COMMUNIA

Response to the public consultation on opportunities offered by digital technologies for the culture heritage sector

Communia Association is pleased to submit comments to the European Commission's consultation on the opportunities offered by digital technologies for the cultural heritage sector. We agree that it is time to re-evaluate the Recommendation from 2011 on the digitisation and online accessibility of cultural material and digital preservation.

Almost ten years after the Recommendation has been published, we see that work of digitising Europe's cultural heritage is not yet finished. Further investments are needed, as well as measures aimed at removing barriers to access to digitised heritage content.

At the same time, the digital environment, in which Europe's digital heritage circulates, is very different from the one of the first decade of this century. Cultural policies, to be fit for their purpose both today and in the years ahead, need to be based on an updated vision of the role of digital heritage for Europe's societies and of strategies that support the creation of social, cultural, and economic value based on Europe's heritage.

In our response, we begin with general remarks followed by more specific comments, related in particular to copyright regulation and access to culture and knowledge.

From the Digital Single Market to Shared Digital Europe

The 2011 Recommendation points to the "Digital Agenda for Europe" document and its vision of digitisation of cultural resources as a supporting measure for economic growth, job creation, and the quality of life of European citizens. The Digital Single Market framework, developed in the last decade, has focused on the economic effects of cultural policies. We believe that today we

need a broader policy framework, which acknowledges a wider range of goals that European policies - and in particular digital and cultural policies - should achieve. We would like to point out the policy framework presented in the report "A Vision for a Shared Digital Europe"[1], to which our association has contributed. The report argues for a broader range of policy goals and a stronger emphasis on European values, including public institutions, democratic governance, sovereignty of communities and people, diversity of cultures, and equality and justice. European policies - including cultural policies - need to promote a more equitable and democratic digital environment, where basic liberties and rights are protected online, where the sovereignty of data is protected, where strong public institutions function in the public interest, and where people have a say in how their digital environment functions and can participate more fully in its creation and use.

Ultimately, heritage and culture are crucial for the well-being of European societies. Today, this means that culture and heritage need to be available and used online, in digital form. The experience of the pandemic demonstrated the risks of significantly decreased access to culture and heritage - through the combined effects of the enforced lockdown of cultural institutions and insufficient online presence. Furthermore, the economic crisis will in the coming years further weaken both cultural heritage institutions and the creative and cultural sectors. European policies should go beyond ensuring the economic or societal value of digitised heritage - at stake is the sustainability and well-being of our societies.

A broad understanding of cultural heritage

We note that the Recommendation of 2011 is based on a broad understanding of cultural heritage. The term is used interchangeably with other terms, such as "cultural material" and "cultural resources".

We agree that European cultural policy needs to adopt a broad view of Europe's digital heritage. This is especially needed with regard to born-digital heritage, which is today made available and sometimes even preserved by a broad range of actors and not just cultural heritage institutions. Resources that are described in some policy debates as "User Generated Content" fit a broad definition of cultural heritage.

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[1] https://shared-digital.eu/

We would like to also point out that Europe's cultural heritage includes not just historical works that lie in the public domain, but also modern works - the status of which, as heritage but also as intellectual property, is much more complicated. A case in point are the archival resources of European broadcasters, which can be seen as both Europe's heritage and contemporary cultural resources.

Europe needs public, cultural infrastructure

The Recommendation of 2011 rightly points to Europeana as a crucial development for the digitisation, accessibility, and preservation of European cultural heritage. Over the last decade, Europeana has proven to be a crucial public, cultural infrastructure for Europe. We hope that it will continue to be Europe's flagship cultural heritage project.

We believe that Europe needs to urgently develop a new, broader vision for public, cultural infrastructure. European cultural environment is today dominated by commercial players, often with an increasingly strong, monopolistic position. This is even more true in 2020 when, due to the pandemic, the influence and role of these commercial players have grown significantly.

In response to this, Europe should explore how to further develop online infrastructure that ensures availability, access to, and the possibility of reuse of European cultural heritage. To this end, heritage should be understood broadly and cover a broad range of publicly created or funded content. The ambition to create the European Platform of Quality Content Providers - currently being explored via a feasibility study - is an encouraging step into conceptualizing alternative communication platforms that embody European values in the tradition of public service media.

Access to digital heritage that is made available by European cultural heritage institutions is today usually mediated by commercial intermediaries and in particular social media platforms. Without such intermediation, cultural heritage would in practical terms not be accessible to European citizens, even when it is available online and without legal restrictions. European cultural policy needs to acknowledge that platform infrastructure is today as important as the digitisation of content or removal of legal barriers - the two traditional goals for digital heritage policies.

This is particularly important since it is the shape and characteristics of online platform intermediaries that determine whether access to heritage is just and ethical, and respects the

basic rights of the users. For this reason, digital heritage policies cannot be limited to shaping just cultural heritage institutions - but rather take responsibility also for the online environment, in which heritage circulates and is being used.

From preservation and access to digital transformation

We agree that European cultural policy needs to support the digital transformation of the European cultural heritage sector. Institutions need to have the capacity to use digital technologies to preserve and make available heritage in digital form. Yet we believe that the stakes of such policies are greater, as cultural heritage in digital form has the potential to generate social, economic, and cultural added value. For this to happen, policy goals cannot be limited to just preservation and providing access. Ultimately, success will be achieved only if heritage is accessed and used. Europe's cultural heritage institutions should facilitate the use of European cultural heritage.

Implementation of the Copyright in the Digital Single Market Directive and the need for harmonisation of European copyright law

The Copyright in the Digital Single Market Directive represents an important step towards addressing the copyright issues faced by cultural heritage institutions. With the provisions on the preservation of cultural heritage and the use of Out of Commerce Works, the Directive introduces EU wide solutions for problems faced by cultural heritage institutions seeking to digitize and make available their collections. Unlike the Orphan Works Directive (see below) these measures address all types of copyrighted works in the collections of Europe's cultural heritage institutions. Another welcome element of the DSM Directive is Article 14 which codifies one of the key elements of the 2011 Recommendation (material in the public domain must remain in the public domain after digitisation) into EU law.

These provisions of the DSM directive come in response to more than a decade of calls from Europe's cultural heritage sector to adopt the EU copyright rules to the realities of the digital environment and bring them in line with the cultural policy objective of increasing access to digitized cultural heritage. It will now be key to ensure that these provisions will be properly implemented by the Member States with an eye on enabling cultural heritage institutions to make maximum use of them.

The success of the out of commerce works provisions in the CDSM Directive will very much depend on effective collaboration between cultural heritage institutions, collective management organisations, and rightsholders, within the terms of the Directive. While this is already foreseen in the Directive, it is important that the Commission reiterates the need for inclusive and practical discussions among these actors, and encourages member states to facilitate them. These dialogues, if transformed into a long-term commitment, can also unlock areas where collaboration among these sectors is needed. The European Commission should explore possibilities of supporting such collaborations via Europeana and via a more active role of the EUIPO which could expand its role of a passive registry of out of commerce works into an active facilitator of collaborations between collective management organisations and cultural heritage institutions.

European copyright law needs to be harmonised if we want to make full use of Europe's digital cultural heritage. We hope that proper implementation of the Copyright in the Digital Single Market Directive will ensure such harmonisation with regard to key legal instruments that regulate digital heritage.

Of particular importance is Article 14 of the Directive, which ensures that public domain works stay in the public domain. We believe that this provision should extend beyond "works of visual art" and include other types of works or objects of related rights.

Improving rights information infrastructure

Much of the copyright issues faced by cultural heritage institutions are rooted in a lack of easily available and reliable rights information. To support cultural heritage institutions (and other users of copyrighted works) the European Union should invest in the creation of trusted repositories of rights information. The EUIPO is already tasked with maintaining a portal with information on out of commerce works. It should be explored if this talk can be expanded into creating a more comprehensive repository for rights information that brings together repertoire information held by collective management organisations, information on works in the public domain, and openly licensed works. In this context, the work done in 2019 by the Finnish Council Presidency on the development of a copyright infrastructure can provide a basis for further exploration.

Retract the Orphan Works Directive

The Orphan works directive should be retracted. More than 5 years after its entry into force it is abundantly clear that the 2014 Orphan works directive is a failure that did not have any meaningful impact on the digitization of cultural heritage in the EU. The directive is hardly used (less than 13.000 works registered in the EUIPO database, with almost half of them from the UK which will fall out of the scope of the directive by the end of this year) and does not even cover all types of work.

This is largely the result of the user-hostile design of the Directive, which requires a diligent search effort that is out of sync with the resources of the intended beneficiary institutions. Professionals in the sector express discouragement when following the provisions in the Orphan Works Directive, given the extremely time consuming diligent search (often with mandatory repositories that are not even suitable for the information that is being looked up, as defined by some member states), and the risk of having to provide a possible compensation requested by the rightsholder (for which there is little guidance).

If there was ever a justification for the Orphan Works Directive and its restrictive approach it has been superseded by the OOCW provisions of the CDSM directive. These provisions are more broadly applicable (they cover all types of works held in the collections of European cultural heritage institutions) and more in line with the resources of the sector. Since all orphan works are also - by definition - out of commerce, there is no need to maintain a separate legal instrument. Maintaining the Orphan Works Directive can only lead to confusion within a sector that already faces many challenges when dealing with copyright and lacks copyright literacy. For all of these reasons and to streamline the EU copyright acquis the Orphan work directive should be retracted.