



**Position Statement of the
Max Planck Institute for Innovation and Competition
on the Proposed Modernisation of European Copyright Rules**

PART B

Exceptions and Limitations

Chapter 3

Preservation of Cultural Heritage

(Article 5 COM(2016) 593)

I. Background

1. General considerations

1. As appropriately recalled in the Impact Assessment (IA), the space allowed for preserving cultural heritage collections under national exceptions is sometimes too narrow, unclearly defined or simply non-existent. Indeed Articles 5(2)(c) and 5(3)(n) of Directive 2001/29 (InfoSoc Directive) only cover some specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives and are of an optional nature. Moreover, even when they have been transposed on a national level, their scope of application differs in the various Member States.
2. Recently the Court of Justice of the European Union (CJEU), while ruling on the scope of these exceptions (see C-117/13, *Technische Universität Darmstadt v. Eugen Ulmer KG*), made even more evident the need for legislative action in order to 1) adapt exceptions in copyright law to the potential offered by technology; 2) make these exceptions consistent throughout Europe fostering legal certainty.

3. Therefore, the EU proposal for a mandatory exception for the preservation of cultural heritage, as drafted in Article 5 COM(2016) 593 is in principle to be welcomed. It is an important step towards 1) creating a certain legal framework that facilitates the preservation of works and other subject-matter which are protected by copyright or related rights; 2) enhancing interoperability and standards; and 3) fostering research and innovation. These are key actions of the Europe 2020 strategy and of the Digital Agenda for Europe, as set out in the Communication from the Commission entitled “A Digital Agenda for Europe” and also recalled in Directive 2012/28/EU (Orphan Works Directive)

2. Justification

4. This proposed permitted use enhances **cultural diversity** within Europe while promoting the functioning of the internal market. Indeed, allowing cultural heritage institutions (CHIs) to “make copies of any works or other subject matter” that are in their collections, means ensuring the preservation of works that represent the cultural identity of every Member State and, at the same time, of Europe itself.
5. On the one hand, according to Article 167(1) TFEU, the harmonisation of copyright law towards a digital single market aligns with fostering cultural diversity. Indeed, Article 167(1) mandates the EU with respect to ensuring the national and regional cultural diversity of the Member States, while at the same time “bringing the common cultural heritage to the fore”, as well as establishing a functioning internal market. In its Communication on a European Agenda for Culture in a Globalizing World (2007), the Commission suggests that a reconciliation of diversity and commonality is possible by nurturing cultural diversity needs while promoting exchange between different cultures and citizens’ access to cultural works (see COM (2007) 242 final, 10 May 2007).
6. Article 5 of the proposed Directive facilitates the **functioning of the European single market** and strengthens the position of European CHIs on different lev-

els. A common approach to allowing the preservation of works or other subject-matter in any format or medium is necessary in order to ensure legal certainty and to foster: 1) collaboration and sharing of infrastructures among CHIs located in the different Member States; 2) the development of business models that revolve around the digitisation, or copying in any other form, of cultural heritage.

7. The **high transaction costs** for locating the rights over the content and acquiring licences have made the digitisation of cultural heritage and the construction of content databases by CHIs difficult. The majority of cultural heritage digitisation projects until now have been based on partnerships with large commercial enterprises that have the financial means to bear such costs as well as the technological infrastructures. For a long time, the European Commission has encouraged such cooperation between CHIs and private companies (e.g. see Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation). These public-private partnerships assume such a great significance that this cooperation model is regulated in detail by Directive 2003/98/EC on the re-use of public sector information as amended by Directive 2013/37/EU (see Recital 30 of the amending Directive).
8. In this context, the proposed exception potentially reduces transaction costs, allowing CHIs to directly manage cultural heritage preservation projects, only outsourcing reproduction activities to third parties. This means that **cultural heritage remains in the hands of CHIs**.
9. Moreover, collaboration and sharing of infrastructures among CHIs located in the different Member States promotes the **standardisation** of techniques for digitising. Further, the preservation and storage of content with uniform technical standards has the potential of easing **content retrieval** as well as enabling **text and data mining**. The innovation effect will likely be immense in view of the rapidly growing importance of data analysis techniques.

II. Concerns regarding the Commission’s Proposal

1. Definitions

a) “Cultural Heritage Institutions”

10. Any reform of copyright law to facilitate the preservation of cultural heritage needs to be considered alongside the question of which institutions ought to be the custodians of this cultural heritage. However, the Commission does not seem to pay sufficient attention to this matter; the definition of the institutions benefiting from the exception is **not sufficiently precise**.
11. Most of all, the CHIs described in Article 2(3) of the proposed Directive do not correspond to those described in the Orphan Works Directive and Directive 2001/29, Article 5(2)(c) (InfoSoc Directive). According to Recitals 1 and 23, Article 1(1), (2)(a)(b) of the Orphan Works Directive, CHIs are “*Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States*”. Directive 2001/29, Article 5(2)(c) (InfoSoc Directive), also includes among CHIs “educational establishments”. Therefore, the Commission needs to be consistent in its definition of the concept of CHIs, including among these “educational establishments”, and all the other institutions indicated in the abovementioned Directives.

b) “Works or other subject matter that are permanently in their collections”

12. The requirement that CHIs need to have “works or other subject matter that are permanently in their collection” is misleading. The idea behind that wording should be that physical copies or carriers (such as paintings, prints, movies and the like) are in their possession. It goes without saying that copyright and neighbouring rights are a different matter than the physical goods themselves, and that the CHI – although possessing a copy or carrier – usually will not dis-

pose of those rights. In the exceptional case that CHIs themselves are the owners of copyright or related rights (e.g. in case of legacy of both, the physical good and the copyright or related rights) an exception – in terms of a legal permission to do something without the consent of the rightholder – is not needed. The proposed Article 5 therefore only applies to the collections of CHIs for which they do not at the same time own the copyrights or related rights. This clarification of that scope of application in one of the Recitals would enhance legal certainty and help with a compliant implementation of the provision by the Member States.

2. Content

a) Making copies on behalf of CHIs

13. CHIs often will not dispose of the technical, technological, financial and other resources to copy their collections themselves. They should therefore be allowed to outsource the activities permitted by the proposed Article 5 to third parties. Following the above-mentioned private-public cooperation model, the European legislator should specify that the CHIs benefiting from Article 5 may delegate the legally permitted activities to other CHIs or specialised institutions. This specification is necessary in order to directly exempt such third parties from copyright infringement. Beyond legal certainty, this will also enhance the effectiveness of the preservation of cultural heritage.

b). Payment to rightholders

14. In cases of delegation of permitted uses to third parties acting on behalf of CHIs in return of cost compensation, an adequate payment to the rightholders should be secured (see Part F para 14 et seqq. as to the splitting of the payment between creators and subsequent rightholders). A similar provision is contained in Article 54(c) of the German Copyright Act regarding the operation of photocopiers.

III. A more ambitious approach

15. To make maximum use of the potential CHIs have, a further-reaching limitation of copyright might be supported for the purposes of carrying out other public interest missions – particularly, interests in **research, education and teaching** – but this ultimately is a question of the political determination.
16. The proposed provision should allow access to copies reproduced by CHIs pursuant to the proposed Article 5. Whereas providing access to the originals is the purpose of most CHIs (e.g. museums, libraries, etc.), access to such copies is likely to be an issue of copyright law. The need to access copies instead of the originals is particularly evident where the originals are **endangered** and access to them needs to be substituted by access to copies.
17. Furthermore, to better allow CHIs – libraries in particular – to fulfil their function, the EU legislator might consider extending copyright limitations already existent in the European copyright *acquis*, including **public lending** of copies made for the purpose of preservation according to the proposed Article 5, but possibly also **document delivery**.

IV. Proposal

| <i>Text proposed by the Commission</i> | <i>Amendment</i> |
|--|---|
| Article 5 | Article 5 |
| Preservation of cultural heritage | Preservation of cultural heritage |
| (...) | (1) (...) |
| | (2) Cultural heritage institutions shall be allowed to mandate specialised third parties to make the copies according to paragraph 1, provided that such copies are directly returned |

to the mandating cultural heritage institution and any provisional or incidental copies are immediately destroyed.

(3) The rightholders shall be entitled to fair compensation from third parties acting pursuant to paragraph 2.

Munich, March 3, 2017

Authors:

Prof. Dr. Reto M. Hilty

Dr. Valentina Moscon

Tao Li