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EXCEPTIONS FOR CULTURAL HERITAGE INSTITUTIONS UNDER THE COPYRIGHT DIRECTIVE IN THE DIGITAL SINGLE MARKET

Michal Koščík

koscik@med.muni.cz

Masaryk University, Czech Republic

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Abstract

The paper introduces the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and analyses its impact on repositories of grey literature. The focus is on the provisions of Article 2, Article 6 and Article 8, which are the most relevant parts from the perspective of cultural heritage institutions. The paper concludes that repositories of grey literature and cultural heritage institutions that store and share pieces of grey literature online will benefit from the new legislation, which will bring more legal certainty in dealing with digital cultural heritage. The new rules will also improve legal certainty in cross border cooperation.

Keywords

Cultural heritage, Digital Single Market, EU law, grey literature

Introduction

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter the "DSM Directive"), which entered into force on 6 June 2019, aims to modernise the EU copyright framework and adapt it to the ever-evolving technologies. The DSM Directive is not a comprehensive European copyright codex for the twenty-first century. Rather, it is just another piece of a heterogeneous mosaic of approximately a dozen directives that relate to the exercise of copyright rights and access to information and cultural heritage. The DSM Directive complements the existing framework¹ and updates the framework only in specific narrow fields. It complements and updates the system of copyright exceptions granted under the InfoSoc Directive by transforming certain optional copyright exceptions to mandatory exceptions and also by making them more specific with regards to the use of works by cultural heritage institutions. The InfoSoc Directive remains in effect and serves as the ultimate limit of how far the copyright exceptions granted by national laws can reach.²

The preservation of European cultural heritage is firmly within the sights of the DSM Directive. The directive extends and updates the existing framework of copyright exceptions applicable to cultural heritage institutions. The copyright exceptions of the DSM Directive are designed to unburden cultural heritage institutions that collect digital works, digitise their collections and make these collections accessible online. The DSM Directive also amends the wording of the InfoSoc Directive so that Member States may introduce copyright exceptions for temporary reproductions made by cultural heritage institutions in their daily activities. However, this exception is not mandatory.

The paper aims to describe the most relevant parts of the newly adopted directive from the perspective of cultural heritage institutions. Below, the paper provides an explanation of Article 2, defining cultural heritage as a beneficiary of the exception, Article 6, setting forth rules for copyright exceptions related to cultural heritage, and Article 8, dealing with so-called out-of-commerce works.

The Cultural Heritage Institution as the Beneficiary of Copyright Exceptions

A cultural heritage institution (hereinafter a "CHI") is defined by Article 2(3) of the DSM Directive as "*a publicly accessible library or museum, an archive or a film or audio heritage institution*". The *acquis* does not contain any specific definition of what a library, museum or archive actually is. This definition of a CHI partially overlaps with the definition of a research organisation [see Article 2(1) of the DSM Directive] but this does not cause any practical problems because there are plenty of institutions that serve both purposes. The *acquis* also does not anticipate any specific legal form, funding source or organisational structure of a CHI. The status of a CHI, such as archive or library, is therefore assigned by national law. For example, a central national library can simultaneously serve as a cultural heritage institution,

¹ The most notable directives which are partially amended or affected in their practical application are Directive 96/9/EC on the legal protection of databases, Directive 2000/31/EC on electronic commerce, Directive 2001/29/EC - InfoSoc, Directive 2012/28/EU on certain permitted uses of orphan works, and Directive 2014/26/EU on collective management of copyright and related rights.

² See Article 25 of the DSM Directive.

research organisation and even teaching organisation, meaning it could potentially rely on the exception for text and data mining for scientific research³, the exception to use the protected subject matter in digital and cross-border teaching activities⁴, and the exception for preservation of cultural heritage⁵. Whether a respective national library in a respective Member State would actually be eligible to rely on the abovementioned exceptions would depend on its role envisaged by the laws of the respective Member State.

Mandatory Exceptions for Making Copies of Protected Content in Permanent Collections

The role of a CHI is to preserve cultural heritage for future generations. The concept of cultural heritage is gradually evolving from tangible objects, such as archaeological heritage, to broader concepts, such as folklore, intangible heritage and digital heritage⁶. Physical objects deteriorate over time, and digital storage is often a suitable place to store a backup copy and preserve the work or a document it contains⁷. Such a backup copy might be analogue or digital. The preservation of an object in a collection might require reproduction and consequently authorisation from the relevant rightsholder⁸. The copyright framework prior to the DSM Directive enabled the creation of backup digital copies⁹, but the use of such backup copies was limited and basically restricted to being displayed on onsite terminals¹⁰. Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) regulated copyright exceptions for CHIs and generally gave Member States rights to create statutory exceptions. However, the InfoSoc Directive neither obliged Member States to introduce such exceptions nor harmonised the extent of such exceptions.

The DSM Directive aims to take another step towards the harmonisation of national laws.

One objective of the DSM Directive is to unify the rules applying to digital preservation in order to promote the establishment of cross-border preservation networks in the internal market¹¹. These cross-border networks should enable the pooling of resources and expertise across Europe. Items of cultural heritage of a Member State that lacks expert knowledge in a certain area of digitization could be digitised by a specialised institution from another Member State without worrying about the compatibility of copyright exceptions in the two countries. The pooling of the resources does not have to be based only on expertise. The cross-border preservation of certain forms of cultural heritage can also make sense for economic reasons.

³ See Article 3 of the DSM Directive - Article 3(1) Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

⁴ See Article 5 of the DSM Directive.

⁵ See Article 6 of the DSM Directive.

⁶ See KOŠČÍK, Michal and Matěj MYŠKA. Copyright Law Challenges to the Preservation of "Born-Digital" Digital Content as Cultural Heritage. *European Journal of Law and Technology* [online]. 2019, 10(1) [Accessed 8 September 2019]. ISSN 2042-115X. Available from: <http://ejlt.org/article/view/664>

⁷ See Koščík.

⁸ See recital 25 of the DSM Directive.

⁹ See Article 5(2)(c) of the InfoSoc Directive.

¹⁰ See Article 5(2)(n) of the InfoSoc Directive.

¹¹ See recital 26 of the DSM Directive.

In accordance with Article 6 of the DSM Directive, all Member States have to introduce statutory exceptions that would enable CHIs to make copies of any works or other subject matter *"that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation"*¹². Article 6 of the DSM Directive provides an exhaustive list of the rights affected by this mandatory statutory exception. As a result, CHIs can make temporary or permanent copies of any original work protected by copyright¹³ or neighbouring right. The protected objects of intellectual property that will be covered under such exceptions are:

- Temporary or permanent reproductions of databases, regardless of whether these databases are protected by copyright¹⁴ or sui generis database rights;¹⁵
- Any performance of a performing artist, or its fixation;¹⁶
- Copies of phonograms and films;¹⁷
- Reproductions of any audio and audio-visual broadcasts, whether those broadcasts are transmitted by wire or over the air, cable or satellite;¹⁸
- Copies of computer programs, and their translations and adaptations;¹⁹
- Press publications and online news.²⁰

CHIs will be able to make backup copies of any item in their collections and freely convert the formats of such backup copies. Works on canvas can be digitized, and digital works can be printed. However, the exceptions enacted under the DSM Directive do not authorise CHIs to create backup copies of items that are not part of a permanent collection. For example, it is not possible to cover reproductions of items that are temporarily borrowed from other CHIs.

The distinction between a permanent and temporary collection can be interpreted in accordance with recital 29 of the DSM Directive. According to recital 29, works are permanently in the collection of a CHI *"when copies of such works or other subject matter are owned or permanently held"* by the CHI, *"for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements"*. The definition of a "permanent collection" is another step towards legal certainty, as the use of this term created interpretational problems in the past²¹. The existence of a license or license agreement can be sufficient for an CHI to consider an item part of its permanent collection. If a provision of the license agreement, or any other type of contract, forbids the CHI from taking advantage of the statutory exceptions under Article 6, it should be considered unenforceable²².

¹² See below for the definition of "other subject matter".

¹³ Article 2 of Directive 2001/29/EC.

¹⁴ Article 5(a) of Directive 96/9/EC.

¹⁵ Article 7(1) of Directive 96/9/EC.

¹⁶ Article 2 of the InfoSoc Directive.

¹⁷ Article 2 of the InfoSoc Directive.

¹⁸ Article 2 of the InfoSoc Directive.

¹⁹ Article 4(1) of Directive 2009/24/EC.

²⁰ Article 15 of the DSM Directive.

²¹ This problem was discussed in the previous works of the author, see KOŠČÍK, Michal and Matěj MYŠKA. Copyright Law Challenges to the Preservation of "Born-Digital" Digital Content as Cultural Heritage. *European Journal of Law and Technology* [online]. 2019, **10**(1) [Accessed 8 September 2019]. ISSN 2042-115X. Available from: <http://ejlt.org/article/view/664> and KOŠČÍK, Michal. Legal Framework for the Digitisation and Storage of Digital Works by Public Archives. *The Grey Journal*. Amsterdam: GreyNet, 2019, **15**(Special Winter Issue), 52-57. ISSN 1574-1796.

²² Article 7 of the DSM Directive.

The wording of the DSM Directive is ambiguous regarding whether a CHI can rely on a third party (subcontractor or other CHI) to digitize or even archive a digital copy of the object of cultural heritage. Recital 28 of the DSM Directive explicitly states that *"the cultural heritage institutions should be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in the other Member States, for the making of copies"*, but this objective is not directly reflected in the normative part of the directive. It is however possible to use, by analogy, the interpretation in the InfoSoc Directive, which has a similarly worded provision and has already been favourably interpreted by the Court of justice of the European union (CJEU). Article 5(2)(d) of the InfoSoc Directive conferred copyright exception to temporary copies made by broadcasting institutions. The CJEU ruled that this article had to be interpreted as *"meaning that a broadcasting organisation's own facilities include the facilities of any third party acting on behalf of or under the responsibility of that organisation"*²³. It can be concluded that the exception under Article 6 of the DSM Directive does not prohibit CHIs from relying on contractors (third parties) which would act on behalf of a CHI and under the responsibility of that CHI in the process of cultural heritage digitisation. These parties could also rely on the new exception under the newly formulated Article 5(2)(d) of the InfoSoc Directive.²⁴

Use of Out-of-Commerce Works by CHIs

The exceptions granted by the InfoSoc Directive and also Article 6 of the newly introduced DSM Directive are suitable for making backup copies of items of a permanent collection, however they are not really useful for making the content available online. Article 8 of the DSM Directive partly addresses this gap in the system of copyright exceptions. It obliges all Member States to create a mechanism under which a CHI is allowed to reproduce, distribute, communicate and make available online all the out-of-commerce works in its collection, providing that they conclude a contract with the representative collective management organisation.²⁵

Out-of-commerce works should not be confused with "orphan works" or "works in the public domain". Orphan works are works for which the author cannot be defined or found²⁶, whereas out-of-commerce works are works no longer offered to consumers via the media. Works in the public domain are works no longer under copyright protection and which can be digitized, distributed and shared without any restrictions.

Certain types of protected content such as databases, computer programs, records of TV broadcasts or news articles often do not have a representative collective management organisation²⁷. If such organisation does not exist in a respective Member State, the CHI will

²³ European Court of Justice, Case C-510/10, DR, TV2 Danmark A/S v NCB - Nordisk Copyright Bureau.

²⁴ See above.

²⁵ See par. 1 of Article 8.

²⁶ See Article 2 of the Orphan Works Directive: "A work or a phonogram shall be considered an orphan work if none of the rightsholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search".

²⁷ On questions of legitimacy and representativeness of CHIs, see: GUIBAULT, Lucie, and Simone SCHROFF. Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-a-Vis Rights Holders. // *C-International Review of Intellectual Property and Competition Law* [online]. 2018, 49(8), 916-939 [Accessed 8 September 2019]. ISSN 2195-0237. Available from: <https://doi.org/10.1007/s40319-018-0748-5>, and STRAKOVÁ, Lucie. Changes in the Area of Extended Collective Management in Relation to Memory and Educational Institutions in the Light of the Czech Amended Copyright Act. *The Grey Journal*. Amsterdam: GreyNet, 2018, 14(Special Winter Issue), 61-65. ISSN 1574-1796.

be able to rely on exceptions based on the wording of the second paragraph of Article 8 of the DSM Directive. The CHIs will be allowed to make works available to the public even without the explicit consent of the (non-existent) collective management organisation. The works have to be made available on a non-commercial basis and identify the name of the author or rightsholder to such content.

Relevance of the DSM Directive for Grey literature

Repositories of grey literature can rely on copyright exceptions under Article 6 of the DSM Directive and also on the legal framework of collective rights management under Article 8. The DSM Directive brings good news for repositories of grey literature since it directly addresses works previously not associated with cultural heritage institutions such as databases, software and records.

Repositories of grey literature contain works not created with the intention to be made available to the general public or distributed by the media. The fact that the DSM Directive also covers "never-in-commerce works" improves the legal certainty for the storage of grey literature and making it available online. The recitals of the DSM Directive directly address works never intended for commercial use such as posters, leaflets, Trench Journals, amateur audio-visual works, unpublished works or other subject matter²⁸. Therefore, grey literature repositories can, in principle, rely on the same legal framework as other CHIs.

CHIs, however, need to be careful when dealing with works never intended for commerce but designed as preparatory versions of works published subsequently. A different manifestation of a work commercially available (such as digital and printed formats of the same work)²⁹ cannot be qualified as an independent out-of-commerce work. The work may be considered to be out of commerce even if its adaptations, such as translations, are commercially available³⁰.

Conclusion

This paper has explained the concepts behind the newly introduced Directive on Copyright and Related Rights in the Digital Single Market relevant to repositories of grey literature and other cultural heritage institutions that archive and make out-of-commerce works available. The concepts of copyright exceptions and collective rights management mechanisms are not completely new and are based on already existing frameworks. The DSM Directive, however, turns certain copyright exceptions from optional to mandatory. Until today, the Member States could introduce exceptions for cultural heritage institutions. After 7 June 2021, all Member States will have to introduce them. This will most likely have a positive impact on cross-border cooperation in the digitisation and digital distribution of digitised copies between Member States.

²⁸ See recital 37 of the DSM Directive.

²⁹ See recital 37 of the DSM Directive.

³⁰ See recital 37 of the DSM Directive.

In general, the new directive is favourable towards cultural heritage institutions and especially repositories of grey literature, as it explicitly includes "other subject matter" such as databases, computer programs and records, as well as works never intended for commercial use.

The directive is an act of secondary legislation and will not have a direct effect on relationships between cultural heritage institutions and rightsholders. Repositories will, therefore, have to wait until national implementations take effect to be able to take advantage of the new rules.

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