED INCLUSION OF CULTURAL AND RESEARCH INSTITUTIONS** **IN THE SCOPE OF PSI DIRECTIVE**

**LAPSI WORKING GROUP 5**  
**PSI AND CULTURAL CONTENT**

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***FINAL VERSION***

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## Executive Summary

- ***Directive 2003/98/EEC from November 2003 on the re-use of public sector information (henceforth: 2003 PSI Directive), makes an exception, inter alia, for documents held by cultural, educational and research establishments. On 12 December 2011 the Commission presented a Proposal to amend the Directive, which in particular strengthens the position of organizations and individuals who wish to re-use PSI. The issue dealt with in the policy recommendation is whether or not cultural, educational and research institutions should be included in the scope of the amended Directive.***
- *Increased use of PSI is desirable because it has a central role as a driver of economic activity in the digital age and therefore contributes to job creation. Several studies have come to the conclusion that the value of PSI held by cultural, educational and research institutions is one of the highest in the field. As research institutions exist to disseminate knowledge in order to stimulate scientific progress, the efficient access to and re-use of scientific information results in increased returns on R&D investment. In order to maximize its potential, publicly funded research should therefore be widely available.*
- *Three main arguments against including cultural, educational and research institutions from the scope of the amended Directive are the same as ones already identified when the Proposal for the original 2003 PSI Directive was being drafted. These are 1) high administrative burden, 2) third party copyrights and 3) particular position of these institutions as carriers of culture and knowledge. While the first two are logical concerns, the third one is less clear. It probably refers to the time when mass digitization of cultural collections was very rare and when every re-use implied access to hard copies of the material. This would prevent access to other users, thus hindering the institutions' purpose of disseminating knowledge to society at large.*
- *The exclusion of cultural, educational and research institutions from the 2003 PSI Directive was apparently also partly a result of a strong opposition by some Member States as well as lobbying by stakeholders, in particular public content holders. Lobbying arguments were 1) hazy structure and ownership of holders of CHI, 2) that preventing CHI holders to charge for their cultural information would lead to their financial demise and 3) layered structure of copyright in case various author were involved. The Commission's study on economic and social impact of the public domain also showed that cultural institutions were concerned about administrative infrastructure and associated costs needed to manage requests relating to their large holdings. The main argument for exclusion of cultural institutions though seems to be a considerable administrative burden of differentiating between content protected by third party intellectual property rights and public domain content when complying with the re-use requests.*
- *Above mentioned arguments do not seem to make much sense in light of the fact that 2003 PSI Directive is aimed specifically at PSI with high exploitation potential. Moreover, cultural, educational and research institutions daily produce a lot of information on the overall management just like every other public sector entity. Their exclusion is therefore in conflict with the fundamental principles. Furthermore, exactly their role as disseminators and creators of knowledge to wider society represents only more of a reason for their PSI to be subject to access and re-use.*
- *In the first review of the 2003 PSI Directive from 2009, which consulted Members States*

and stakeholders, respondents were divided on the question of inclusion of these institutions in the amended Directive. While some supported the widened scope, others (especially member States and stakeholders representing sectors currently excluded from the Directive) expressed the opposite opinion. Similar results emerged from the 2010 online public consultation on the existing Directive. PSI holders again reiterated third party intellectual property rights as an argument against the extension, while a new argument relating to the protection of privacy and personal data was raised by the representatives of public archives. Both issues boil down to the question of how information affected by these concerns would be distinguished from non-affected.

- *The bottom line is however that the additional administrative burden placed on the institutions in question will be outweighed by the benefits resulting from the accessibility of their PSI. The cultural institutions also stand to benefit in being able to open their holdings and thus gain opportunities they were once excluded from.*
- *Most of the existing material held by institutions in question which is not internally generated is subject to third party intellectual property rights and thus under the Directive's exception. Therefore there is a risk that the subjection of cultural, educational and research institutions to the amended Directive would even decrease availability of the reusable content, as they would purposefully seek for the third parties to retain rights on the content they acquire, thus sparing themselves a hassle of making it accessible.*
- *The abovementioned review of the 2003 PSI Directive recognized a tendency among cultural institutions to charge for accessing or re-using their digital public domain material. The Proposal allows libraries, archives and museums to charge "over and above marginal costs" which is of vital importance for self-financing of these institutions. As digital way become a default way of accessing this material, database rights and contractual arrangements might diminish content's status as public domain. While public private partnerships are often essential to enable mass content digitization efforts, this also poses a risk of increasing privatization public domain content in the digital environment. The review of the Directive therefore recommended that the material deemed public domain in the analogue form should remain so also in its digitized form. If restrictions are necessary for digitization to occur at all, they should only apply for a limited time period. In that vein, the recent proposal by the Danish Presidency proposed the limit of 7 years, after which work returns to public domain proper and any digitized public domain material is again available for re-use on a non-exclusive basis.*
- *Cultural institutions will of course be faced with the task of identifying third party intellectual rights of their PSI. This task however befalls also every other government department, which must sort out the outside partners' or subcontractors' material when complying with PSI requests. Third party content is therefore not a substantial reason for exclusion of cultural institutions from the scope of the revised Directive.*
- ***An interim recommendation is that a substantial cost/benefit study is conducted on the inclusion of cultural and research institutions in the amended Directive before the presentation of the Proposal. As the exclusion of these institutions is becoming less and less justified however, the main recommendation is for the inclusion.***

## Intro

This document discusses arguments pro and contra the inclusion of cultural, educational and research institutions in the scope of Directive 2003/98/EC (hereinafter, “Directive”). Public Service Broadcasters are not covered by this policy recommendation. Its initial aim was to recommend potential amendments of the Directive in this respect. While this policy recommendation was being drafted the EU Commission already presented the proposal to amend the Directive on December 12, 2011. Consequently this draft does not simply present the arguments pro and contra inclusion and does not simply make a recommendation on the basis of that analysis but it also comments on the Commission proposal and recommends its improvements.

## 1 Preliminary Issues

It has been estimated in 2006 that the overall market size for public sector information in the European Union ranges from €10 to €48 billion, with an average value of around €27 billion.<sup>1</sup> The public sector, by nature of its size and scope of activities, represents the biggest single information content resource for the creation of value-added information content and services.<sup>2</sup> Cultural, educational and research establishments hold a sizable part of that resource.

In November 2003, Directive 2003/98/EEC on the re-use of public sector information was adopted which introduced a common legislative framework regulating the conditions and procedure for the making available for re-use of their public sector information by EU member states. All 27 Member states have implemented the PSI Directive into their national legal orders.

According to Article 1(1) the Directive establishes a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of the Member States. The Directive is not imposing, but merely suggesting the re-use. Should the re-use be imposed at the moment of the Directive's implementation into national law, the rules of Article 1(1) should be followed.<sup>3</sup> However in Article 1(2), there is a list of exemptions that fall outside the scope of Directive. Excluded from the scope of the Directive are the documents that need to be kept confidential, including those held by public service broadcasters for the fulfilment of their public service broadcasting remit. Similar exceptions apply to documents held by cultural, educational and research establishments.

On the 12<sup>th</sup> of December 2011, the Commission presented its draft proposal to amend the Directive.<sup>4</sup> The Commission's proposal significantly strengthens the position of organisations and individuals that wish to re-use PSI and – as a consequence – will contribute to unlock the economic, cultural and social potential of the information held by the European Public Sector.<sup>5</sup>

The aim of this recommendation is firstly to present potential pros and cons of the inclusion of cultural, educational and research institutions in the scope of the Directive as they were collected in

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<sup>1</sup> MEPSIR - Measuring European Public Sector Information Resources - Final Report of Study on Exploitation of public sector information - benchmarking of EU framework conditions, available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/mepsir/final\\_report.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/mepsir/final_report.pdf), accessed on 18. 10. 2012.

<sup>2</sup> Green Paper on public sector information in the information society (European Commission 1998) available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/green\\_paper/gp\\_en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/green_paper/gp_en.pdf), accessed on 18. 10. 2012.

<sup>3</sup> It seems that most of the EU countries left the PSBs free to enable re-use: see Article 1.2 of the Italian Decree 36/2006. However see Article 10 of the French Act 1978.

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council, Amending Directive 2003/98/EC on the re-use of public sector information, available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/opendata2012/revision\\_of\\_PSI\\_Directive/proposal\\_directive\\_EN.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf), accessed on 18. 10. 2012.

<sup>5</sup> Reaction of the COMMUNIA association to the proposal to amend Directive 2003/98/EC on re-use of the public sector information.

several consultations of interested parties<sup>6</sup> and as they were assessed in several studies regarding different aspects of PSI reuse.<sup>7</sup> It is fair to say that such an inclusion is not a foregone conclusion as there is a tendency among cultural institutions to impose special conditions (charging, marking) for accessing or re-using digitized material with special concern given to the content belonging to the public domain.

## 2 Interests involved

### *2.1. Object: increasing the use of PSI*

Public sector content has a central role in the digital age as a driver of economic activity.<sup>8</sup> Therefore any further increase in the use of this resource will directly contribute to the EU's goals of increasing competitiveness and creating more jobs.<sup>9</sup>

### *2.2. Interest of stakeholders and cultural institutions*

After the adoption of the PSI Directive and in accordance with Article 13 of the Directive the Commission has been working on several documents to review the scope of the Directive. The main question has been whether cultural, educational and research organizations should and could be included in the scope of the Directive.

There is no doubt that the value of information held by cultural and research institutions is one of the highest in the field of PSI. As to cultural institutions already in 1999 it was estimated that in terms of "European Investment Value," across the EU as a whole, governments invested in PSI to the tune of about €9.5 billion each year. Cultural information, including museums and libraries made up the next largest sector after geographical information. However, in calculating the estimated economic value of this investment, the proportionate returns on investment in cultural information appeared to be much lower (€3.9 billion out of €68 billion per year).<sup>10</sup> The Study on the Economy of culture in Europe highlighted that the cultural sector turned over more than 654 billion Euros in 2003, that the sector contributed to 2,6% of EU GDP in 2003, that the overall growth of the sector's value added was 19,7% in 1999-2003 and that in 2004, at least 5,8 million people worked in the sector, which is the equivalent to 3,1% of the total employed population in Europe.<sup>11</sup> As to research institutions, their main purpose is to disseminate knowledge for the purpose of

<sup>6</sup> The recent consultation was opened from 9 September 2010 until 30 November 2010. It was published on the Commission's Your Voice in Europe. The results were assessed in the Commission staff working paper at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/opendata2012/impact\\_assessment/impact\\_assessment\\_report.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/impact_assessment/impact_assessment_report.pdf), accessed on 18. 10. 2012.

<sup>7</sup> These studies are: MEPSIR - Measuring European Public Sector Information Resources - Final Report of Study on Exploitation of public sector information - benchmarking of EU framework conditions, available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/mepsir/final\\_report.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/mepsir/final_report.pdf), accessed on 18. 10. 2012. Study on Exclusive Agreements available at: [http://ec.europa.eu/information\\_society/policy/psi/facilitating\\_reuse/exclusive\\_agreements/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/exclusive_agreements/index_en.htm) accessed on 18. 10. 2012, Economic Indicators and Case Studies on PSI pricing models, study on pricing models for PSI available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/minutes\\_psi\\_group\\_meetings/presentations/15th/03\\_01\\_study\\_economic\\_deloitte.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/minutes_psi_group_meetings/presentations/15th/03_01_study_economic_deloitte.pdf), accessed on 18. 10. 2012, study on the market value of PSI (Vickery, not yet published), study on the re-use of cultural material available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/report/cc462d011\\_1\\_1final\\_report.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/cc462d011_1_1final_report.pdf), accessed on 18. 10. 2012.

<sup>8</sup> See pg. 1 of the WG 6 Policy Recommendation 2 (Institutional Backing of PSI Re-use) on the need to inform the public about the potential value of PSI.

<sup>9</sup> See pg. 2 of the WG 1 Policy Recommendation (Competitive Issues that the Re-Use of PSI raises) and pg. 3. of the Policy recommendation regarding the interface between the protection of commercial secrecy and the re-use of public sector information, which both affirm large economic potential of the re-use of PSI.

<sup>10</sup> Commercial exploitation of Europe's public sector information - executive summary, available at: [ftp://ftp.cordis.europa.eu/pub/econtent/docs/2000\\_1558\\_en.pdf](ftp://ftp.cordis.europa.eu/pub/econtent/docs/2000_1558_en.pdf), accessed on 18. 10. 2012.

<sup>11</sup> Study is available at [http://ec.europa.eu/culture/key-documents/economy-of-culture-in-europe\\_en.htm](http://ec.europa.eu/culture/key-documents/economy-of-culture-in-europe_en.htm), accessed on 18. 10. 2012.

scientific progress. The widespread and efficient access to and re-use of scientific information adds to the efficiency of research and leads to increased returns on R&D investment.<sup>12</sup> Therefore publicly funded research should be widely available to and usable for all, in order to maximize its potential.

### 3 Interests Protected within the Current Legal Framework (Arguments for Excluding Cultural and Research Institutions from the Scope of the Directive)

3.1. The Green Paper on public sector information, which was a basis for the development of public sector information in the information society, does not specifically address the exemptions that should be excluded from the scope of the re-use of PSI.<sup>13</sup> The Proposal for a Directive on the re-use is more informative, as it explains that:

*“More in general, certain public sector bodies in the cultural and educational area merit a special treatment in view of a combination of different factors. The application of the Directive may cause a relatively **high administrative burden** for them in comparison to the benefits to be gained. Much of their information would anyhow fall outside the scope of the Directive in view of **third party copyrights**. Finally, their function in society as **carriers of culture and knowledge** gives them a particular position.”<sup>14</sup>*

Although the arguments of the existence of high administrative burden and third party copyrights<sup>15</sup> are logical concerns regarding the inclusion of cultural and research institutions in the PSI Directive, it is not clear what the point of the third argument is. It is not excluded that this position was taken because at that time the mass digitization of cultural collections was inexistent or very rare. In order to exploit cultural PSI re-users needed to access the hard copies collected in the cultural or educational institutions. That has now changed and there are more and more initiatives of cultural content digitization aimed at enabling access to soft copies, and thus facilitating re-uses. More generally the task of cultural, education and research institutions is the creation and transfer of knowledge or information to society at large. This implies that policies for broad access are already in place and because of their particular position as carriers of culture and knowledge such institutions should be in particular subject to access to and re-use of their information. It may of course also be that the third argument is referring essentially to the particular position of these bodies as carriers of information. Most public sector information is generated as a necessary side product of a public task exercised by the relevant body. Here storage of information, acting as its carrier is on the contrary the main public task of these bodies. In the context of a repository of information it may be inappropriate to speak about the RE-use of the information. Use is a more appropriate term, but such use has also a much more important impact of the main function of the repository body and potentially on the way it is financing. That financing is also the financing of its core activity and the impact of a re-use strategy on any self-financing policy is therefore also much larger.

<sup>12</sup> Commission staff working document, Accompanying document to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions on the re-use of Public Sector Information - Review of the Directive 2003/98/EC (7.5.2009), available at: <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0597-en.pdf> accessed on 18. 10. 2012.

<sup>13</sup> Green Paper on public sector information in the information society (European Commission 1998) available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/green\\_paper/gp\\_en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/green_paper/gp_en.pdf), accessed on 18. 10. 2012.

<sup>14</sup> Proposal for a Directive of the European Parliament and the Council on the re-use and commercial exploitation of public sector documents (Commission - 2002), available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/directive\\_proposal/en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive_proposal/en.pdf), accessed on 18. 10. 2012.

<sup>15</sup> Also listed as a limitation to access to PSI in the context of The Council of Europe Convention on Access to Official documents, as explained on pg. 10 of the WG 6 Policy Recommendations on Rights of Access to Public Sector Information.

3.2. Are there also other interests for excluding cultural, educational and research institutions from the scope of the Directive? The reading of the provisions and the recitals of the PSI Directive does not give us any answers as to why cultural, educational and research institutions were excluded. The ePSIplatform Briefing Paper<sup>16</sup> explains that exemptions from the scope of the PSI Directive were taken on board during the proceedings in Parliament, as a result of strong opposition from some Member States and lobbying by some stakeholders, and by public content holders in particular. The lobbying arguments were:

- The hazy structure and ownership of holders of CHI.
- Preventing from money exploitation of cultural information would lead content holders of CHI to their bankruptcy.
- The layered structure of copyright in the creation of copyrighted works, in case various authors have been involved.<sup>17</sup>

3.3. The review of the Directive<sup>18</sup> highlighted some of the problems regarding the inclusion of cultural and research institutions in the scope of the PSI Directive. As to cultural institutions the Commission also prepared a study on the Economic and social impacts of the public domain.<sup>19</sup> The study focused on the readiness to adopt and on the appropriateness of adopting the principles and provisions of the Directive on PSI Re-use on the side of Europe's cultural institutions and for them to be brought within its formal scope. For this study, a questionnaire was initially e-mailed to a wide selection of cultural institutions, mainly at the national level. Again it was found that 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** that are needed in order to manage requests in relation to their large holdings (many of which are subject to **third party copyright**) and other cost issues such as the licensing of third party rights or the effect on existing PPP. The study also found that the benefits of including cultural heritage institutions under the terms of Directive are modest at the current level of activity. There are also other disadvantages of an extension of the scope of the Directive that were identified in the study and that will be summarized in point 6 below.

3.4. It seems that there is one main argument for the exclusion of cultural and research institutions from the scope of the Directive. Both cultural and research institutions are collecting and using material covered by IPRs, of which a high proportion involves third-party rights. They are also holding amongst their collections a considerable amount of public domain material.<sup>20</sup> The obligation to respond to re-use requests could lead to major administrative activity to clear what is protected by educational, research and cultural institutions IPRs; what is protected by identified third-party

<sup>16</sup> Briefing Paper for 2nd Law and Regulation Meeting *E-exploitation of Cultural Information – a need for a European hand?* Available at: [www.epsiplus.net](http://www.epsiplus.net), accessed on 18. 10. 2012.

<sup>17</sup> Towards the 2008 review of the Directive on PSI re-use - Briefing Paper for 2nd Law and Regulation Meeting, *E-exploitation of Cultural Information – a need for a European hand*, available at: [http://old.epsiplatform.eu/psi\\_library/reports/epsiplus\\_thematic\\_psi\\_re\\_use\\_meeting\\_reports\\_2006\\_to\\_2009](http://old.epsiplatform.eu/psi_library/reports/epsiplus_thematic_psi_re_use_meeting_reports_2006_to_2009), accessed on 18. 10. 2012.

<sup>18</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Re-use of Public Sector Information: Review of Directive 2003/98/EC (2009)* available at <http://eur-lex.europa.eu/LexUriServ/LexUri-%20Serv.do?uri=CELEX:52009DC0212:EN:NOT>, accessed on 18. 10. 2012.

<sup>19</sup> *Economic and Social Impact of the Public Domain - EU Cultural Institutions and the PSI Directive (5.5.2009)*, available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/report/comm\\_0022\\_psi\\_v6.0.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/comm_0022_psi_v6.0.pdf), accessed on 18. 10. 2012.

<sup>20</sup> Commission staff working document, *Accompanying document to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions on the re-use of Public Sector Information - Review of the Directive 2003/98/EC (7.5.2009)*, available at: <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0597-en.pdf> accessed on 18. 10. 2012.

IPR; what is protected by unknown third-party IPRs and what is in the public domain.<sup>21</sup> This would consequently raise costs for the institutions to screen and monitor what is free from copyright and what is not.<sup>22</sup> One needs to add to this that countries such as Italy and Greece have also introduced specific quasi intellectual property rights for cultural heritage.<sup>23</sup>

#### **4 Arguments for Including Cultural and Research Institutions under the Scope of the Directive**

Given that the PSI Directive is aimed specifically at valuable PSI information with high exploitation potential, from the economic point of view the above mentioned arguments for excluding research and cultural institutions from the scope of Directive 2003/98/EC do not make much sense.

First, this exclusion discriminates in favour of the cultural, research and educational institutions by treating them differently from other PSBs. As a matter of fact these institutions daily produce and manage a lot of information on overall management, exactly as each and every PSB (e.g. information on revenues, employments, expenses, etc.). A lack of justification of such discrimination would create a conflict with fundamental principles. In addition, as already mentioned, the basic function of cultural institutions is the creation and transfer of knowledge or information to society at large. This implies that policies for broad access are already in place and because of their particular position as carriers of culture and knowledge such institutions should be in particular subject to access to and re-use of their information.

In a first review of Directive 2003/98/EC<sup>24</sup> it is stated that the public sector content has a central role in the digital age as a driver of economic activity. Therefore a further increase in the use of this resource will directly contribute to the EU's goals of increasing competitiveness and creating more jobs. In light of the revision of PSI Directive the European Commission consulted Member States and stakeholders for this review. The respondents to the consultations underlined the potential for re-use of the information held by cultural, research and public broadcasting institutions. However opinions about extending the scope of the Directive to include cultural institutions were divided. Some stakeholders indicated that it would have a positive impact on the development of the content market in Europe, while others (MS and stakeholders representing the excluded sectors) considered, however, that at this stage the scope should not be widened. The two most important arguments against the extension were again high administrative costs and problems with IP rights. As a way forward it was proposed that cultural institutions simply abide by the principles and spirit of the PSI Directive, but stay out of the scope of Directive.<sup>25</sup>

The most recent study that was prepared by the Commission is an on-line public consultation on the existing PSI Directive that was launched on 9 September 2010 and closed on 30 November 2010.<sup>26</sup> The 2010 consultation on the review of the PSI Directive spurred high interest among different categories of stakeholders, with 594 responses received - a more than 15-fold increase when

<sup>21</sup> See pg. 5. of the Policy recommendation regarding the interface between the protection of commercial secrecy and the re-use of public sector information on the similar issue in identifying the PSI covered by commercial secrecy rules.

<sup>22</sup> It may be worthy to add at this stage that public domain material could be still subject to authorization because of the existence of other rights (potentially exploitable).

<sup>23</sup> Italy : Article 107 Code of Cultural Heritage and the Ministerial Decree of 20th April 2005.

<sup>24</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Re-use of Public Sector Information: Review of Directive 2003/98/EC (2009) available at <http://eur-lex.europa.eu/LexUriServ/LexUri-%20Serv.do?uri=CELEX:52009DC0212:EN:NOT>, accessed on 18. 10. 2012.

<sup>25</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Re-use of Public Sector Information: Review of Directive 2003/98/EC (2009) available at <http://eur-lex.europa.eu/LexUriServ/LexUri-%20Serv.do?uri=CELEX:52009DC0212:EN:NOT>, accessed on 18. 10. 2012.

<sup>26</sup> RESULTS OF THE ON-LINE CONSULTATION OF THE STAKEHOLDERS - "Review of the PSI Directive" available at: <http://www.lapsi-project.eu/norms>, accessed on 18. 10. 2012.

compared with the 2008 consultation. More specifically on the question of scope, respondents generally favoured an extension of the Directive, with little difference among opinions regarding each excluded sector but with differences in support rates: least support from PSI holders (around 50% for each sector) and most from academics and citizens (neighbouring 80% for each sector). Representatives of the excluded sectors essentially recalled the arguments against extending the scope that were used to justify the initial exclusion of these sectors from the scope of the Directive, i.e. **preponderance of third party intellectual property rights** on materials held by these public bodies. An additional argument, relating to the protection of privacy and personal data,<sup>27</sup> was brought forward against the extension of scope by representatives of public archives.<sup>28</sup> However, the inclusion of educational, research and cultural institutions in the Directive would not affect intellectual property or privacy/personal data right owners' interests, since the directive contains other articles devoted to these issues. That reduces the issue to the distinction between materials affected by intellectual property rights/personal data rights and those that are not so affected.

It is therefore clear that the suggestion that the administrative burden resulting from inclusion is too large in comparison to the benefit is hard to accept when looking at the very large potential benefits that can be derived from inclusion. It is also hard to see why the administrative burden would be more troublesome to bear for cultural institutions than for the vast majority of other government departments. The latter seemed to have had no major complaints when operating the current Directive. Small cultural and educational bodies may be less equipped for this and may be most affected, but these bodies now find it especially difficult to take part in PSI re-use. Including them in the scheme will therefore allow them to particularly benefit, in terms of the valorisation of their (dormant) PSI. It opens options and opportunities they were until now excluded from.

## 5 Public Domain

Beside arguments of exclusion of cultural, educational and research institutions from the scope of PSI directive there is another important issue that should be addressed in this paper. Special concern should be given to the content belonging to the public domain. The Review of the Directive<sup>29</sup> already found that there is a special tendency among cultural institutions to charge for accessing or re-using digitised public domain material. Whilst it is clear that the public domain material itself cannot be brought back into copyright, it is equally clear that the digitised copy of the work that is necessarily produced as part of any digitisation process will in most cases in their own right be (new) copyright works. Database rights and contractual arrangements may complete the protection of the digitised versions of works. As these digitised versions become in practice the common way to access the material that is in the public domain, all these rights may be used to limit access to and re-use of the works, leaving the public domain status of the original analogue work deprived of much of its apparent value. This may lead to the privatisation of the benefits deriving from the exploitation of public domain material in the digital age, instead of allowing the widest possible accessibility and use for the benefit of citizens and companies. Competition law may offer a remedy in this respect, but whilst it may be possible to see an abuse in such practices, it is much less obvious to establish the required dominant position that is to be abused in most circumstances.

<sup>27</sup> See WG 2 Policy recommendation on privacy and personal data protection for a detailed analysis of this issue and pg. 5 of the WG 6 Policy Recommendation 1 (Structure and Proportionality of Fundamental Rights) for a take on the right to privacy from a fundamental rights perspective.

<sup>28</sup> See pg. 4 of the WG 6 Policy Recommendation 2 (Institutional Backing of PSI Re-use) on the issue of personal data in PSI generated by judicial authorities.

<sup>29</sup> Commission staff working document, Accompanying document to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions on the re-use of Public Sector Information - Review of the Directive 2003/98/EC (7.5.2009), available at: <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0597-en.pdf> accessed on 18. 10. 2012.

The European Commission has made digital libraries a key aspect of its policy, as set out in its strategy for digitization, online accessibility and digital preservation of Europe's collective memory.<sup>30</sup> As is stated in the Economic and Social Impact of Public Domain research:

*“Many cultural institutions have embarked upon major digitization 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.”<sup>31</sup>*

In this respect the Review of the Directive, as well as the sub-group on Public Private Partnerships recommended that public domain content in the analogue world should also remain in the public domain in the digital environment. If restrictions to user’s access and use are necessary in order to make the digital content available at all, these restrictions should only apply for a time-limited period.<sup>32</sup>

It is on the other hand correct to assume that cultural institutions will have a lot of resources that involve third party intellectual property. But this conclusion does not apply to all cultural institutions, or at least not in the same way. A lot of the relevant materials are also in the public domain. It is therefore not an argument for a blanket exclusion of cultural institutions. And the fact that third party intellectual property is involved simply puts the relevant resources outside the scope of the Directive. It does not create additional difficulties for cultural institutions. Properly identifying the relevant third party intellectual property is a task that obviously applies, but it applies also and in the same way to other government departments that work with outside partner or subcontractors. Third party intellectual property is therefore not necessarily the factor that points in favor of excluding cultural institutions from the scope of the Directive, or at least it does not do so straightforwardly and in all cases. That conclusion also applies to educational and research institutions, even if they may in comparison hold less material that is in the public domain and more IP protected material.

## 6 Arguments in Favour of... and Related Counter-Arguments

### *6.1. Arguments in favour of including cultural institutions under the scope of Directive<sup>33</sup>*

- 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

<sup>30</sup> i2010 European digital libraries initiative - High Level Expert Group on Digital Libraries, Sub-Group on Public-Private-Partnerships (PPP). Final Report on PPP for the Digitisation and online Accessibility of Europe’s cultural Heritage (2008), available at: [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/ppp/ppp\\_final.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/ppp/ppp_final.pdf), accessed on 18. 10. 2012.

<sup>31</sup> Economic and Social Impact of the Public Domain - EU Cultural Institutions and the PSI Directive (5.5.2009), available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/report/comm\\_0022\\_psi\\_v6.0.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/comm_0022_psi_v6.0.pdf), accessed on 18. 10. 2012.

<sup>32</sup> i2010 European digital libraries initiative - High Level Expert Group on Digital Libraries, Sub-Group on Public-Private-Partnerships (PPP). Final Report on PPP for the Digitisation and online Accessibility of Europe’s cultural Heritage (2008), available at: [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/ppp/ppp\\_final.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/ppp/ppp_final.pdf), accessed on 18. 10. 2012.

<sup>33</sup> Arguments are made according to *Economic and Social Impact of the Public Domain* research, available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/report/comm\\_0022\\_psi\\_v6.0.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/comm_0022_psi_v6.0.pdf), accessed on 18. 10. 2012.

through activities such as greater commercial re-use.

- 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.
- The potential for increasing the economic and market value and visibility of cultural institutions (greater awareness of opportunities and the potential to participate in funded cross-sectorial projects and initiatives).
- The incentive to digitize their collections in order to meet the needs of re-users.
- The opportunity to begin to charge re-users in order to provide an income for the institution to cover the costs of digitization, legal work etc.
- The greater harmonization of prices and more awareness-raising on free or low cost pricing of information generated with public money.
- The creation of innovative co-operation models between the public and private sector.
- Enhanced opportunities for cross-domain research and education on all levels (schools, universities) and enhanced opportunities for all interested in European cultural heritage.
- 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.

### ***6.2. Arguments in favour of including educational and research institutions under the scope of Directive***

- Enhance access; enhance reuse of publicly funded research.
- Unify practices and increase interoperability.
- Increase value of research through better visibility of research institutions.
- Better promotion of existing research in new channels.
- Promotion of education in general.
- Promotion of new research.
- To clarify general exceptions of the PSI also for these institutions.

### ***6.3. Arguments for excluding cultural institutions from the scope of the Directive***

- Many cultural institutions are concerned that 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 anticompetitive practices are not as yet uniformly understood or adhered to among European cultural institutions.<sup>34</sup>
- 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 digitization in the cultural sector, would need to rely quite heavily on the need to incentivize private sector partners by exclusive deals.
- The re-use licensing requirements of the Directive represent a major hurdle because the number of cultural institutions that run extensive content licensing services is relatively small with staff numbers usually between 1-5 FTEs.
- Guidance will be required as to whether image libraries or other services provided by cultural institutions fall within or outside the public task.
- Deployment and maintenance of customer-oriented delivery systems may be costly and cumbersome.
- Dealing with metadata and data structuring will be burdensome.
- Portal development will be impeded.
- The need for comprehensive digitization programs, as without digitization there is very little content that can be made available.
- Unclear significant economic impact e.g. due to unregistered objects which would have to be made accessible, which is quite impossible under the present financial conditions.
- Identifying whether a document or information is in the public domain is difficult.
- Negotiating with rights holders may be complex.
- Legal processing imposes a high additional and complex burden.
- Establishment of adequate licensing regimes and supervision of their execution may require expertise that is not readily available.

#### ***6.4. Arguments for excluding educational and research institutions from the scope of the Directive***

- Third parties copyrights, sui generis database rights of third parties may be present in large numbers.
- Software is excluded, reducing the scope of what is covered further.
- Industrial property excluded, reducing the scope of what is covered further.
- Problems with orphan works, public domain works. Identifying whether a work is covered by an IP right held by a third party may become virtually impossible in these cases and it may become impossible to determine whether certain materials are covered by the Directive or not. This would put these institutions in a very difficult position.

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<sup>34</sup> See pg. 5 of the WG 1 Policy Recommendation (Competitive Issues that the Re-Use of PSI raises) on the anticompetitive practices regarding the re-use of PSI by public sector bodies.

## 7 Interim Conclusion

**Before looking at the Commission's proposal of December 2011 to revise the Directive the general recommendation would be to conduct** a substantial cost/benefit study on the topic of an extension of the scope of the directive. However the main recommendation would be, especially since in the digital economy the continued exclusion from the scope of the Directive becomes harder and harder to justify, to include the cultural sector in the scope of the Directive and to abolish the relevant exclusion. It thus remains to be seen whether the proposal executes such an inclusion in a way that addresses the concerns that became clear above.

## 8 The Commission's Proposal

Before analysing the particular competence awarded to the EU in terms of PSI re-use, a brief review of several statements on the general question of distribution of powers between member states and the EU is necessary<sup>35</sup> since competence must be considered a key aspect of institutional backing; a logical *prius*, we would say.

### 8.1. The proposal

The Proposal states already in recital 10 that the “*scope of application of the Directive is extended to libraries (including university libraries), museums and archives. The Directive does not apply to other cultural institutions, such as operas, ballets or theatres, including the archives that are part of these institutions.*”<sup>36</sup>

The text of the Proposal is the following:

#### - Article 1, paragraph 2, point (e):

This Directive shall not apply to:

*(e) documents held by educational and research establishments, such as schools, universities, archives, libraries and research facilities including, where relevant, organizations established for the transfer of research results.*<sup>37</sup>

**is replaced by the following:**

<sup>35</sup> In general (chronologically ordered): HINOJOSA MARTÍNEZ, L. M., *El reparto de competencias entre la Unión Europea y sus Estados miembros*, Tirant Lo Blanch, Valencia, 2006; SANDER, F., “Subsidiarity infringements before the European Court of Justice: futile interference with politics or a substantial step towards EU federalism?”, *The Columbia Journal of European Law*, vol. 12, nº 2, 2006, pp. 517-ss; VON BOGDANDY, A. y BAST, J., “The vertical order of competences”, *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2006, pp. 335-ss; MANGAS MARTÍN, A. y LIÑÁN NOGUERAS, D. J., *Instituciones y Derecho de la Unión Europea*, Tecnos, Madrid, 2011, pp. 69-ss.

<sup>36</sup> Proposal for a Directive of the European Parliament and of the Council, Amending Directive 2003/98/EC on the re-use of public sector information, available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/opendata2012/revision\\_of\\_PSI\\_Directive/proposal\\_directive\\_EN.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf), accessed on 18. 10. 2012, p. 14.

<sup>37</sup> DIRECTIVE 2003/98/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 November 2003 on the re-use of public sector information, available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/directive/psi\\_directive\\_en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf), accessed on 18. 10. 2012.

This directive shall not apply to:

*(e) documents held by educational and research establishments, such as research facilities, including, where relevant, organizations established for the transfer of research results, schools and universities (except university libraries in respect of documents other than research documents protected by third party intellectual property rights).*<sup>38</sup>

**- Article 1, paragraph 2, point (f):**

This directive shall not apply to:

*(f) documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres.*<sup>39</sup>

**is replaced by the following:**

This directive shall not apply to:

*(f) documents held by cultural establishments, other than libraries, museums and archives.*<sup>40</sup>

**8.2. A caveat: interaction with intellectual property**

Intellectual property rights held by third parties are a major reason to exclude documents from the scope of the Directive. The Commission proposes to broaden the recital dealing with that exclusion as follows:

*“...documents on which third parties hold intellectual property rights should be excluded from the scope of Directive 2003/98/EC. If a third party was the initial owner of a document held by libraries (including university libraries), museums and archives that is still protected by intellectual property rights, that document should, for the purpose of this Directive, be considered as a document for which third parties hold intellectual property rights.”*<sup>41</sup>

It is easy to understand that the Commission does not want the Directive to touch on intellectual property rights and wants its proposal to be intellectual property neutral. But one should not underestimate the effect of such an approach. Not allowing, or worse obliging, a public sector body to make documents on which not they but third parties own intellectual property rights is an obvious step in this context, but in the proposal it is only a first step. A second lock is placed on the door by treating works that are still protected by intellectual property rights and whose initial owner was a third party as a document for which third parties hold intellectual property rights. The limitation to works that are still protected by intellectual property rights is in practice of little effect. It leaves the public domain unaffected and one of the characteristics of works in the public domain is that they are free for anyone to use anyway. But extending the exclusion to documents initially owned by a

<sup>38</sup> Proposal for a Directive of the European Parliament and of the Council, Amending Directive 2003/98/EC on the re-use of public sector information, available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/opendata2012/revision\\_of\\_PSI\\_Directive/proposal\\_directive\\_EN.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf), accessed on 18. 10. 2012, p. 15.

<sup>39</sup> DIRECTIVE 2003/98/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 November 2003 on the re-use of public sector information, available at: [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/directive/psi\\_directive\\_en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf), accessed on 18. 10. 2012.

<sup>40</sup> Proposal for a Directive of the European Parliament and of the Council, Amending Directive 2003/98/EC on the re-use of public sector information, available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/opendata2012/revision\\_of\\_PSI\\_Directive/proposal\\_directive\\_EN.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf), accessed on 18. 10. 2012, p. 16.

<sup>41</sup> Recital 7.

third party covers vast amounts of documents. Libraries and museum buy most of their holdings and works that are commissioned are first owned, as is the copyright in them in modern copyright, by their creators. Add to that that works that are donated have an initial owner other than the library or museum and one starts to understand that most of the holdings of libraries and museums are covered. The same goes for archives, but the intellectual property rights on more of their holdings may have expired.

That leaves the coverage of the extension of the Directive to libraries, archives and museums almost entirely limited to the documents they generate internally. Digitisation of older analogue works may prove the most interesting element in this context, but in practice a lot of this work is for financial reasons undertaken in partnership with a third party. Such a third party is likely to claim at least a share in the intellectual property rights in the digitised versions (e.g. databases that are created). That brings us back to the exclusion.

Coupled with the practical difficulties of determining which works are covered by the Directive the proposed inclusion of libraries, museums and archives may in practice become an added incentive for those institutions to outsource the digitisation and to make sure that the work is initially owned by a third party. It allows them to avoid the debate as to whether material is covered by the Directive and whether or not the charges for re-use they propose are justifiable.

A perverse consequence of this could be that less, rather than more documents will be available for re-use. Matters can of course become worse if institutions are driven towards involving third parties in the digitisation process. Such third parties will own a share of the intellectual property rights in the digital versions of the documents and may not only restrict re-use of them, but they may also restrict free access to the documents. This is not a direct effect of the proposed changes to the Directive, but it stands in stark contrast with the aim of the inclusion to make more documents available for re-use.

On top of the internally generated documents, such as personnel data and user data, there are those documents that are not covered by intellectual property rights. But these are in the public domain already and free to be re-used. There is no need for the Directive to restate that or put a public domain in place.<sup>42</sup> Maybe museums and archives carry out more internal studies though and these could be covered by the Directive. But the involvement of any third party may again easily lead to them being excluded. Purely internally created content may also be less valuable in terms of re-use (e.g. personnel records, staffing policies, etc.)

All this leads to the conclusion that the proposed extension, positive as it is in principle, covers almost exclusive internal documents and is therefore extremely limited in scope, thanks to the very broad approach in recital 7. On this narrow basis it becomes also much harder to see why the internal documents of operas and ballets are different. Maybe excluding these bodies altogether becomes much more difficult when one looks at the impact of recital 7.

### ***8.3. Charging over and above marginal costs***

It is also important to note that the proposed article 6(3) allows libraries, archives and museums to charge over and above marginal costs. This is recognition of the fact that these institutions as repositories of documents can to a far lesser extent rely on public sector funding for their main activities. I.e. the information is not a side product of them exercising a part of the public task. Their core activity is engaged and even for that core activity they are increasingly urged to look at means of self-financing. Being able to charge a reasonable return on investment, as proposed in article 6(4) of the proposal is therefore vital. The opening created in article 6(3) is also a vital building block in terms of their ability to negotiate favourable terms in their digitization contracts with third

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<sup>42</sup> Leaving aside all practical problems of access.

parties. That is turn is of vital importance from a self-finance perspective. It is therefore vital that the exception created in the proposed article 6(3) is retained and is not abolished in the light of the rather narrow scope of the inclusion of these institutions as set out above.

#### ***8.4. Public Private Partnership***

Digitization and other projects are key elements of European policy in the area of culture and for libraries, archives and museums in particular. Financing these operations is increasingly difficult, also in the light of the vast investments involved in order to make these initiatives comprehensive in scope and nature. Public sector bodies are therefore increasingly required to rely on private public partnerships for these initiatives. Private investors do want a return on their investment though and the easiest way to guarantee this is often the grant of exclusivity. That creates a tension with the idea that all information should be available on similar conditions for re-use to all potentially interested parties. In order to strike a balance and to keep the public private partnership route alive the Danish Presidency proposed a recital 14b (and article 11) that when adopted would allow public private partnerships to operate on a basis of exclusivity for a period of 7 years. Afterwards all exclusivity is dropped and any digitized public domain work will again in all its forms return to the public domain and re-use will become possible on a non-exclusive basis. This is an important improvement to the proposal, even if it can be argued that the 7 year period maybe too long in some case and unduly short in others. In any case, there is a need for a clear cut rule.

## **9 Conclusion**

The inclusion of cultural and research institutions in the scope of the PSI Directive is to be endorsed and supported.

Its impact should however not be overestimated. The existence of third party intellectual property and the wide way in which the proposal conceives this concept substantially curtail the amount of information that will be available for re-use as a result of the inclusion. One can understand the Commission's view that the PSI Directive is not an IP Directive and should as such leave intellectual property untouched, but sooner or later the interaction between the two areas will need to be addressed head-on. For now IP has a limiting effect on PSI re-use the scope of which should not be underestimated.

As we are now not dealing with a peripheral issue, but one that is at the hearth of the relevant bodies' activities the proposal to allow these bodies to charge over and above marginal costs needs to be applauded. This is vital for them and for the successful operation of any PSI re-use scheme in this area.

Public private partnerships are vital in this area and securing their survival and growth by means of a limited 7 year period of exclusivity is a necessary restriction.

A significant number of the concerns that became apparent above have been addressed by the proposal and the overall balance is clearly such that the inclusion will be beneficial.