LICENSING OF OUT-OF-COMMERCE WORKS

An IFRRO Guide
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**Disclaimer**

The information in this Guide is not intended to address the specific circumstances of any particular individual or entity and is not necessarily complete, accurate or up to date. It is not professional or legal advice (if you need specific advice, we recommend consulting a suitably qualified professional).
I. FOREWORD

This IFRRO guide on licensing of the digitisation and making available of out-of-commerce works (OOCW) by CMOs (Collective Management Organisations), or RROs (Reproduction Rights Organisations) in the text and image sector aims to provide practical assistance in respect of licensing and other issues related to the 2019 Copyright in the Digital Single Market ("DSM") Directive1 (referred to as "the DSM Directive" throughout this guide). The Directive, under Articles 8 – 11, introduces rules regarding uses of OOCW that are permanently in the collections of publicly accessible Cultural Heritage Institutions (CHI), to be implemented in all EU Member States by 7 June 2021.

The IFRRO guide draws upon the experiences of those IFRRO members that have already been involved in licensing projects concerning OOCW. These IFRRO Members emphasise the importance of close cooperation with authors, publishers and their organisations, as well as with the CHIs, as a key criterion for success.

Many CHIs are interested in digitising their collections and making those collections available online to the general public. When the collection includes copyright works, a means of identifying the copyright holders and clearing permission to include the work in the digitised collection is necessary – this is where CMOs come in. Examples of current projects involving cooperation amongst CHIs, RROs and author and publishers to make their works available in this way are further explained in Annex B.

Although there can be administrative challenges in OOCW licensing, IFRRO members have demonstrated that they will strive to offer those services despite such challenges. IFRRO very much supports and recommends this approach. It is important that the CMO mandate is a broad and inclusive one, covering all rights mentioned in the Directive (reproduction, communication to the public including making available and distribution).

It is the EU Member States that will ultimately decide how the provisions of the Directive will be implemented at national level and they have quite some flexibility in doing so. Importantly, it is obligatory for Member States to consult rightholders, CMOs and CHIs in each sector when it comes to the key question of deciding when a work is out of commerce. It is also vital that there is a constructive dialogue amongst the relevant stakeholders to foster the relevance and usability of the licensing mechanisms and ensure effective safeguards for rightholders.

The guide aims to clarify what authors and publishers should expect from EU CMOs if their works fall under an OOCW digitisation project. It highlights some key concerns raised by authors and publishers within IFRRO’s membership, whose input was sought in preparing this guide and puts forward some suggestions as to how RROs, IFRRO and the broader IFRRO community could assist in ensuring that the safeguards foreseen for rightholders in the Directive are applied as effectively as possible.

The IFRRO Secretariat thanks Olav Stokkmo, international copyright and collective management consultant, who assisted us in the preparation of this Guide, giving us the benefit of his vast expertise and experience in this field also as IFRRO’s former CEO.

In addition, the Secretariat thanks all the representatives of the IFRRO member organisations that directly contributed to this Guide - Copydan Writing, DILIA, EFJ, EMMA, ENPA, EVA, EWC, FEP, Kopinor, LITA, NWU, SEMU, SOFIA and VG Wort - as well as those members that provided additional information and comments on this subject during IFRRO meetings, which also contributed to the Guide.

2. Copydan Writing, DILIA, Kopinor, LITA, SOFIA and VG Wort
3. Representatives of IFRRO members EFJ, EMMA, ENPA, EVA, EWC, FEP, Kopinor, LITA, NWU, SEMU, SOFIA and VG Wort
II. EXECUTIVE SUMMARY / KEY SUGGESTIONS

This Guide reviews the provisions of the DSM Directive relating to the licensing of out-of-commerce works (OOCW) and makes a number of suggestions about how to successfully license digitisation schemes. It takes into account collective licensing best practices and the issues and concerns raised by IFRRO members, in particular rightholder authors and publishers.

Rightholders are concerned that works will too easily be considered as OOC and might be digitised and made available without their knowledge or consent. The Guide suggests ways of establishing if a work is OOC, the customary channels of commerce that should be consulted as a minimum to verify a work’s OOC status and what should be considered a “reasonable effort” to verify that a work is OOC.

The Guide also addresses the concerns of rightholders in different types of works, such as images, embedded, translated and foreign works. It concludes that a good communications network amongst the CMOs representing rightholders is essential to enable searches to be conducted effectively.

The key to successful schemes is for rightholders to trust in the licensing system. The Guide discusses collective licensing, the main mechanism to allow CHIs to digitise and make OOCW available to the public under the Directive, including mechanisms to extend licence agreements (Annex A) and successful case studies from different countries, demonstrating that licensing can and does happen in different legal systems (Annex B). It also discusses the key elements of a best practice licensing agreement.

The Guide, in addition, discusses the CMO requirements under the Directive. It is important that CMOs only negotiate licences with CHIs where they are “sufficiently representative” including of rightholders in other countries, through having a sufficient number of bilateral agreements with CMOs in those other countries in place.

Some rightholders are concerned that dissemination of works considered to be OOC (but which may not be) by a digitising CHI across the EU (and possibly beyond) could have a negative impact on existing and future markets for authors and publishers. To mitigate these very real concerns it is therefore important that there is a clear mandate for the territorial scope of licences agreed between RROs and CHIs combined with effective publicity and simple opt-out mechanisms in place.

It is agreed that licensing solutions must be in place, so that rightholders have a choice, and the exception under Article 8(2) of the Directive does not come into effect. There is concern that exceptions or limitations might be applied too readily, leading to various potentially quite negative implications. These implications include the possibility that works might be digitised and made available across the EU, and possibly beyond, without all rightholders being aware and against the wishes of some, without the possibility of remuneration and potentially negatively impacting future commercial exploitation.

As regards the opt-out and publicity provisions of the Directive, authors and publishers want to ensure that
there are effective safeguards in place to ensure that they are informed in a timely manner if their works might be disseminated in the context of an OOCW digitisation project and, should they wish to opt out, for the opt-out process to be easy and effective. There are concerns that the relevant information may not always reach all rightholders, in particular when they are outside of the country of the digitising CHI, or outside the EU.

It is very important for all rightholders, including those situated outside the EU, that the EUIPO OOCW Portal, which is currently in development and will be up and running by 7 June 2021, is easy to use and facilitates a single EU-wide opt out. For many rightholders, being able to exclude their works from the licensing mechanism or the exception or limitation, “at any time, easily and effectively”, is critical to their confidence in the system.

It is essential to the different groups of authors and publishers in IFRRO’s membership that their sector specific concerns, as literary authors; translators; visual artists; journalists; and book / STM / newspaper / magazine / music publishers, can be raised, discussed and addressed in constructive stakeholder dialogues at national level. It is vital that the safeguards foreseen under the Directive are properly implemented and effective.

Key suggestions for the successful licensing of future digitisation schemes:

1. In order to help establish if a work is OOC, RROs and author and publisher associations should discuss and set out clearly what they consider to be the relevant “customary channels of commerce” to be consulted in their country. This could be consolidated into an industry guide to be consulted at national level, so that the verification mechanisms applicable to their respective countries are complied with.

2. An approach focused on works published for the first time in the country of the CHI would be a pragmatic as well as a prudent approach to initial mass digitisation projects. In the event that works of foreign rightholders are included in digitisation projects, searches as to the OOC status or opt out for those works should also be conducted in the country of first publication of the work.

3. As regards collective licensing, RROs should agree with national author and publisher organisations which extension mechanism to advocate, and ensure that there is a clear mandate from a significant number of authors and publishers [in the relevant type of works or other subject matter] allowing the licensing of the relevant type of use. The mandate must cover licensing of the reproduction, distribution, and communication or making available of the works by the CHI (i.e., the uses listed under Art. 8(1)).
4. RROs should ensure that the scope of licensing agreements is as clear as possible, including the territorial scope which should be precisely defined. If the intention is that an agreement is limited in its territorial scope to one country or to the EU, this should be made clear. If the intention is that an agreement should extend beyond the EU, it should also be made clear which other countries are included in the licence. CMOs should discuss with the digitising CHI the extent to which they wish to make the licensed works available in other countries and ensure that there is a clear mandate from the rightholder or by law for such a licence to be granted.

5. The licensing CMO should carefully ensure that it is “sufficiently representative” and authors and publishers appropriately represented on the governing bodies of the licensing RRO. If foreign works (both EU and third country nationals) are amongst those which the CHI wants to digitise and make available, the RRO should endeavour to seek mandates to represent rightholders of those works through bilateral agreements with CMOs in other countries. Unless specifically mandated by affected rightholders or by law, CMOs should not license the OOCW of non-national rightholders to be made accessible outside national borders.

6. As regards the opting-out of works from schemes and information / publicity measures, it is suggested that CMOs and the national authors’ and publishers’ organisations agree on the information procedures and verification mechanisms to advocate and implement. CMOs should publish information on planned initiatives and concluded agreements on their website, and through other relevant publications and media (e.g., press releases, newsletters etc.), which will help assist rightholders in making an informed decision about whether to participate. CMOs should share the relevant information with author and publisher organisations to allow them to publish it on their websites and in newsletters and other relevant publications / media, so they can alert members who may be affected by the initiative.

7. At least until the EUIPO OOCW Portal has been established, and is fully up and running, with the relevant organisations managing opt-outs from all EU Member States being registered in the Portal, a licensing RRO should alert other IFRRO RRO members to national OOCW licensing schemes and any works which an author or publisher has excluded from the national OOCW licence scheme. The licensing RRO should also inform IFRRO about the scheme and, where appropriate, any details could then be further publicised by IFRRO within the IFRRO network with a view to generating broader awareness among RROs and rightholders. IFRRO members should in turn alert rightholders in their respective countries of OOCW initiatives in other countries, by posting information on their websites or via other appropriate channels. Licensing CMOs responsible for providing information on OOCW initiatives should strive to do so at least six months prior to the CHI making the works publicly available.

8. In relation to the EUIPO Portal, while interoperability of the Portal with external databases is not within the scope of the first phase of building the Portal, this should be made possible in its second phase of development. The EUIPO should also assess the feasibility of having a mechanism that will allow rightholders to directly create, modify or delete records about the status of a work in a second phase.
9. In order to avoid an exception being applied, **efforts should be made to ensure that representative CMOs managing text and images operate in EU Member States currently without one**. Cooperation between authors and publishers should be supported wherever possible. CMOs should seek to include digitisation and making available of OOCW in the mandate granted to them by their national authors and publishers, in order to be prepared to be in a position to negotiate requests for such uses from CHIs. **CMOs should endeavour to seek mandates through bilateral agreements with CMOs in other countries to represent rightholders in foreign works, so as to be in a position to negotiate when and if they are approached to licence an OOCW digitisation project involving foreign works.**

10. As regards **preparation of national stakeholder dialogues** (under Article 11 of the Directive), it is suggested that RROs agree with national author and publisher organisations which extension mechanism, information procedures and verification mechanisms to advocate in advance of any dialogue. It is suggested that the constructive approach set out in the 2011 Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of OOCW is **used as a reference point ahead of any national dialogues**. The MoU advises, amongst other things, that a CHI which initiates an OOCW project, engages in an “open dialogue” with rightholders and the licensing CMO and, when required, other CMOs concerned, before starting the initiative. This will make subsequent rights clearance easier and smoother.
III. BACKGROUND – INITIATIVES LEADING TO THE DSM DIRECTIVE RULES

It may well be that CHIs without tangible books and other subject matter are the future - indeed, they already exist. Nevertheless, for the foreseeable future, when entering CHIs offering access to books, journals and similar protected works, we expect to find works in tangible versions. Most of them will be in copyright, with a significant proportion no longer in commerce. Collective licensing will play, and is indeed already playing, a key role in authorising the making available of this cultural heritage online to the public.

The DSM Directive is the first EU legislation directly addressing the digitisation of OOCW. However, it was preceded by various initiatives to make Europe’s rich cultural and scientific heritage available online. These included the “i2010: Digital Libraries” initiative\(^4\) in 2005, which was in part a response to the announced Google plan to “digitise 15 million books from four major libraries in the US and one in Europe”\(^4\).

A High-Level Expert Group (HLEG) with stakeholder representatives was established in 2006. Its copyright subgroup, in which IFRRO and some of its members played a key role, delivered a final report in 2007\(^5\), which included amongst other things, model licence agreements on digitising and making available to the public OOCW - for the offline and online environments; key principles for the clearances of rights to digitise and make works available; and key principles for OOC and orphan works databases (portals).

A subsequent stakeholder dialogue led by the European Commission, focused on books and journals, resulted in a 2011 Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (referred to throughout this guide as “MoU”)\(^6\), signed by IFRRO and several IFRRO members\(^7\), as well as the European Publishers Council (EPC), the three European library associations (CENL, EBLIDA and LIBER\(^8\)) and the Internal Market Commissioner\(^9\).

The MoU established that collective management by a CMO, such as an RRO, is the preferred solution to license CHIs for their use of OOC books and journals when various conditions for licence agreements, and for the CMOs signing them, are respected.

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7. European Federation of Journalists (EFJ), European Visual Artists (EVA); European Writers’ Council (EWC); Federation of European Publishers (FEP), International Association of Scientific, Technical and Medical publishers (STM)
9. For further information on the OOCW initiatives referred to see: http://ifrro.org/content/i2010-digital-libraries
IV. THE COPYRIGHT IN THE DIGITAL SINGLE MARKET ("DSM") DIRECTIVE

The objective of the DSM Directive is to make it easier for CHIs to obtain licences from CMOs for certain uses of OOCW that are permanently in the collections of CHIs. The key provisions are Articles 8 – 11, together with recitals 29 – 43.

Under Art. 8(1) Member States shall provide that a CMO, in accordance with its mandates from right-holders, may conclude a non-exclusive licence for non-commercial purposes with a CHI for the reproduction, distribution, communication or making available to the public of OOCW or other subject matter that are permanently in the collection of the CHI, irrespective of whether all rightholders covered by the licence have mandated the CMO. This is on the condition that the CMO is, on the basis of mandates, “sufficiently representative” of rightholders in the relevant type of works.

10. Under Art. 2(3), a Cultural Heritage Institution means “a publicly accessible library or museum, an archive or a film or audio heritage institution”
A. What is an out-of-commerce work?

What the Directive says

Under Article 8.5 of the DSM Directive, a work is deemed OOC when “it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce after a reasonable effort has been made to determine whether it is available to the public.”

Recital 37 further specifies that “commercial availability of adaptations, including other language versions or audio-visual adaptations [should not preclude a work] from being deemed to be out of commerce in a given language.”

Rightholder concerns

There is a concern among authors and publishers that works will too easily be considered to be OOC under the Directive.

Indeed, the approach contrasts to the approach of the 2007 stakeholder working group whereby a work was considered OOC only when it “is not commercially available as declared by the appropriate rightholder”. For many, the 2007 approach would have been preferable as it is practical and simple. It also is centred on whether the author or other rightholder has declared or agreed that the work is no longer being commercialised, putting the question beyond doubt.

In order for the Directive’s approach to OOCW to work, it is crucial that rightholders have trust in the system. A key aspect of building trust is the knowledge that at any time a rightholder can exclude their works. For this reason, straightforward and easy to operate opt out mechanisms must be an integral part of any OOCW digitisation project. Simple opt outs through the OOCW Portal (to be established by the EUIPO by June 2021) directly or indirectly via a CMO, will be critical in developing rightholder trust in the system. Ideally, CMOs should be informed automatically of opt out declarations by their members.

Practical considerations / suggestions

IFRRO suggests that for mandating and non-mandating authors and publishers that can be located, a work should be considered to be OOC only on the basis of objective evidence, such as confirmation from the relevant rightholders. This agreement can be demonstrated e.g., by evidence that the work is commercially available or by a rightholder not excluding the work from an OOCW licence agreement or registry. As regards foreign rightholders’ works, it is important to check commercial availability in the country of first publication. For non-mandating rightholders who cannot be located, ascertaining that the work is not commercially available in “customary channels of commerce” (see further details below) becomes critical.

Rightholders should also be made aware that they may at any time reverse or alter the OOC status of a work, such as if they intend to re-commercialise it. It will then be excluded from the works that the CHI may make available to the public.
B. What are “customary channels of commerce”?

What the Directive says

Recital 38 of the DSM Directive states: “When determining whether works or other subject matter are out of commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or other subject matter or of the particular set of works or other subject matter. Member States should be free to determine the allocation of responsibilities for making that reasonable effort.”

Recital 38 also provides further guidance in stating: “The limited availability of a work or other subject matter, such as its availability in second-hand shops, or the theoretical possibility that a licence for a work or other subject matter could be obtained should not be considered as availability to the public in the customary channels of commerce.”

Rightholder concerns

Rightholders are concerned that the phrase “customary channels of commerce” may be interpreted narrowly, and not take into account the myriad ways in which works can now be made available to the public, including through the Internet.

Feedback from author and publisher members of IFRRO suggest that “customary” channels of commercialisation would include: bookstores and newsstands, publicly available websites with information on commercialised books; e-bookstores, such as Amazon and Kobo, the websites of authors, publishers, institutions, aggregators and agents, books-in-print databases and other commercial registries. Print on Demand is now also considered as a customary channel of commerce for many categories of works, including books and sheet music.

For non-book content, such as images, music and magazines and newspapers, the term would include image libraries, newspaper websites, digital kiosks and the websites of individuals, galleries and agents.

For book content, the question of rights reversion is also important. Rights in works, which are no longer being commercialised by the original publisher, may have reverted to the author. (S)he may in turn have opted to re-commercialise it - her/himself or by another publisher - including as a publishing on-demand service. As a result, concluding that a work is OOC based on a search for the original published edition would not be sufficient to determine that the work is indeed OOC. Especially in the book sector, other editions of a work, such as paperback editions by another publisher under a new ISBN, are a common phenomenon. While the first hardcopy edition might be out of commerce, the paperback version might still be commercially available.

Similarly, only searching against common identifiers such as ISBN, is not sufficient for works that are self-published by the author. Such titles are usually not registered in a books-in-print database, or in any other catalogue or bibliographic registry. Frequently, they do not have an ISBN or another identifier. Nevertheless, they may generate revenues to the author or other rightholder based, for example, on advertising, subscription or pay-per-download. This includes commercialisation through licensing of stories, articles, excerpts, poems, photos, illustration, etc., for their inclusion in anthologies, periodicals, classroom or corporate distribution, newsletters, applications, web content, or games, and the like.
Musical works include sheet music, scores, notes, songs and songbooks. While sheet music, notes and scores may rarely, if ever, be OOC, they may have been made available and subsequently included in library collections, even without having been commercialised.

This could, for example, happen with works composed for competitions, such as the Queen Sonja International Music Competition (Norway) and the Queen Elisabeth Music Competition (Belgium).

**Practical considerations / suggestions**

The number of different searches required to independently determine if a work is OOC, indicates that the simplest and most straightforward approach would be to rely on objective evidence of the right-holders’ intention.

IFRRO suggests, in light of the feedback from right-holders, that as a minimum the customary channels of commerce to be consulted to verify OOCW status should include:

- International Standard Numbers (ISNs) for books (ISBN), periodicals (ISSN), sheet music (ISMN), textual works (ISTC), and ISNI.
- Additional databases / registries specific to different sectors, such as e.g., books in print databases and bookstore registries, as well as the key registry for commercial music (www.idnv.net/en/home.html).
- E-book-store websites and portals including Print on Demand availability
- Author, publisher, bookstore, aggregator and agent websites
- Image libraries
- Image CMOs
- Auction house catalogues
C. What might constitute a “reasonable effort” to verify that a work is out of commerce?

What the Directive says

The Directive requires that “a reasonable effort” be made to verify whether the work is available to the public through “customary channels of commerce” (Art. 8(5)). Member States are free to determine the allocation of responsibilities for making the reasonable effort (Recital 38).

Recital 38 provides further guidance regarding what might be considered a reasonable effort. It should, for example, take into account the “characteristics” of the particular work(s) and should, amongst other things, “involve taking into account any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce.”

A work-by-work assessment should only be required “where that is considered reasonable in view of the availability of relevant information, the likelihood of commercial availability and the expected transaction cost”. It also says that “in many cases, the OOC status of a set of works... could be determined through a proportionate mechanism, such as sampling”.

Rightholder concerns

It is of the utmost importance for rightholders that a sufficient effort is made to establish whether a work (in all its various manifestations) is OOC and that there is an effective system of publicity in order that they are aware when a work is involved in a digitisation project (so they have the possibility to opt-out, should they wish to).

Many rightholders take the view that attempts should be made to locate and contact each affected rightholder directly. Web searches in most cases would allow this. On the other hand, the point has also been raised that in large-scale digitisation projects, contacting each author and publisher directly is not feasible and that automated checks against standardised databases will be the future.

Specific considerations apply to projects involving works that although technically OOC, were never in commerce in the first place. Examples of works in this category include drafts of works that the author may not
have wanted to be published, private letters and photographs. It will also include political posters and pamphlets. In determining the OOC status of the work, a consideration of the impact on the authors’ moral rights must be part of the assessment.

If the decision is therefore made to determine the OOC status of a set of works through a sample, it is important that the sample of works chosen is both of a sufficient size and representative of the composition of the collection to accurately determine that all works in the collection are OOC.

Practical considerations / suggestions

As a way forward, it is important to understand that in OOCW digitisation projects undertaken so far, verification has involved a two-step process. First, there is an agreement on the type and number of works that might be made available, and then rightholders have been alerted to the project.

In Germany, the OOCW initiative and the enabling law was broadly publicised. The National Library acts as a hub for institutions with OOCW initiatives, transmitting relevant data to the RROs VG Wort and VG Bild-Kunst. OOCW are title specific and must be registered before any usage in the OOCW registry administered by the German Patent and Trade Mark Office, and being made publicly accessible on the Internet. The subsequent notification comprises information on the right of authors and publishers to object to works being made available under the OOCW arrangement.

A similar approach was taken in the Czech Republic (see further details in the country report in Annex B).

In Slovakia, the Slovak National Library enters details of possible OOCWs in the register, provided that within three months after filing of the proposal for registration of the work: a) according to its investigation it is not possible to acquire a copy of the work by paid transfer of title, despite reasonable efforts and under usual conditions and b) the author has not raised objections in writing against registration of the work. After the work has been included in the register only the author or CMO can ask to exclude a work (there is no time limit).

Extended collective licensing is used in Denmark and Norway (where the “Bookshelf” agreement includes OOCW as well as orphan and in-commerce works) and work selections do not specify whether the work is assumed to be OOC. Rightholders are alerted when a CHI expresses an interest in making works responding to defined criteria accessible to the public (in the Bookshelf, works published in the country before 2001), and informed about their rights to exclude works. The main information channels are various publications and publicly available websites, for instance in Norway, those of the National Library, Kopinor (the RRO), and authors’ and publishers’ associations. In Denmark the focus is not on whether a work is orphan or OOC, as this does not impact on whether the work could be part of a digitisation project. Instead the focus is on ensuring representativeness of the CMO and informing rightholders about the approval and the possibility of opting-out of the agreement. In each country, works are only made available within national borders.

In France, under the ReLire initiative, information about potentially OOCW was posted to a website for authors

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12. For further details about the register (in Slovak) see https://www.snk.sk/sk/sluzby/v-sidelnej-budove/sluzby-vydavatelom/katalog-obchodne-nedostupnych-diel.html and for the register itself see: https://chamo.kis3g.sk/search/query?term_90=fd:%22OND%22&theme=snk_ond
and publishers to consult. They were able to oppose within six months following the posting, the supposed OOC status. It was also possible for a publisher, with the agreement of the author, to withdraw the OOCW in the event they planned to reprint the work. Authors may still opt out for their titles at any time. For further details about ReLire, see Annex B.

All these examples indicate there are cost effective ways, through communication and publicity to make rightholders aware of an intent to digitise their works, and to allow them to decide whether to opt out. As current projects focus on the digitisation and making available of works first published in the country where the CHI is based, the question has arisen as to whether the verification of the status of the work and alerting rightholders in these cases might be more straightforward than under the Directive.

**IFRRO suggests that:**

- different manifestations of works must be considered and taken into account when establishing whether a work is OOC. For example, audiobooks must be taken into account, along with print and digital versions of books (and other print publications)
- “reasonable” searches involve (at least as a starting point) verifying the status of works via the “customary channels of commerce” referred to above (databases, registries etc.)
- RROs and author and publisher associations should discuss and set out clearly what they consider to be the relevant “customary channels of commerce” in their country. This could be consolidated into an industry guide to be consulted at national level, so that the verification mechanisms applicable to their respective countries are complied with.
D. Which CHIs are eligible?

What the Directive says

The CHIs able to rely on the DSM Directive include libraries, museums and archives, which are “publicly accessible” (Article 2(3)).

Recital 13 provides further guidance that CHIs “should also be understood to include, inter alia, national libraries and national archives, and, as far as their archives and publicly accessible libraries are concerned, educational establishments, research organisations and public sector broadcasting organisations.”

This approach is consistent with the 2011 MoU, which refers to the institutions set out under Article 5.2(c) of the EU’s “InfoSoc Directive” 2001/29.

Rightholder concerns

Rightholders are concerned that there should be clarity, and a consistent approach to determining if a CHI is eligible to rely on the national provisions implementing the Directive.

There are concerns as to the extent to which privately owned libraries, archives and museums with a commercial interest can rely on the provisions.

Practical considerations / suggestions

It is important that those publicly accessible libraries and other CHIs that will undertake digitisation of parts of their collections, under the national legislation transposing the DSM Directive, are easily identifiable. It is important that Member States as well as stakeholders are confident that a digitising CHI has the adequate infrastructure in place in order to be able to fulfil all the requirements set out under a licence or exception.
E. Which out of commerce works can be used?

What the Directive says

Under Arts. 8(1) and (2), a CHI may only digitise and make available OOCWs or other subject matter under a licence or exception, if they are “permanently” in its collection.

Recital 29 provides further guidance: “For the purposes of this Directive, works and other subject matter should be considered to be permanently in the collection of a cultural heritage institution when copies of such works or other subject matter are owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements.”

However, Article 8 provides that any works excluded by rightholders from the application of the licensing mechanism or exception should not be digitised and made available by the CHI.

Rightholder concerns

Rightholders want to be sure that any works they might want to be excluded from the application of a licence or exception are not inadvertently digitised and made available without their knowledge. Some have expressed particular concern that there is an increased risk of this happening where the works being digitised are published in a different country from the one in which the digitising CHI is located. This may indeed be the case if searches for the OOC status of a work are conducted only on a national basis, reinforcing the importance of easy opt out and effective information provision. This highlights the importance of communication with the CMO in the country of the works first publication so they can assist in the determination of the OOC status of the work and if a rightholder prefers to opt out.

Practical considerations / suggestions

While the Directive allows CHIs to digitise and make available OOCWs or other subject matter under a licence or exception, if they are “permanently” in their collections, it is important for CHIs to consider the consequences of digitising the works of rightholders from another Member State or a third country whose works are held in the collection and how to best ensure that they are not negatively impacted by a project.

A meaningful “reasonable” effort to determine the status of a work is essential in this regard, as is an effective publicity system.

Initiatives licensed by Copydan Writing in Denmark, Kopinor in Norway, and VG Wort and VG Bild-Kunst in Germany have focused on works published by national publishers in their respective countries. This has in effect eliminated the risk that rightholders from outside these countries could have their works digitised and made available without their knowledge.

The approach in these countries reflects the scope of the 2011 MoU, which also focuses on works “which have been published for the first time in the country where the Agreement [to digitise and make the works available] is requested”.

IFRRO suggests that:

- an approach focused on works published for the first time in the country of the CHI would be a pragmatic as well as a prudent approach to initial mass digitisation projects.

- in the event that works of foreign rightholders are included in digitisation projects, searches as to the OOC status or opt out for those works should also be conducted in the country of first publication of the work. This again highlights the importance of a communication network amongst CMOs to enable these searches to be conducted readily.

F. Images

As well as standalone images such as works of fine art and photographs, that may be the subject of separate OOCW digitisation projects, images are an integral component of many books, magazines, journals and newspapers.

Images in these publications are used in two ways. Firstly, there are publications such as comics, manga, exhibition catalogues and children’s books where the illustrator must be considered a co-author. The second way is when the artistic work is an embedded image. The term “embedded images” refers to an artistic work which is included in another publication, such as a photo included in a book, magazine or newspaper, or the cover art for a book or magazine. Often, the rights to use the work have been obtained by the rightholder in the primary publication through a permissions process, and the other rights in the embedded image, are held by a third party.

What the Directive says

The Directive does not specifically mention embedded images. Embedded images may or may not separately be OOC or have been opted out.
Rightholder concerns

Owners of copyright in embedded works, such as visual artists whose works are embedded in other publications, are concerned that when the other work is digitised that their works will be digitised and made available without their authorisation.

Other types of works, such as poems and extracts from newspapers can also be embedded works, and similar considerations apply to those works.

Practical considerations / suggestions

Although the Directive does not mention embedded works, the MoU does. The MoU recommends that where the CMO itself is not mandated to represent visual works, it should reach out to specialised CMOs representing visual artists when negotiating with the CHI.

In Denmark, Copydan Writing involves VISDA (the visual CMO), which also co-signs the agreement whenever a project involves embedded images.

There are ways to manage the situation where an embedded work is withdrawn from the licence agreement. One possible means is to use technical means to remove the work, the other is to exclude the whole work from the licence. By way of example, in Norway, if a rightholder excludes an embedded work covered by the agreement between Kopinor and the Norwegian National Library, be it an image, poem, journal article etc., the entire work will be excluded from being made accessible under the agreement.

In France, if the rightholder of the artistic work on the book cover does not want their work used in the ReLire project, that work is not used and a different cover is substituted.

When developing such guidelines or approaches, it is important to consult closely with the visual CMO in the country, and with groups representing visual artists as to their preferred approach.

IFRRO suggests that:

- where the digitisation and making available of a work includes embedded works, the licensing CMO should seek to consult with or involve in the negotiation process, specialised CMOs or organisations representing rightholders of those works
- where an embedded work is withdrawn from the licence agreement, the whole work should be considered excluded unless technical or other means can be found to prevent that work also being made available.
G. Translated works

What the Directive says

Recital 37 provides guidance, explaining that “the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not preclude a work or other subject matter from being deemed to be out of commerce in a given language”.

Rightholder concerns

There is concern that there is a risk that rightholders of translated works included in the schemes might not be aware that their works are involved.

Practical considerations / suggestions

In the Czech Republic, Germany and Norway, translated works are included in OOCW digitisation initiatives, in so far as they have been published in the respective countries. It is vital that also the distinct rights in the translation of the original be handled properly.

The 2011 MoU recommends that “a specific procedure should be undertaken in order to reach the rightholders in translated works”. It does not however specify what those procedures should be, or how they should be developed. Procedures that are best found in a dialogue between the CMO and the national organisations representing authors, especially those representing translators, and publishers may ensure this.

IFRRO suggests that:

- RROs strive to consult with organisations representing translators and inform RROs in countries where the original authors reside when the licence agreement involves translated works.
H. Foreign works

What the Directive says

Article 8.7 of the DSM Directive restricts the possibility for stakeholders nationally to include non-EU works in the licence agreement. This is especially important in respect of cross-border availability. The Directive establishes that sets of OOCW, which are “predominantly” made up of “works of third country nationals” shall, as a rule, either be excluded from the licence agreement, or be licensed on the basis of rightholder mandates. It suffices that “there is evidence available to presume” that the set includes several foreign works.

Rightholder concerns

There is a concern that works of third country nationals can and will fall under OOCW digitisation schemes. A key challenge is related to works published simultaneously, a frequent phenomenon especially in English language countries, and multinational publishers who might, for instance, publish the work in different countries with different titles and ISBNs. It is important that rightholders who are third country nationals will be informed and can easily opt-out.

Within the EU, rightholders also want to be consulted when works by non-national rightholders are included in national OOCW digitisation projects, be informed of upcoming projects and be able to easily opt-out.

Practical considerations / suggestions

RROs are well-placed to address the issue of including both categories of foreign works in an OOCW digitisation project. They may be - or be made to be - representative for such works through bilateral agreements with other CMOs, both within and outside the EU. If digitisation projects are not covered by a general (bilateral) agreement, a separate agreement on representation specifically addressing the OOCW digitisation would be required. This mechanism of including foreign works in OOCW projects is also acknowledged by the Directive. Current OOCW initiatives licensed by RROs have focused on publications published nationally by local publishers.

IFRRO suggests that:

- whenever works of non-national authors published by non-national publishers are proposed to be included in a CHI initiative to make available OOCWs, the licensing CMO must ensure that it is sufficiently representative and has the mandate to authorise it. Representation may, for example, be achieved through agreements with RRO(s) representing affected rightholders.
- unless specifically mandated by affected rightholders or by law, CMOs should not license the OOCW of non-national rightholders to be made accessible outside national borders.
- the stakeholder dialogues foreseen at a national level provide the opportunity to raise specific concerns about the works of both third country nationals and other EU nationals and how to ensure that they are informed about and can opt-out of OOCW licensing schemes, should they wish to.
V. LICENSING AGREEMENTS FOR OUT-OF-COMMERCE WORKS

A. Collective licensing: mandates and scope of the licence

What the Directive says

The Directive makes it clear that the main mechanism to allow CHIs to digitise and make OOCW accessible to the public, is collective licensing. Art. 8(1) states:

“Member States shall provide that a collective management organisation, in accordance with its mandates from right-holders, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:

a. the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and

b. all rightholders are guaranteed equal treatment in relation to the terms of the licence.”

Recital 33 provides further guidance, underlining that Member States should, within the framework provided for in the Directive, “have flexibility in choosing the specific type of licensing mechanism that they put in place” for the use of OOCW by CHIs, “in accordance with their legal traditions, practices or circumstances”.

It explicitly mentions that mechanisms such as extended collective licensing (ECL) or presumptions of representation can be used to extend collective licence agreements. Further details about how these mechanisms work in practice are set out in Annex A.

Member States also have flexibility in determining the requirements for collective management organisations to be sufficiently representative, “as long as that determination is based on a significant number of rightholders in the relevant type of works or other subject matter having given a mandate allowing the licensing of the relevant type of use.” (Recital 33)

It is up to Member States to decide who is to have legal responsibility as regards the compliance of the licensing of OOCW, and of their use, with the conditions set out in the Directive, and as regards the compliance of the parties concerned with the terms of those licences (Recital 36).
Member States also have the possibility of implementing Article 12 of the DSM Directive, which contains provisions allowing collective licensing with extended effect for use on their national territory, subject to various safeguards. Art. 12 (1) allows Member States to provide that where a CMO, “in accordance with mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter,

- such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or
- with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly”.

Member States must ensure that this licensing mechanism “is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely” (Art. 12(2)).

The Directive, in recital 43, also states that “the measures provided for in this Directive to facilitate the collective licensing of rights in out-of-commerce works or other subject matter that are permanently in the collections of cultural heritage institutions should be without prejudice to the use of such works or other subject matter under exceptions or limitations provided for in Union law, or under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works or other subject matter. Those measures should also be without prejudice to national mechanisms for the use of out-of-commerce works or other subject matter based on licences between collective management organisations and users other than cultural heritage institutions”.

It cannot therefore be ruled out that Article 12 might also provide the basis for national digitisation projects in the future, including those which include works other than OOCW, depending on Member States’ approach to implementation of the Directive.

Rightholder concerns

It is essential for rightholders to be able to trust in the licensing system in order for OOCW licensing schemes to be successful.

The mandate from authors and publishers to the CMO clarifies the works and rights that can be licensed. It is important for rightholders that there is a clear mandate from a significant number of affected authors and publishers, which unequivocally includes the digitisation and making available online of their OOCW by CHIs. It is important that the licence is clear as regards, e.g., uses, territorial scope, time duration and remuneration.

13. While ideally leaving all non-excluded parts of a work included in the scheme
Practical considerations / suggestions

As explained, the main mechanism to allow CHIs to digitise and make OOCW accessible to the public, is collective licensing. This section of the guide discusses the key elements of a best practice licensing agreement, which would be:

1. based on mandates from right holders concerned
2. negotiated on a voluntary basis
3. be non-exclusive
4. permit licensing only for non-commercial purposes
5. allow rightholders to exclude specific works from the agreement
6. include a mechanism to resolve claims and disputes about rights
7. provide for adequate remuneration for the rightholders

Before getting involved in a digitisation project, there are several key questions that need to be raised, such as considering the number of authors and publishers involved. For example, a publisher might in some cases already be involved in a project, while in other cases the number of publishers involved might be relatively low. In the latter case, the parties could agree that CHI will contact the publishers directly and that the licence agreement between the CHI and RRO focuses on clearing authors rights.

Other considerations include for example, if foreign right holders are included and if there are embedded works/illustrations – and if so, to what extent. This is necessary to clarify whether the RRO is “sufficiently representative” or if it also needs to involve another RRO, such as one representing visual artists or one from another country.

Mandates

As OOCW licensing involves large-scale digitisation of multiple works, mandates have so far been collected on an opt-out basis. There have been very few opt-outs so far (see further details in the section on opting out below).

While the Danish and Norwegian RROs, Copydan Writing and Kopinor collect mandates via the authors’ and publishers’ organisations and statutes, VG Wort, in Germany acquired mandates through a modification of the contract of representation with the individual author and publisher.

Although rightholders may wish to put a time limit on the granting of the mandate for certain uses, particularly in respect of pilot projects, this approach has thus far not been used in relation to OOCW licence agreements with CHIs.

IFRRO suggests that:

- IFRRO members bear in mind the flexibility open to Member States as regards the licensing mechanisms put in place at national level and raise awareness about their preferred approach
- RROs should agree with national author and publisher organisations which extension mechanism to advocate
- RROs ensure that there is a clear mandate from a significant number of authors and publishers [in the relevant type of works or other subject matter] allowing the licensing of the relevant type of use
- the mandate must cover licensing of the reproduction, distribution, and communication or making available of the works by the CHI (i.e., the uses listed under Art. 8(1)).

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13. While ideally leaving all non-excluded parts of a work included in the scheme
The licence agreement

An OOCW licence agreement sets out permitted uses and conditions placed on the uses. According to the feedback received from contributors to this guide, a licence would typically allow the CHI to:

- digitise the licensed material
- permit online accessibility over open networks controlled by the digitising CHI
- enable any user within the territorial scope of the licence agreement to search, retrieve, display, view, consult and read the work on the screen (but not download, print out or copy the work.)

In addition, the work cannot be modified, altered, adopted or abridged in any way, other than in the digitisation process itself. Most importantly, the name of the author, publisher or other accredited rightholder cannot be removed from the work or altered.

Equal treatment of all affected rightholders, would also cover the distribution of any collected remuneration from the CHI under the licence agreement.

Whether the works digitised under the agreement can be made available across EU borders and beyond would also be specified in the agreement, as user needs vary. While there are advantages – for both users and rightholders – of having an agreement covering all EU Member States, this might not always be possible or, in some cases, desired and different countries have taken different approaches.

For example, on the one hand German OOCW initiatives enable cross-border accessibility, whereas in Denmark and Norway, where the projects were concluded under an ECL, this has not been a part of the project.

An additional consideration is that where there is an agreement concerning OOCW based on collective licensing with an extended effect, which is regulated under Article 12 of the DSM Directive, use of works must be limited to the national territory (Art. 12(1)).

IFRRO suggests that:

- RROs should ensure that the scope of licensing agreements is as clear as possible (as outlined above), including the territorial scope which should be precisely defined
- If the intention is that an agreement should not extend, e.g., beyond one country or beyond the EU, this should be made clear
- If the intention is that an agreement should e.g., extend beyond the EU, it should be made clear which other countries are covered.

14. This does not preclude the RRO, subject to rightholder mandates, from also licensing the CHI for other usages, such as for its internal use, or for education or research purposes. Subject to rightholder mandates, the licence agreement may also allow redirection to rightholder websites for the purchase of a copy of the work – in an electronic format or a hard copy, whenever available. Usages such as downloading may be also allowed under a (remunerated) exception.
B. Opt-out of works and information / publicity measures - EUIPO Portal

What the Directive says

Art. 8(4) obliges all Member States to allow all rightholders to be able to opt-out from a licensing mechanism or exception: "Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned."

This is reinforced by recital 35, which states: "Appropriate safeguards should be available for all rightholders, who should be given the opportunity of excluding the application of the licensing mechanisms and of the exception or limitation, introduced by this Directive for the use of out-of-commerce works or other subject matter, in relation to all their works or other subject matter, in relation to all licences or all uses under the exception or limitation, in relation to particular works or other subject matter, or in relation to particular licences or uses under the exception or limitation, at any time before or during the term of the licence or before or during the use under the exception or limitation."

Article 10 (on "Publicity Measures") obliges Member States to ensure that information about the OOCW and other relevant details regarding a licence or exception, such as the territories covered, as well as the opt-out options available to rightholders, are publicised in the Portal established and managed by the EUIPO. This information must be available at least six months before the works are made available under the licence or exception.

Although the DSM Directive does not oblige reaching out to each author and publisher individually, efforts must be made by CMOs to ensure that information is available to both mandating and non-mandating authors and publishers. Like the MoU, the Directive emphasises the particular importance of implementing appropriate special information procedures when cross-border availability is envisaged (Article 10(2) / Recital 41).

Under Art. 11, Member States "shall encourage regular dialogue between representative users’ and rightholders’ organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to ensure that the safeguards for rightholders referred to in this Chapter are effective".
Rightholder concerns

Authors and publishers want to ensure that there are effective safeguards in place to ensure that they are informed in a timely manner if their works might be disseminated in the context of an OOCW digitisation project and for the opt-out to be easy and effective. There are concerns that this information may not always reach all rightholders, in particular when they are outside of the country of the digitising CHI, or outside the EU.

It is very important for all rightholders, including those situated outside the EU that the EUIPO Portal, which is currently in development, is easy to use and facilitates a single EU-wide opt out. For many rightholders, being able to exclude their works from the licensing mechanism or the exception or limitation, “at any time, easily and effectively”, is critical to their confidence in the system.

Rightholders also want to be in a position to make an informed decision on whether to opt-out of an OOCW scheme or not, which might be a difficult decision.

The EUIPO Portal

The EUIPO's High Level Specification (HLS) document (see here), setting out the Portal’s main functionalities, underlines that the Portal’s main purpose is to provide access to information about OOCW that could be used under the new mechanisms introduced by the Directive, and that it should also make it easier for rightholders to opt out of those mechanisms (although it is not in itself an opt-out instrument).

Importantly, there is the possibility of a general opt-out (via an e-form), even before information about the OOCW has been entered on the Portal, and the responsible organisations in multiple Member States can be notified at the same time. It is up to that organisation (e.g., a CHI or CMO) to check the validity of the opt out request. It is understood that rightholders requesting a general opt-out will be listed on the Portal, specific opt-out records will also be clearly displayed and there will be a warning system for when new information is entered into the Portal, detecting previous opt-outs.

There is concern among some rightholders, however, that at this stage of its development they cannot themselves create entries on the Portal and that this general opt-out may not therefore be fully effective. For the system to function in practice in all 27 Member States, each Member State must decide on an organisation to manage opt-outs, which must then be registered in the Portal. There are concerns there is a risk that some works will not be actually opted out in certain countries if the structure has not been put in place to enable that opt-out.

If rightholders cannot depend on this single opt out, the concern is that they will have the burden of having to continuously monitor if any works have been recently identified as being OOC in each of the EU Member States, in order to avoid works being digitised.

It is also important that the criteria for users to search for information about OOCW will allow for easy identification of OOCW in the different sectors (e.g., including author, publisher, visual artists and other contributors, title, identifiers etc.).

As rightholders are the best placed to determine whether a work is OOC, a mechanism for them to be able to create, modify or delete records, either directly or through a registered user of the Portal such as the CMO, is important. However, the Portal does not, at this stage, offer such a (direct) mechanism for rightholders. This approach also ensures more effectively that there is, accurate, up to date information, publicly available for any interested party to see, about works that rightholders want to opt-out.

Rightholders have raised concerns that the Portal will not allow rightsholders to establish “user” accounts on the Portal, but only to participate as “guests”, meaning they cannot directly create, modify or delete records.
Practical considerations / suggestions

The Directive (Art. 10) does not specify which party is responsible for ensuring that appropriate information measures are taken or what, in detail, would constitute the relevant information. This is something to be decided at national level when implementing the Directive.

The information must be sufficient for the rightholders to make an informed decision about whether to stay in or opt out of the licence agreement. Therefore, there should be sufficient information to identify the works in question, the rights of the rightholders, including the right to exclude works from the agreement, and the territories covered by the licence agreement.

In IFRRO's view, this provision requires that the licensing CMO and the digitising CIHI in the country where the licence is sought, identify what would constitute relevant information in any particular circumstance.

In practice, this provision requires that the CMO and the digitising CIHI develop information and other procedures that meet this requirement. The DSM Directive does not specify what constitutes relevant information. This must be worked out jointly by the rightholders, their organisations, the licensing RRO and the digitising CIHI.

Information can be publicised in various media, for instance, on platforms known to be used by rightholders. The most important channels to reach rightholders are the websites and other publications of the national RROs and author and publisher organisations. In France, SOFIA also used the annual book-fair to inform authors and publishers about the OOCW arrangement, as well as launching a national press campaign, together with all CMOs and authors organisations.

It is interesting to note that once they become aware of the possible digitisation of their works very few right- holders actually have withdrawn their works. For example, in Denmark, one publisher has excluded works. In Germany, nine works (0.03%) and, in Norway, 4,000 of the potential 244,000 works to be made accessible (1.6%), have been excluded from licensing schemes.

As digitisation of OOCW will involve a large number of works, it is of utmost importance that “manual work” will be minimised. Common standards and easy use of automated data will be critical.

For example, where a licence is granted in a country that is not the country of first publication, it would make sense that a database, such as the books in print database of the country of first publication, is used to check whether there are no mistakenly in-commerce titles in the set, rather than having to search title by title. The more information there is the better, and the more authors and publishers will be reassured that no in commerce works are covered.

Furthermore, it would also be important to be able to match against CMO databases, so the CMO can ensure works are not inadvertently included. CMOs also need to be clear about who has opted out, also from the perspective of distributing any revenues.

It is **important to further explore how the EUIPO Portal can better interact with other databases** containing information about the status of works with a view to ensuring the Portal contains the most up to date information about whether a work is OOC or not.
IFRRO suggests that:

- CMOs and the national authors’ and publishers’ organisations agree on the information procedures and verification mechanisms to advocate and implement
- there must be a sector-specific stakeholder dialogue at national level to ensure that rightholders are adequately protected (as underlined in Recital 42)
- CMOs should publish information on planned initiatives and concluded agreements on their website, and through other relevant publications and media (e.g., press releases, newsletters etc.), which will help assist rightholders in making an informed decision about whether to participate
- CMOs should share the relevant information with author and publisher organisations to allow them to publish it on their websites and in newsletters and other relevant publications / media, of so they can alert members who may be affected by the OOCW initiative
- at least until the EUIPO OOCW Portal has been established, and is fully up and running, with the relevant organisations managing opt-outs from all EU Member States being registered in the Portal, a licensing RRO should alert other IFRRO RRO members to national OOCW licensing schemes and any works which an author or publisher has excluded from the national OOCW licence scheme.
- the licensing RRO should also inform IFRRO about the scheme and, where appropriate, any details could then be further publicised by IFRRO within the IFRRO network with a view to generating broader awareness among RROs and rightholders
- IFRRO members should in turn alert rightholders in their respective countries of OOCW initiatives in other countries by posting information on their web sites or via other appropriate channels
- licensing CMOs responsible for providing information on OOCW initiatives should strive to do so at least six months prior to the CHI making the works publicly available
- while interoperability of the EUIPO Portal with external databases is not within the scope of the first phase of building the Portal, this should be made possible in its second phase of development.
- the EUIPO should also assess the feasibility of having a mechanism that will allow rightholders to directly create, modify or delete records about the status of a work in a second phase.
VI. COLLECTIVE MANAGEMENT ORGANISATIONS - REQUIREMENTS

What the Directive says

Under the Art. 8.6 of the Directive, the licence agreement must be sought from the RRO (CMO) in “the Member State where the cultural heritage institution is established” (This differs from the MoU principles, which recommend that licences be sought from the CMO situated in the first country of publication\(^{15}\) of the work).

The licensing CMO must be “on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence” (Art. 8(1)a).

Under Recital 33, Member States have flexibility in determining what the requirements for CMOs to be sufficiently representative are, “as long as that determination is based on a significant number of rightholders in the relevant type of works or other subject matter having given a mandate allowing the licensing of the relevant type of use”.

It adds that Member States “should be free to establish specific rules applicable to cases in which more than one collective management organisation is representative for the relevant works or other subject matter, requiring for example joint licences or an agreement between the relevant organisations”.

The Directive also underlines that “a rigorous and well-functioning collective management system is important” for the chosen licensing mechanisms and that Directive 2014/26/EU (the “CRM Directive”) provides for such a system, including in particular “rules on good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders”.

Rightholder concerns

It is important that authors and publishers have confidence in the licensing system and the RRO which is negotiating the licence. The licensing CMO must have the necessary mandates in the relevant type of works or other subject matter and of the rights that are the subject of the licence.

They are particularly concerned that CMOs will only negotiate licences with CHIs where they are “sufficiently representative” including of rightholders in other countries, through having a sufficient number of bilateral agreements with CMOs in those other countries in place.

\(^{15}\) See also III e) on embedded works on involvement or licensing by specialised CMOs, e.g. a visual CMO
Practical considerations / suggestions

The licensing CMO must be sufficiently representative in the Member State where the licence is sought for the rightholders and works in question. Representation is, as a general rule, granted through both mandates from authors and publishers resident in that country and bilateral agreements with other RROs (both EU and non-EU) for works of foreign origin. Representativeness was also emphasised in the MoU principles: The licence agreements should be “granted by collective management organisations in which a substantial number of authors and publishers affected by the Agreement are members”.

There are various indicators of “representativeness”. It does not necessarily require a majority of works or rightholders in question. A clear indication would also be whether the RRO (CMO) is the organisation that the country’s rightholders would normally refer to in respect of collective licensing of the relevant categories of work (which is also an indicator of trust in the organisation).

Membership of the CMO is another indicator, but is not sufficient in itself. A licensing CMO must also ensure that it has mandates from a significant number of rightholders in order to sign an agreement with the CHI. Also, a CMO can only sign a licence agreement with a CHI on the use of OOCW for the categories for which it has been mandated. For instance, if it has been mandated by book and journal authors and publishers only, it cannot sign a licence with a CHI authorising making OOC newspapers and magazines available.

An equally important principle, which was set out in the MoU, is that the rightholders shall be “appropriately represented in the key decision making bodies” of the CMO. Further requirements are laid down in the CRM Directive16. Articles 11-13 on management, governance and representation in governing bodies, articles 5-10 on representation and membership and articles 17-22 on information and transparency are of particular relevance; when foreign and translated works are involved, also articles 14 and 15 on management on behalf of other CMOs.

IFRRO suggests that:

- The licensing CMO carefully ensures that it is “sufficiently representative” and has mandates from a significant number of relevant rightholders whose works are covered by the licence agreement
- The authors and publishers must be appropriately represented on the governing bodies of the of the licensing RRO
- If foreign works (both EU and third country nationals) are among those which the CHI wants to digitise and make available, the RRO should endeavour to seek mandates to represent rightholders of those works through bilateral agreements with CMOs in other countries.

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16. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026, in particular chapters 1 Representation of rightholders and membership and organisation of collective management organisations, 3 Management of rights on behalf of other collective management organisations, and 5 Transparency and reporting
VII. CROSS-BORDER USES

What the Directive says

The Directive specifically addresses cross-border uses within the EU under Art. 9:

"1. Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.

2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established."

Recital 40 also states that contracting CHIs and CMOs “should remain free to agree on the territorial scope of licences, including the option of covering all Member States, the licence fee and the uses allowed. Uses covered by such licences should not be for profit-making purposes...”.

Rightholder concerns

Some rightholders are concerned that dissemination of works considered to be OOC (but which may not be) by a digitising CHI across the EU (and possibly beyond) could potentially negatively impact existing and future markets for authors and publishers.

To mitigate these very real concerns it is therefore important that there is a clear mandate for the territorial scope of licences agreed between RROs and CHIs combined with effective publicity and simple opt-out mechanisms in place. It is vital that licensing solutions are in place so there is the possibility of rightholder choice (and the exception does not come into effect).

Practical considerations / suggestions

The territorial scope of the licence agreement should be agreed by the RRO and the CHI and can extend to one, some or all EU Member States (and EEA countries (Iceland, Lichtenstein and Norway)17 once they implement the Directive). This depends primarily on the mandates which authors and publishers grant to the CMO, which might of course allow for works to be made available outside the country.

The MoU advises that the CMO considers limiting cross-border access to works of mandating rightholders. Impact on future commercialisation is one factor to consider when deciding whether to enable cross-border uses. At least for some languages, it may lead to an important extension of the audience that can read and consume the works. This might result in additional restrictions being considered across some borders.

17. European Economic Area, https://www.efta.int/eea
(e.g., so access may be allowed in some EU Member States and not in others).

The Directive is silent as regards access to the digitised works from outside the EU. It is understood that works digitised under an exception cannot be made available outside the EU. For works digitised under a licence, specific right-holder mandates would be needed. It may be that technical protection measures will need to be applied to the digitised works to restrict access from non-licensed countries.

It remains to be seen how far CHIs in the EU Member States will actually want their digitisation initiatives to be cross-border. The information collected for this guide suggests that only the German initiative has so far included cross-border availability. This perhaps reflects the wishes of many CHIs to preserve and make available national cultural heritage to the citizens of the countries where they are located. The costs of extending the territorial scope of the licence agreement may also be a decisive factor in their decision to only make the works available on a national basis.

**IFRRO suggests that:**

- CMOs should discuss with the digitising CHI the extent to which they wish to make the licensed works available in other countries and ensure that there is a clear mandate from the rightholder or by law for such a licence to be granted.
VIII. EXCEPTION OR LIMITATION - AN ALTERNATIVE WHEN A LICENCE IS NOT OBTAINABLE

What the Directive says

Under Art. 8(2), “Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:

a. the name of the author or any other identifiable rightsholder is indicated, unless this turns out to be impossible; and

b. such works or other subject matter are made available on non-commercial websites.”

Under Art. 8(3), “Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.”

Furthermore, under Art. 8(4), “Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from...the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.”

Recital 32 specifies that “lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing solutions.”

Rightholder concerns

There is concern, not only among rightholders, that exceptions or limitations might be applied too readily, leading to various potentially quite negative implications. These implications include the possibility that works might be digitised and made available across the EU (and possibly beyond) without all rightholders being aware and against the wishes of some, without the possibility of remuneration and potentially negatively impacting future commercial exploitation.
Practical considerations / suggestions

What counts is the possibility of negotiating a licence agreement (that complies with the requirements of the Directive, including the CMO being sufficiently representative). An exception or limitation cannot become operative simply because a CMO and CHI cannot agree on the conditions of the licence agreement. Although this is clearly specified in recital 32, there may well be a practical difference of opinion as to what a “lack of agreement on the conditions” of a licence might be. In IFRRO’s view, this would include a failure to agree on the level of payment, or the territory in which the licence will operate for example. Neither of these circumstances could be considered to constitute a lack of availability of licensing solutions, which must be confined to the circumstance where there is no CMO able to negotiate on the rightholders’ behalf. Even if a licensing solution is not available and an exception or limitation is applied, rightholders can still prevent their works from being digitised and made available, either before, in the course of, or after the digitisation has taken place, by opting out. They can withdraw one, more or all of their works as they decide is best for them on an individual basis. In making this decision, it is important to bear in mind that there is no guarantee of remuneration for works digitised and made available under an exception.

If rightholders wish to be in control of the digitisation and making available of their OOCW by CHIs, they are therefore well advised to mandate RROs to handle this issue on their behalf. While there are RROs established in almost all EU Member States, the OOCW provisions of the Directive provide a major incentive to create “sufficiently representative” RROs where none currently exist.

IFRRO suggests that:

- Efforts should be made to ensure that representative CMOs managing text and images operate in EU Member States currently without one.
- Cooperation between authors and publishers should be supported wherever possible.
- CMOs should seek to include digitisation and making available of OOCW in the mandate granted to them by their national authors and publishers, in order to be prepared to be in a position to negotiate requests for such uses from CHIs.
- CMOs should endeavour to seek mandates through bilateral agreements with CMOs in other countries to represent rightholders in foreign works, so as to be in a position to negotiate when and if they are approached to license an OOCW digitisation project involving foreign works.
IX. PREPARING IMPLEMENTATION AT NATIONAL LEVEL: STAKEHOLDER DIALOGUES

What the Directive says

Article 11 (Stakeholder dialogue) states: “Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 8(5), and shall encourage regular dialogue between representative users’ and rightholders’ organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to ensure that the safeguards for rightholders referred to in this Chapter are effective.”

Rightholder concerns

It is essential to the different groups of authors and publishers in IFRRO’s membership that their specific concerns (e.g., as literary authors; translators; visual artists; journalists; book / STM / newspaper / magazine / music publishers) can be raised, discussed and addressed in constructive stakeholder dialogues at national level. It is vital that the safeguards foreseen under the Directive are properly implemented and effective.

Practical considerations / suggestions

As regards how to best approach a stakeholder dialogue, as previously mentioned, it is suggested that RROs agree in advance with national author and publisher organisations which extension mechanism to advocate, as well as on the information procedures and verification mechanisms to advocate and implement.

The MoU advises that a CHI, which initiates an OOCW project, engages in an “open dialogue” with rightholders and the licensing CMO and, when required, other CMOs concerned, before starting the initiative. This will make subsequent rights clearance easier and smoother.
The MoU recommends that, at least, the following steps be taken:

1. Ensure that relevant organisations of authors and publishers are consulted;

2. Agree on the criteria for the selection of works to be digitised and made available. It could, for instance, be based on a cut-off date (e.g. works published before 2001), specific topics (such as books and journal articles on a national musical instrument), or other selection criteria;

3. Agree on the mechanism to determine commercial availability and thus the out-of-commerce status of a work;

4. Clarify the right of rightholders to withdraw some or all of their works from the licence agreement. For this to become a reality,
   • the digitisation project must be publicised in a way that rightholders are able to make an informed decision whether to stay in or opt out of the initiative. The RRO should agree the information method with the representing authors’, visual artists’ and publishers’ organisations;
   • an additional special procedure should be considered to reach non-mandating rightholders if the licence agreement allows cross-border access or commercial use;

5. Agree on the mechanism to follow for the withdrawal and revival of a work. This would normally include information from the CHI to the rightholders via the contracting RRO on its use and accessing;

6. Agree on the remuneration that the CHI shall pay to rightholders;

7. Sign the agreement between the digitising CHI and the licensing RRO, or, when appropriate, other CMO.

It is considered that this procedure remains a constructive approach for a stakeholder dialogue. IFRRO therefore suggests that it is used as a reference point ahead of any national dialogues.
ANNEX A: Mechanisms to extend licence agreements - Key elements

An OOCW licence agreement between a licensing CMO and a digitising CHI, starts with the negotiation of a voluntary collective licence agreement based on representative mandates from authors and publishers agreeing that the CMO can sign agreements with CHIs.

However, a large-scale digitisation initiative has the potential to also include works of rightholders who have not mandated the RRO directly. The DSM Directive obliges Member States to enable the representative licensing CMO to also include works of non-mandating rightholders in the agreement (Article 8.1). The four main conditions are:

1. the works are of the same category as those of the mandating rightholders;
2. the CMO must guarantee “equal treatment in relation to terms of the licence”;
3. rightholders are granted the right to opt out of the licence agreement; and
4. an information procedure to rightholders, both ahead of and after the signing of the licensing agreement, has been put in place.

In Recital 33, the Directive explicitly mentions that mechanisms “such as extended collective licensing or presumptions of representation” can be used to extend collective licence agreements on the use of OOCW.

Both models require voluntary collective licensing and substantial rightholder representation with the RRO (CMO) for the extension effect to take effect. The main difference is that while the ECL agreement extends the licence agreement when it has been signed, Legal Pre- assumption of representation extends the CMO mandate prior to signing the licence.

Annex A highlights key features of each of these approaches.

As previously mentioned under Section V (A), Article 12 of the DSM Directive also gives EU Member States the possibility to provide collective licensing with extended effect, as far as use on their national territory is concerned and subject to the safeguards set out under Article 12, using mechanisms “such as ECL, legal mandates or presumptions of representation” (recital 44).

For further information about the various approaches to collective licensing schemes that have been taken in European countries (France, Germany, Czech Republic and Norway) see Annex B.
A. The Extended Collective Licence Agreement (ECL)

The ECL is a construction to facilitate voluntary collective licence agreements where it cannot be assumed that the CMO can represent all authors, publishers, or other right holders of the works in question. Having emerged in the Nordic countries in the 1960s, other countries have subsequently adopted ECL, or are considering doing so, especially for the digitisation and making available of OOCW by CHIs.

An ECL requires that:

- the organisation which signs the agreement, must be representative for the right holders and works in question;
- a large number of right holders concerned must grant voluntarily a prior mandate to the RRO for the use covered by the licence agreement for the extension effect by law to be granted;
- on this basis, the licensing CMO signs a voluntary collective licence agreement with the user;
- the law subsequently grants the agreement an extended effect, authorising users to use works of non-mandating right holders (i) of the same category of works; (ii) for the same type of usages; and (iii) on the same conditions as covered by the voluntary licence agreement;
- right holders who opt out, or withdraw works from the voluntarily signed agreement, where this right is granted, may choose to negotiate terms and conditions, and thus sign licence agreements themselves directly with the same users for the same type of use as covered by the collective licence agreement.

EXAMPLE OF ECL LEGISLATION - DENMARK

Article 50 of the Danish Copyright Act reads (excerpt):

1. Extended collective licence [] may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.

2. Extended collective licence may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field. However, this does not apply, if the author has issued a prohibition against use of his work in relation to any of the contracting parties.

3. The extended collective licence gives the user right to exploit other works of the same nature even though the authors of those works are not represented by the organisation. The extended collective licence gives the user right only to exploit the works of the unrepresented authors in the manner and on the terms that follow from the licence agreement made with the organisation.

4. Rightsholder organisations which make agreements of the nature mentioned in subsection (1) and (2), shall be approved by the Minister for Culture to make agreements within specified fields. The Minister may decide that an approved organisation in certain fields shall be a joint organisation comprising several organisations which meet the conditions of subsection (1) or (2).
B. Legal Presumption of Representation (LP)

The Legal Presumption of Representation (LP) implies that:

- the CMO, which is granted the right to sign a licence agreement based on the LP, must document that it is sufficiently representative for the right holders concerned; otherwise it will not be approved and authorised by the appropriate authorities to enter into the agreement with an extended effect
- the extension effect by law is on the representation and mandate to administer rights of non-mandating right holders of the same category of works
- the signing of the agreement between the CMO and the user is on a voluntary basis
- rightholders who opt out or withdraw works from the voluntary collective licence agreement, may choose to negotiate terms and conditions, and thus sign agreements themselves directly with the same users for the same type of usages as covered by the collective licence agreement.

The OOCW licence agreement that the German National Library has signed is based on the presumption that the CMOs VG Wort (for texts) and VG Bild-Kunst (for images) represent all relevant works and rightholders. Rightholders are able to opt out.

EXAMPLE OF PRESCRIPTION OF REPRESENTATION - GERMANY

Section 51 of the German Copyright Act\(^2\) (excerpts):

“It shall be presumed that a collecting society which manages the rights of reproduction [] and of making available to the public [] in out-of-commerce works and which is authorised to do so [] is authorised, within its scope of activity, to also grant users these rights in the work of those rightholders who have not mandated the collecting society with the management of their rights.” This applies “in the case of out-of-commerce works published before 1 January 1966 in books, journals, newspapers, magazines or in other writings". It is also a condition that “the works are part of the holdings of publicly accessible libraries, educational institutions, museums, archives and institutions active in the field of film and audio heritage”, and that “the reproduction and the making available to the public serves non-commercial purposes”.

The works must be “entered, on application by the collecting society, in the Register of Out-of-Commerce Works”. The rules of the Register\(^2\), administered by the German Patent and Trade Mark Office, are set out in the Copyright Act s.52. It shall “contain the following information:

1. the title of the work,
2. the designation of the author,
3. the publishing company which published the work,
4. the date of publication of the work
5. the designation of the collecting society [] and
6. whether the rightholder has objected to the management of his rights by the collecting society”

Rightholders shall be notified of data entry in the Register and may “within six weeks of notice of the entry being published, lodge an objection against the Register on account of the intended management of their rights by the collecting society.” Also, the “Rightholders may at any time object to the management of their rights by the collecting society.” With respect to any remuneration collected, the law imposes that “a rightholder shall have the same rights and obligations vis-à-vis the collecting society as if the rights to management had been delegated.”

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\(^2\) See DPMA website: www.dpma.de/english/our_office/about_us/further_duties/cmos_copyright/register_out_of_commerce_works
ANNEX B: Country examples

FRANCE

Legislation enacted on 1 March 2012 allows for the digitisation of OOC books that are still under copyright, that were published in France in the 20th century (prior to 1 January 2001) that are no longer available on the market or available in a printed or digital form. The legislation was subsequently updated23, with part of the text deleted, following the 2016 CJEU Soulier Doke judgment (C-301/15) and the State Council decision of 7 June 2017.

The legislation provides for an approved CMO to authorise the reproduction and re-issue of books in digital form. This is merely a presumption of transfer of rights as the author or publisher can challenge such a move and resume publication on their own account. The Société Française des Intérêts des Auteurs de l’écrit (“Sofia”) has a legal mandate from the Ministry of Culture, renewed in 2018, to license the commercial uses of out of commerce books.

The “ReLIRE” (Le Registre des Livres Indisponibles en Réédition Électronique) digitisation project, targets 500,000 books listed in the catalogue of the French National Library (Bibliothèque nationale de France (BnF)). 164,453 works have been licensed by Sofia and are registered on the ‘ReLIRE’ platform administered by BnF24. More than 80 000 titles had been commercialised as of 1 October 2020.

In practical terms, each 21 March until 2016, a list of OOC books was published on the ReLIRE platform for consultation. Authors and publishers had the possibility to remove the supposed OOC status within six months following the posting. It was also possible for a publisher, with the agreement of the author, to withdraw the OOC book in the event they planned to reprint the work. An opt-in is also available for authors of OOC books. Annual, national information campaigns via the internet and newspapers were used to help raise awareness.

In order to be able to opt out, the publisher must hold reproduction rights for the book in printed form. In that case, he is obliged to print the book within a period of 2 years, in agreement with the author. If a publisher who is the owner of the reproduction right wishes to remain within the system, Sofia will offer them a 10-year exclusive licence to exploit the digital publishing rights. They have three years to commercialise the work. If the original publisher does not accept the exclusive licence, any publisher or distributor may apply for a non-exclusive 5-year licence to digitally copy the OOC book (which FeniXX currently holds).

24. See http://relire.bnf.fr/
As regards authors’ compensation, under an exclusive licence they get 15% of the book’s price, with a 1€ guarantee. Under a non-exclusive licence, they get 20% of the book’s price (1€ guarantee) if they reclaim their copyright. They get 10% of the book’s price (75 cents guaranteed) if the publisher is still the owner of the publishing rights.

For licences prior to 2016, Sofia collects and distributes funds to the authors and identifies and finds rights holders in cooperation with other CMOs. After 5 years, any unallocated funds are to be used for cultural purposes.

The OOC books can be accessed, as any e-book, via digital bookshops and specialised site networks, as well as through search and loan systems located in libraries that are accessible to the public.

Authors may still opt out for their titles at any time.

GERMANY

In Germany, the use of OOCW is possible under Sections 51, 52 and 52a of the German CMO Act (VGG). On the basis of this legislation, the Federal Republic of Germany and the “German Länder” have concluded a framework contract with the CMOs VG WORT and VG Bild-Kunst enabling the digitisation and making available of out of commerce books, limited to those that the digitising institution holds permanently in its collection. As yet, journals and other periodicals are not covered by the agreement. A pilot project on this is though under preparation. The contract is available on the VG WORT website.

The law itself only provides for the digitisation of print works published before 1966, January 1966 being the date when the current German Copyright came into force. Also, for those works, the institutions were confident that they would be able to carry out a reliable and easy search to verify whether the works were still commercially available.

Based on the framework contract, eligible institutions, i.e. publicly accessible libraries, educational institutions, museums, archives and institutions active in the field of film and audio heritage, may conclude agreements individually. They consult the books-in-print database German (VLB, Verzeichnis lieferbarer Bücher), to verify whether the book is still commercially available.

The licensing process is highly automated. The German national library acts as a hub for all institutions. It transmits all relevant data to VG WORT as the entrusted RRO via a technical interface, and, subsequently, the work is entered into the OOCW database administered by the German Patent and Trade Mark Office (DPMA), also by way of technical interface. The DPMA makes the work information accessible on a portal on the Internet.

VG Wort has been mandated by its affiliated rightholders through a modification of the representation agreement. Section 51 of the law further presumes that the

26. https://www.vgwort.de/publikationen-dokumente/gesamtvertraege.html (German language only)
RROs concerned represent all affected rightholders, mandating as well as the non-mandating ones (legal presumption of representation). Any author or publisher can inspect the publicly available register and, at any time, object to their works being included in an OOCW agreement. The exclusion of a work will result in it not being posted or, if already posted, its removal from the website of the institution. As at October 2019, 26,508 works had been licensed, with 9 objections raised.

The agreed remuneration, as a one-off payment, for the making available of the licensed out-of-commerce works is:

- Books published before 31 December 31 1920: 5€
- Books published between 1 January 1921 and 31 December 1945: 10€
- Books published between 1 January 1946 and 31 December 1966: 15€

Non-mandating rightholders may claim their remuneration from the relevant RRO. The per work registration cost is currently 1 €. It is paid for by the CHI separately. Both the licensing fee and the registration fee are non-refundable, even in cases where the rightholder excludes the work.

The modified Copyright Act of April 2017 includes, in Article 97e, provisions on the digitisation and making available of OOCW. DILIA, the national multipurpose CMO, and the National Library have been negotiating an agreement. Subject to funding being made available, from the year 2020, libraries will be able to start making OOCW available to the public.

The law obliges the National Library to maintain a list of OOCW and publish it on its website. Any of the Czech public libraries, or CMOs may submit a proposal to the National Library for a literary work, including embedded works forming an integral part of the work, to be examined, with the aim of verifying whether it is out of commerce. The National Library shall only add a work to the list of OOCW if it has not managed to purchase or obtain a licence to use the work through ordinary commercial channels within a period of 6 months from when it received the proposal to examine the work status. A periodical publication may only be included if it has been published in the Czech Republic and is, at least, 10 years old.

Rightholders have the right to exclude works from being listed as an OOCW. When opted out, the work must be removed from the list within the end of the calendar month following the month the request was made. Information to rightholders is provided on the websites and relevant publications of the CMOs and the National Libraries, and possibly also by the associations of the authors and publishers concerned.

DILIA is mandated by its author members to negotiate a licence agreement with the National Library through modifications of the representation contracts. Article 97.4e(a) presumes that its representation is extended to also include non-mandating rightholders of the same category of works as the mandating ones. There has also been close cooperation with the Czech Publishers’ Association, and, given the inclusion of embedded images, active involvement and cooperation with OOA-S, the visual CMO.
Bokhylla.no – the Bookshelf in English – is a Norwegian success story, which demonstrates that digitisation projects can include both out-of-commerce works, orphan and in-commerce works.

The former Norwegian Minister of Culture and Equal Opportunities, Ms. Trine Skei Grande, stated on several occasions that Bokhylla.no offers the Norwegians a unique access to our national cultural heritage. She often added that this has been made possible for just a few eurocents per Norwegian per year. A main key to the success was the close contact and cooperation between Kopinor, the RRO, and the rightholders and their organisations – before and under the negotiation of the agreement and in presenting it after it was concluded.

The National Library and the right holders agreed already in 2009 on a pilot project digitising and making available published works, without any distinction as to the commercial status of the works involved. Following several extensions of the pilot, a permanent licence agreement was signed, in 2012, with Kopinor representing the rightholders. Information on the initiative was provided to authors, publishers and other stakeholders via the websites and other communication tools of the National Library, Kopinor and its member organisations, as well as through the news media. The publicity, general interest and media coverage was such that it is fair to assume that the relevant information, by all likelihood, reached those concerned.

The agreement. Some 4,000 works (just over 1.5% of the total) have been withdrawn. A total of 240,000 books and nearly 8,300 cultural and similar journals published in Norway before 2001 have been digitised and made available to the public on Internet under the agreement.

The works are, so far, available to Norwegian URL addresses only. They may merely be accessed on the National Library’s web page and read on the user’s screen; no downloading or storing is allowed. Rightholders may opt out of the agreement – by work or totally. This is important, also because the works that are digitised and made available to the public do not comprise out-of-commerce books only; also orphan works and books which are still on sale may be and have, in fact, been included.

The Bookshelf has enabled a unique compilation of language resources accessible from the National Library. It is what Norway refers to as a “linguistic bank” of resources, with the aim of preserving, stimulating and further developing linguistic identity. This is considered to be especially important for smaller and vulnerable languages, such as Norwegian.

The Bookshelf offers a full-text searchable database integrated in the National Library services. As such, it contributes to fulfilling its task of preserving and making available national cultural heritage and information to the public. To the rightholders, it means that their works are being made accessible legally in controlled environments - against a reasonable compensation. The yearly remuneration to be acquitted by the National Library is fixed in the licence agreement.

28. https://www.kopinor.no/articles/bookshelf-contract
29. The Norwegian National Library and Kopinor have started negotiations on the inclusion also of works published after 2001