

Creative Commons submission to the European Commission consultation on digital cultural heritage

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Introduction

What is Creative Commons?

[Creative Commons](#) (CC) is pleased to submit comments to the European Commission's [consultation on the opportunities offered by digital technologies to the cultural heritage sector](#). This consultation's outcomes are not only bound to shape policy in the European Union (EU) but are also likely to influence digital cultural heritage-related policy globally. Creative Commons is honored to take part in this process and to share its views on the crucial issues at the heart of the consultation, especially under the lens of copyright law as well as access to and sharing of culture and knowledge.

Creative Commons is the world's leading non-profit organization that stewards the Creative Commons open copyright [licenses and tools](#), which are free, easy-to-use, simple and standardized tools that enable the worldwide sharing of creative content. As part of our role as advocates for the [OpenGLAM](#) initiative, we provide guidance on the use by cultural heritage institutions, such as galleries, libraries, archives and museums (GLAMs) of open licensing as a way to further their missions of providing access to and enabling use and reuse of their collections by the public.² We help GLAMs understand and apply our licenses and tools so they can more effectively and clearly share their collections with the commons, notably by offering training courses such as the [CC Certificate](#).

CC also develops technology like [CC Search](#) that makes openly licensed material, including cultural heritage from several museums' and other cultural heritage institutions' [collections](#), easier to discover and use.

¹ This paper has been prepared by Brigitte Vézina, Open Policy Manager, Creative Commons. It has benefited from invaluable input from Diane Peters, Lisette Kalshoven, Susanna Anas, Deborah De Angelis, Scann, Julia Brungs, Susan Reilly, Shanna Hollich and Maja Bogataj.

² For example, we advocate that cultural heritage-related data beyond metadata should be more readily accessible with liberal reuse conditions (preferably under a CC0 tool) and not be hampered by copyright and/or restrictive licensing conditions.

In addition, CC [drives policy change](#) to help create a regulatory environment that supports creativity, collaboration and the sharing of creative works, upholds user rights and enables a rich, robust and thriving public domain. CC works to shape the copyright system in order to build a fair framework for all stakeholders involved.

The EC consultation is a welcome initiative

The European Commission's key policy instrument on digitization, online access and digital preservation of cultural heritage material is the 2011 [Recommendation on the digitisation and online accessibility of cultural material and digital preservation](#), designed to help EU Member States set their policy priorities with regard to digital cultural heritage as well as to support the important work of cultural heritage institutions.

While this instrument provides fundamental guidance on the links between copyright and digital cultural heritage, the cultural heritage sector has since 2011 undergone profound changes at the legal, social and technological levels, which have prompted the need to reconsider this instrument and to reflect on new policy options. In particular, the COVID-19 crisis has magnified the immense value for society of online access to and use of digital cultural heritage. It has also prompted a reflection on the physical vs. virtual engagement strategies of cultural heritage institutions, with countless museums worldwide facing the threat of having to close down³ and for valuable collections to be sold into private hand, with the public losing access. At the same time, the crisis has revealed the [dynamism and resilience](#) of the cultural sector and its potential to lead on the path to recovery and into the future.⁴

Summary of Creative Commons' policy position

In this position paper, we identify the main copyright issues that arise in the context of the digitization of cultural heritage and provide insights to shape EU policy in this area. In a nutshell, we are of the view that cultural heritage represents humanity's memory and that digitizing that memory and using the right legal tools to ensure the broadest possible access, use and reuse by the public must be the highest priority. Our main recommendations are:

- Digitization is essential to ensure access, sharing, use and reuse of cultural heritage
- Digitization is a fundamental component of cultural heritage preservation
- Creative Commons licenses and tools are standard and easy ways to communicate with users a work's copyright status and use permissions
- The copyright system, notably through exceptions and limitations, must enable cultural heritage institutions to fulfil their missions

³ According to [ICOM](#) and [UNESCO](#) reports, 13% of museums worldwide might have to close down because of COVID-19.

⁴ For example, members of the Creative Commons Global Network carried online training workshops and [webinars](#) for cultural heritage professionals to learn about relevant risks and [exceptions to copyright](#) when providing online services. Other organizations, e.g. in Australia, organized [fact sheets](#) to provide libraries and archives with basic guidance on how to deal with copyright challenges.

- Access and use of cultural heritage is also governed by ethical considerations that must be taken into account
- The implementation of the DSM Directive should be done in such a way as to support cultural institutions
- There is a crucial need for training and capacity building on copyright and licensing issues in the cultural heritage sector
- Artificial intelligence can potentially offer many benefits for the cultural heritage sector

The importance of digitization for cultural heritage preservation, access, use and reuse

Digitization is nowadays the most trustworthy, effective, and efficient way to ensure cultural heritage can be shared and copies for preservation made, including as strategies to face such challenges as [climate change](#). This is recognized in the [2015 UNESCO Recommendation concerning the preservation of, and access to, documentary heritage including in digital form](#), the EC's [2011 Recommendation](#) at the crux of this consultation, and the 2019 [Report on Digitisation, Online Accessibility and Digital Preservation of Cultural Material](#).

Digitization efforts for preservation and access purposes can in turn provide significant support to safeguarding, revitalization, research and study of cultural heritage, as well as protection and promotion of cultural diversity. Cultural heritage items are invaluable resources for education, entertainment and allow for many kinds of reuse by the creative industries and the general public. Therefore, it is important to not only encourage access to digital cultural heritage but also its use and reuse, so as to foster innovative ways for further creation and enjoyment of culture.

Use of Creative Commons licenses and tools for online sharing of cultural heritage

As part of our role as stewards of the CC licenses and tools, we at CC share our expertise with cultural heritage institutions (both public and private), where vast quantities of the world's cultural heritage are housed, and accompany them on their digital transformation journey. For example, we have directly assisted aggregators like [Europeana](#), the Digital Public Library of America ([DPLA](#)) and [Wikimedia](#), as well as cultural heritage institutions such as [the Met](#), the [Smithsonian](#), the [Tate](#), the [Rijksmuseum](#), and [many others](#). In fact, the [European Commission itself](#) uses CC licenses for its publications, and has [recommended](#) the use of CC licenses for public sector information, including information produced by cultural heritage institutions.

CC licenses and tools are the easiest and simplest means to communicate to the public what uses can be made of digital cultural heritage objects and to facilitate wide dissemination of culture. They are becoming the standard for GLAMs that are “opening up” their collections on the internet, helping navigate some of the challenges posed by copyright law and enabling broad reuse.

It's important to recall that CC licenses and tools (including [CC0](#)) can only be applied to digitized cultural heritage works under copyright and by (or with authorization of) the copyright owner(s).

CC licenses should not be applied to works in which the cultural heritage institutions do not hold the rights or where they do not have permission from the rights holders to do so.

For material in the worldwide public domain, CC offers the [PDM](#), which makes it easy for GLAMs to indicate to users the public domain status of the digital objects made available online. The PDM should only be applied to very old works that are in the public domain worldwide (either through expiration of the term or because the material was never subject to copyright to begin with).

For digital reproductions of public domain works, Creative Commons [recommends](#) since 2015 the use of CC0 for faithful digital reproductions of public domain works, as a way to avoid any possible claims over rights that might arise as a result of applying technical digitization processes over a public domain work. Doing so ensures the public that both the underlying work and the digital surrogate are free for reuse.

As concerns publicly funded GLAM-generated material subject to copyright, it should fall within the scope of the 2019 [Open Data Directive](#) and therefore be released openly, using a CC license or tool.

Strengthening and harmonization of limitations and exceptions for GLAMs

GLAMs often face insurmountable hurdles to determine the copyright status of works and clear any subsisting rights before they can digitize them and share them online.⁵ As a result, many digitization projects are simply nipped in the bud or substantially reduced or modified to comply with burdensome legal requirements. The world over, outdated, disparate and misaligned copyright rules fail to accommodate the legitimate activities of GLAMs, exacerbate inequalities by curtailing their efforts to provide access to knowledge and culture, and carve “the 20th century [black hole](#)” into the world’s digital cultural heritage.

At CC, we promote the [interests of GLAMs in the copyright law and policy arena](#). Central to CC’s copyright policy agenda is making sure GLAMs’ concerns and needs are treated on equal footing with those of rights holders, in a balanced and fair manner. We believe that copyright should not stand in the way of day-to-day operations by GLAMs, including but not limited to, digital preservation and making available of cultural heritage. For example, a lot of cultural heritage materials stewarded by GLAMs are either out of commerce, never were in commerce, have no legal guardians, or are orphan works. For these materials, the copyright system proves utterly inflexible and a great hindrance to digitization and making available online.

Unfortunately, existing exceptions are all too narrow, unclear, and rare. A recent World Intellectual Property Organization (WIPO) [International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums, and Educational & Research Institutions](#)

⁵ See, for instance, the 2016 Europeana report [What rights clearance looks like for Cultural Heritage Organizations - 10 case studies](#).

made evident the unacceptably skewed balance of the copyright system towards the rights holders to the detriment of those institutions that curate, care for and help interpret, understand, and share cultural heritage. This is the reason CC signed the [open letter](#) prepared by the International Council of Museums (ICOM) and the International Federation of Library Associations and Institutions (IFLA), among others, calling on WIPO to urgently create an international legal instrument with clear rules allowing the preservation of cultural heritage collections.

Furthermore, many cultural institutions conduct research, education and other non-commercial activities that should not be subject to copyright restrictions, as they are conducted in the public interest. Digitization is an expensive process, and digitization projects often involve the collaboration of multiple actors across different countries within the EU and outside. A lack of global harmonization on the scope and term of protection, limitations and exceptions, and on public domain rules, presents unjustified challenges to these projects. This situation is particularly dramatic for [archives](#), which often hold unique materials. Of serious concern are the different treatments of published vs. unpublished works as well as perpetual moral rights, which continue to apply after the expiration of the economic rights, and might prevent making a public-domain work available online.

All these rules should be harmonized across EU member states (and throughout the world) to ensure clarity in the copyright status of works for purposes of digitization and making available. Where harmonization is not achieved, exceptions and limitations should allow for the cross-border exchange of digital reproductions of works, similar to what is being provided under the [Marrakesh Treaty](#).

Regarding the Marrakesh Treaty, to which the European Union is a signatory, its provisions are limited to textbooks and printed materials only. We believe that the EC should take a bolder step in pushing for limitations and exceptions that allows for GLAMs as authorized entities to provide access to more types of works (including artistic, musical and audiovisual works), ensuring true accessibility to many more works of arts. We also invite the EC to enact measures that would prevent versions of public domain works created for accessibility purposes from being subject to copyright protection. At a minimum, new versions of works created for accessibility purposes by authorized entities should be subject to the same limitations and exceptions as the underlying works.⁶

Ethical considerations over certain cultural heritage elements

There might be some instances where digitizing cultural heritage material and making it available openly is unacceptable practice, particularly in situations of power imbalance, for instance as regards [Indigenous](#) cultural material or material held in cultural institutions as a

⁶ On this point, see Wallace, Andrea, Accessibility and Open GLAM (January 1, 2020). Forthcoming, Jani McCutcheon and Ana Ramalho (eds), International Perspectives on Disability Exceptions in Copyright and the Visual Arts: Feeling Art (Routledge 2020).

consequence of colonization, such as [African](#) cultural heritage. Aside from copyright restrictions, more guidance should be put in place on ethical considerations when dealing with contested cultural heritage. While we defend unrestricted access to the furthest extent possible, we also acknowledge ethical caveats when appropriate.

We also need to acknowledge that the largest buyers of archives are located within the EU. Proper cross-border exchange should be in place to avoid “locking out” citizens from where those materials were originally produced to have access to their own cultural heritage.

Alignment with Copyright DSM Directive provisions

EU policy in the field of digital cultural heritage should be in line with the relevant provisions of the 2019/790 [Copyright and Related Rights in the Digital Single Market Directive](#) (the “DSM Directive”). Although the DSM Directive introduces mandatory exceptions and provisions, EU member states still have some leeway to implement them. In order to meet the intended objectives underpinning the DSM (i.e. the creation of a fair digital single market), the provisions of the DSM should be implemented at the national level in the most uniform and harmonized way to ensure clarity and certainty on the part of all actors concerned, across Europe.

Text and data mining

Articles 3 and 4 contain a mandatory exception for the purposes of data analytics. Article 3 gives scientific researchers who have legal access to the open web as well as the collections of universities, libraries, archives and other cultural heritage organisations across the EU, the freedom to undertake data analytics without requiring permission from rights holders. The right to enjoy this new exception cannot be removed by either contract or by technical protection measures. Article 4 is a mandatory exception (or limitation, in the form of a right to use against remuneration or limited by contract) for the purposes of data analytics for anyone who wishes to mine copyright materials; however, rights holders are legally authorized to prevent data mining under this exception if they so choose.

These new exceptions have the potential to support the development of AI, and COMMUNIA provides a great overview of the most desirable [implementation of these provisions](#) to that effect.

Public domain materials should stay in the public domain

At CC, we are convinced that digitized public domain works must [remain in the public domain](#). We commend the adoption of Article 14. In that vein, we look forward to seeing Member States that provide copyright protection for non-original reproductions of copyright works in the public domain review their laws and cultural institutions change their practices of claiming rights over digital reproductions of cultural heritage works in the public domain. We recall that Article 14 also covers three-dimensional reproductions of three-dimensional works, such as 3D models of

sculptures created via 3D scans, a point highlighted by [COMMUNIA](#). 3D reproductions of 3D works are also excluded from related rights protections.

Further, we believe that this provision should extend beyond “works of visual art” and include other types of works or objects of related rights, such as musical works (including music sheets) and sound recordings, literary works (including manuscripts), audiovisual works, archeological works and remains as well as maps (where they are not considered works of visual art).

If the work is in the public domain, no copyright licenses should be applied. As CC licenses are designed to operate in relation to works where copyright subsists, applying a CC license is ineffective.

Moreover, agreements entered between cultural heritage institutions and private third-parties to govern the digitization of institutions’ collections should not provide that said third-parties can claim rights over digitized reproductions of public domain works.

Out of commerce works

As [stated](#) by our sister organization the COMMUNIA Association and as further [developed](#) by Europeana regarding Articles 8-11, EU policy should facilitate the large-scale digitization and cross-border accessibility of out-of-commerce works, preferably under an exception. Licensing, although it is foreseen in the DSM, should be discouraged as it increases transaction costs, causes delays and risks impeding the digitization of out-of-commerce works. Licensing simply cannot uphold fundamental rights such as the right to information, the right to access to culture and freedom of expression, as noted in CC’s [latest submission](#) to the World Intellectual Property Organization’s Standing Committee on Copyright and Related Rights (SCCR). [CC licenses](#) are an excellent way to share culture, information and knowledge—our licenses are the international standard for open licensing and the broadest, best understood and recognizable way to signal an intention to share. However, licensing (especially collective licensing) falls short of addressing the problems that libraries, museums, archives, educational and research institutions, as well as persons with disabilities, face on a daily basis.

Relatedly, the convoluted and ineffective [Orphan Works Directive](#) should be retracted. For various reasons that have been exposed at great length, the provisions of the directive have virtually never been invoked. Maintaining this directive reduces clarity and increases complexity in an already overly complex environment.⁷

No contract override

According to Article 7, certain national exceptions must be protected from contractual override. In other words, no contractual terms could have the effect of minimizing or cancelling the uses that can be made by relying on certain exceptions, as explained by [COMMUNIA](#). We believe

⁷ On this point, see Maarten Zeinstra, [The trainwreck that is the Orphan Works Directive](#), Kennisland, 2017, and several [EnDow resources](#) on the topic of diligent searches under the Directive.

that this provision should be extended to cover *all* copyright exceptions and limitations and thus allow wide-scale digitization of cultural heritage, where this would be covered under an exception not subject to the current scope of Article 7.

Preservation of cultural heritage

[Article 6](#) provides a mandatory exception in order to allow cultural heritage institutions to make copies of works in their collection for preservation purposes (without any restriction as to medium or format). This exception is protected from contract override. Cultural heritage institutions should be able to make preservation copies of works to which they have access on third-party servers (e.g. works on open-ended lend), as well as other internal uses by these institutions (e.g. cataloguing) and web harvesting (as allowed under German copyright law, e.g.). This exception should not be encroached on by TPMs.

The exception from Article 6 should be understood to permit copying of all types of works and other subject matter and should cover a broad spectrum of purposes for which copying can be carried out (e.g. for reconstruction of works, replacement of lost works. etc.). In addition, pursuant to Article 6, cultural heritage institutions should be able to work with and through others (other cultural heritage institutions as well as other third parties) in order to achieve preservation purposes and there should therefore not be any limitation in respect of which subjects can carry out preservation reproduction on behalf of cultural heritage institutions.

Capacity building and training on digitization and rights management for the cultural heritage sector

It is essential that practitioners in the cultural heritage sector are able to acquire knowledge and develop practical skills regarding copyright and the public domain, together with other legal and ethical considerations, when dealing with digitization and cultural heritage online. Knowledge of technologies, processes and content is a valuable effort and investment for the entire sector. Of great importance is the adoption of uniform and interoperable protocols, formats and metadata. CC runs a [GLAM platform](#), a space to share resources, enhance collaboration and raise awareness on open access to digital cultural heritage.

CC is also involved in the Steering Group of the [Copyright Community](#) of the [Europeana Network Association](#), whose activities should be broadly supported.

The forthcoming CC GLAM Certificate is also a key element in improving the development, adoption and proper implementation of digitization and open access policies by GLAMs. The rising interest in digitization of cultural heritage by GLAMs isn't always accompanied by robust and consistent copyright clearance workflows and a shared understanding about how open access and CC licenses and tools work. The CC GLAM Certificate could play a role in educating and providing essential resources and capacity to the GLAM community, with a special focus of the implications of digitization and making available of cultural heritage. In particular, GLAMs

should improve their copyright practices and training, should not claim copyright over material they do not hold rights over (including not applying any CC license over such material), and improving the quality of the current rights data in light of these recommendations. Appropriate funding should be provided to building capacity in cultural heritage institutions. Generally, open access policies creation, adoption and implementation deserves dedicated funding and resources.

Potential benefits of artificial intelligence in the cultural heritage sector

Artificial intelligence (AI) technologies have the potential to increase the capacity to digitize, research, study and analyze large amounts of information (including cultural heritage material and copyright works) in unprecedented ways. The use of AI in relation to cultural heritage material will likely contribute to academic and scholarly activities in various disciplines that rely on cultural heritage, and allow the general public to interact with cultural heritage in novel and exciting ways.

Furthermore, AI may potentially be used to automatize the determination of the copyright status in works and other metadata information at the digitization ingestion into databases stage, and should therefore be trained extensively to achieve autonomy and reliability.

Lastly, AI can be used to adapt cultural heritage materials to make them accessible in other mediums or formats, for example for visually or hearing-impaired people.

As concerns the use of digital cultural heritage materials, including copyright works, as inputs and the training of AI applications, Creative Commons supports broad and unfettered access and use to help reduce bias, enhance inclusion, promote important activities such as education and research, and foster innovation in the development of AI. AI innovation is bound to be stimulated by the use of openly accessible materials.

Assuming access to copyright works (including cultural heritage materials) is legitimate at the point of input, works' use to train AI should be considered non-infringing by default. Indeed, such uses are non-expressive and do not compete with the original works in any market (on this point, see also our discussion of the text-and-data mining exception below). We believe that the European Commission's work should focus on guidance in the field of exceptions and limitations to enable uses of cultural heritage material, where such uses are in the public interest. In the context of openly licensed content used to train AI applications, our online FAQs⁸ clarify how Creative Commons licenses work: from a copyright perspective, no special or explicit permission regarding new technologies is required from the licensor.⁹

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⁸ Creative Commons, FAQs, "Artificial Intelligence and CC Licenses," <https://creativecommons.org/faq/#artificial-intelligence-and-cc-licenses>

⁹ For more on CC's policy position on AI, see our submissions to the [World Intellectual Property Organization](#) and the [European Commission](#).