

POLICY RECOMMENDATION AS TO THE ISSUE
OF THE PROPOSED INCLUSION OF CULTURAL
AND RESEARCH INSTITUTIONS IN THE SCOPE
OF PSI DIRECTIVE – WORKING GROUP 5

by

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Because of the great impact of the public sector on the information and knowledge society, the European Parliament issued the Directive 2003/98/EC on the re-use of public sector information (hereinafter, "Directive"). While the Directive mandates the re-use of public sector information, it limits its reach by not including cultural, educational and research institutions. The aim of this document is to present the arguments for and against the inclusion of cultural, educational and research institutions in the scope of the Directive, and to make recommendations for further legislation based on the analysis. The initial aim of this document was to recommend amendments for the Directive, however, during the drafting of this policy recommendation, the European Commission already presented its own proposal to amend the Directive, on December 12, 2011. If the amendments considered in the proposal were to come in effect, there would be significant changes in the position of cultural, educational and research institutions. Consequently, this draft also considers the proposal. While doing so, it also makes recommendations on how to improve it. The main conclusion stemming from the research is that inclusion of cultural, educational and research institutions would be beneficial and should be endorsed and supported. However, it would be wise to conduct an extensive cost/benefit study on this topic beforehand.

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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.¹ 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.² 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.³ 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 fulfillment of their public service broadcasting remit. Similar exceptions apply to documents held by cultural, educational and research establishments.

¹ Dekkers, M., Polman, F., te Velde, R., de Vries, M. 2006, *MEPSIR - Measuring European Public Sector Information Resources - Final Report of Study on Exploitation of public sector information - benchmarking of EU framework conditions*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/mepsir/final_report.pdf [Accessed 2. 1. 2013].

² European Commission 1998, *Green Paper on public sector information in the information society*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/green_paper/gp_en.pdf [Accessed 2. 1. 2013].

³ 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.

On the 12th of December 2011, the Commission presented its draft proposal to amend the Directive.⁴ 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.⁵ 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 several consultations of interested parties⁶ and as they were assessed in several studies regarding different aspects of PSI reuse.⁷ 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.

⁴ European Commission 2011, *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*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf [Accessed 2. 1. 2013].

⁵ COMMUNIA 2012, *Reaction of the COMMUNIA association to the proposal to amend Directive 2003/98/EC on re-use of the public sector information*, http://www.communia-association.org/wp-content/uploads/2012/01/120122communია_PSI_directive_reaction.pdf [Accessed 2. 1. 2013].

⁶ 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 European Commission 2011, *Commission staff working paper, Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directive 2003/98/EC on the re-use of public sector information*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/impact_assessment/impact_assessment_report.pdf [Accessed 2. 1. 2013].

⁷ These studies are:

- 1) Dekkers, M., Polman, F., Te Velde, R., De Vries, M. 2006, *MEPSIR - Measuring European Public Sector Information Resources - Final Report of Study on Exploitation of public sector information - benchmarking of EU framework conditions*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/mepsir/final_report.pdf [Accessed 2. 1. 2013].
- 2) Europe's Information Society Thematic Portal n.d., *Exclusive Agreements*, http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/exclusive_agreements/index_en.htm [Accessed 2. 1. 2013].
- 3) Patrick Wauters, P., Kapff, L., De Vries 2011, *POPSIS, Pricing of PSI Study, 15th PSI Group Meeting*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/minutes_psi_group_meetings/presentations/15th/03_01_study_economic_deloitte.pdf [Accessed 2. 1. 2013].
- 4) Vickery, G. 2011, *Review of recent studies on psi re-use and related market developments*, http://www.google.si/url?sa=t&rect=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCoQFjAA&url=http%3A%2F%2Fec.europa.eu%2Finformation_society%2Fpolicy%2Fpsi%2Fdocs%2Fpdfs%2Freport%2Fpsi_final_version_formatted.docx&ei=1RbkUNasIyJEsWaUyIGDQD&usq=AFOjCNG9RIgaKloSD0dY7lNuCx-FejWhkQ [Accessed 2. 1. 2013].
- 5) Clapton, G., Hammond, M., Poole, N. 2011, *PSI re-use in the cultural sector, Final report*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/cc462d011_1_1final-report.pdf [Accessed 2. 1. 2013].

2 INTERESTS INVOLVED

2.1 OBJECTIVE: INCREASING THE USE OF PSI

Public sector content has a central role in the digital age as a driver of economic activity. 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.

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. In 1999, cultural information, including museums and libraries made up the next largest sector after geographical information. However, the proportionate returns on investment in cultural information appeared to be much lower (€3.9 billion out of €68 billion per year).⁸ As to research institutions, their main purpose is to disseminate knowledge for the purpose of 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.⁹ Therefore publicly funded research should be widely available to and usable for all, in order to maximize its potential.

⁸ *Commercial exploitation of Europe's public sector information - executive summary*, ftp://ftp.cordis.europa.eu/pub/econtent/docs/2000_1558_en.pdf [Accessed 2. 1. 2013].

⁹ *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 2009*, <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0597-en.pdf> [Accessed 2. 1. 2013].

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.¹⁰ 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.”¹¹

Although the arguments of the existence of high administrative burden and third party copyrights 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 infor-

¹⁰ European Commission 1998, *Green Paper on public sector information in the information society* http://ec.europa.eu/information_society/policy/psi/docs/pdfs/green_paper/gp_en.pdf [Accessed 2. 1. 2013].

¹¹ European Commission 2002, *Proposal for a Directive of the European Parliament and the Council on the re-use and commercial exploitation of public sector documents*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive_proposal/en.pdf [Accessed 2. 1. 2013].

mation. 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.

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 Paper¹² 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 and the layered structure of copyright in the creation of copyrighted works, in case various authors have been involved.¹³

3.3

The review of the Directive¹⁴ 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

¹² 'e-Exploitation of Cultural Information – a need for a European hand?', *Briefing Paper for 2nd Law and Regulation Meeting*, http://old.epsiplatform.eu/psi_library/reports/epsiplus_thematic_psi_re_use_meeting_reports_2006_to_2009 [Accessed 2. I. 2013].

¹³ 'e-Exploitation of Cultural Information – a need for a European hand?', *Briefing Paper for 2nd Law and Regulation Meeting*, http://old.epsiplatform.eu/psi_library/reports/epsiplus_thematic_psi_re_use_meeting_reports_2006_to_2009 [Accessed 2. I. 2013].

¹⁴ *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*, <http://eur-lex.europa.eu/LexUriServ/LexUri.do?uri=CELEX:52009DC0212:EN:NOT> [Accessed 2. I. 2013].

the Economic and social impacts of the public domain.¹⁵ 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.¹⁶ 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 IPR; what is protected by unknown third-party IPRs and what is in the public domain. This would consequently raise costs for the institutions to screen and monitor what is free from copyright and what is not.¹⁷ One needs to add to this that countries such as Italy and Greece have also introduced specific quasi intellectual property rights for cultural heritage.¹⁸

¹⁵ European Commission 2009, *Economic and Social Impact of the Public Domain - EU Cultural Institutions and the PSI Directive*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/comm_0022_psi_v6.0.pdf [Accessed 2. 1. 2013].

¹⁶ *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 2009*, <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0597-en.pdf> [Accessed 2. 1. 2013].

¹⁷ 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).

¹⁸ Italy: Article 107 Code of Cultural Heritage and the Ministerial Decree of 20th April 2005.

4 ARGUMENTS FOR INCLUDING CULTURAL AND RESEARCH INSTITUTIONS UNDER THE SCOPE OF THE DIRECTIVE¹⁹

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/EC²⁰ 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

¹⁹ For an exhaustive list of arguments in favour and against including cultural institutions in the scope of the Directive see *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, accessed on 2. 1. 2012.

²⁰ *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*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0212:EN:NOT> [Accessed 2. 1. 2013].

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.²¹

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 2010.²² 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 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, was brought forward against the extension of scope by representatives of public archives. 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 that 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 ed-

²¹ *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*, <http://eur-lex.europa.eu/LexUriServ/LexUri-%20Serv.do?uri=CELEX:52009DC0212:EN:NOT> [Accessed on 2. 1. 2013].

²² *Results of the On-line Consultation of Stakeholders "Review of the PSI Directive" 2010*, <http://www.lapsi-project.eu/norms> [Accessed 2. 1. 2013].

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 Directive²³ 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.

The European Commission has made digital libraries a key aspect of its policy, as set out in its strategy for digitization, online accessibility and digi-

²³ *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 2009*, <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0597-en.pdf> [Accessed 2. 1. 2013].

tal preservation of Europe's collective memory.²⁴ 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.”²⁵

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.²⁶

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 prop-

²⁴ High Level Expert Group on Digital Libraries, Sub-Group on Public-Private-Partnerships (PPP) 2008, *Final Report on PPP for the Digitisation and online Accessibility of Europe's cultural Heritage, i2010 European Digital Libraries Initiative* http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/ppp/ppp_final.pdf [Accessed on 2. 1. 2013].

²⁵ 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, accessed on 26.02.2013.

²⁶ High Level Expert Group on Digital Libraries, Sub-Group on Public-Private-Partnerships (PPP) 2008, *Final Report on PPP for the Digitisation and online Accessibility of Europe's cultural Heritage, i2010 European Digital Libraries Initiative* http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/ppp/ppp_final.pdf [Accessed on 2. 1. 2013].

erty is therefore not necessarily the factor that points in favour 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 THE COMMISSION'S PROPOSAL

6.1 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.”²⁷

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.”²⁸

is replaced by the following:

“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

²⁷ European Commission 2011, *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*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf [Accessed 2. 1. 2013], p. 14.

²⁸ *Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf [Accessed 2. 1. 2013].

research documents protected by third party intellectual property rights).²⁹

- 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.”³⁰

is replaced by the following:

“This directive shall not apply to:

(f) documents held by cultural establishments, other than libraries, museums and archives.”³¹

6.2 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.”³²

²⁹ European Commission 2011, *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*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf [Accessed 2. 1. 2013], p. 15

³⁰ *Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf [Accessed 2. 1. 2013].

³¹ European Commission 2011, *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*, http://ec.europa.eu/information_society/policy/psi/docs/pdfs/opendata2012/revision_of_PSI_Directive/proposal_directive_EN.pdf [Accessed 2. 1. 2013], p. 16.

³² Recital 7.

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 third party covers vast amounts of documents. Libraries and museums 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.³³ 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.

6.3 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

³³ Leaving aside all practical problems of access.

block in terms of their ability to negotiate favourable terms in their digitization contracts with third 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.

6.4 PUBLIC PRIVATE PARTNERSHIPS

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.

7 CONCLUSION

The inclusion of cultural and research institutions in the scope of the PSI Directive is to be endorsed and supported. Nevertheless, a substantial cost/benefit study on the topic of an extension of the scope of the directive should be conducted on the topic.

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 inter-

action 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 heart 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.

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