

Case A – Guide on Exceptions for Text and Data Mining (inDICES)

Available in inDICES Deliverable D2.4, soon at www.indices-culture.eu.

Article 3 of the DSM Directive requires member states to introduce a mandatory exception for text and data mining for research purposes, without the need to ask for authorization from the rightsholder. Article 4 of the DSM Directive requires member states to introduce an exception for anyone who wishes to mine materials – but the rightsholder can still oppose to the use of their copyrighted works.

Article 3:

- **Beneficiaries:** research organizations, cultural heritage institutions; any person with lawful access to the copyrighted work and affiliated with a research organization or cultural heritage institution; only research organizations fully dedicated to commercial and for-profit interests are excluded.
- **Copyrighted Works:** copyrighted subject matter, subject matter protected by neighboring rights (performances, recordings...), databases. Not software. Lawful access included any acquisition, licensed work, or the open web (content accessible to the public).
- **Scope:** the provision creates an exception for acts of reproduction (of copyrighted works) and extraction of the contents of a database. Any reproduction is allowed as long as it is needed to perform text and data mining. This text and data mining can only be done for “scientific purposes” – any form of educational or scientific production. Commercial text and data mining is included. Beneficiaries should be able to rely on their private partners for carrying out their text and data mining (Recital 11).
- **Contractual and technological override:** any contractual provision contrary to the exception is unenforceable, regardless of the jurisdiction or place of signing of the contract. Technical protection measures are allowed but they explicitly shall not “undermine the effective application of the exception” (Recital 16), and the beneficiary is granted the right to seek means to remove them.

Article 4:

- **Beneficiaries:** any organization or individual that wants to use copyrighted works for text and data mining, as long as they have lawful access to the content and are not prevented by contract.
- **Copyrighted Works:** all the works foreseen in Article 3 + computer programs. Lawful access included any acquisition, licensed work, or the open web (content accessible to the public).
- **Scope:** the same acts of reproduction as foreseen in Article 3. Any purpose is accepted. There are no limits on the type of beneficiary (both commercial and non-commercial text and data mining is possible, too).
- **Contractual and technological override:** the exception can be restricted by contract (like terms and conditions, but also machine-readable means like robots.txt). A lawful application of the provision cannot be unproportionally restricted by technical measures, and the beneficiary is granted the right to seek means to remove them.

Case B - Excerpts from reCreating Europe Deliverable 5.3 - Guidelines & FAQs (GM) industries (2021)

Consult the full deliverable [here](#)

On preservation

Are there EU copyright exceptions and limitations that promote digital preservation?

Yes. Generally, exceptions and limitations to copyright permit certain uses of the work or other subject matter that would be otherwise not allowed. Under EU Copyright Law, there are specific exceptions and limitations that make the digital preservation or other use of copyrighted works or other subject matter by CHIs possible.

Within EU Copyright law and the InfoSoc Directive, Member States have been encouraged to adopt non-mandatory exceptions or limitations for acts of reproduction by cultural institutions, as for when the reproduction has not a commercial aim (Article 5(2)© InfoSoc Directive).

More recently, however, EU Copyright dispositions in the CDSMD have mandated Member States to create new exceptions or limitations and rules addressed to CHIs, that are of mandatory nature.

These new dispositions establish Member States shall provide exceptions and limitations (Articles 8-11 CDSMD) that would allow CHIs to use orphan works - that are works for which the rightholder cannot be identified - and out-of-commerce works - that are works not available through channels of commerce. These specific exceptions and limitations primarily regard the case that works or other subject matter are permanently included in the CHIs collections.

Another rule (Article 14 CDSMD) establishes that Member States shall exclude copyright or related rights on the reproductions of works of visual arts in the public domain. Finally, a specific provision (Article 6 CDSMD) mandatorily requires Member States to adopt an exception or limitation for CHIs when their objective is preserving works or other subject matter that are permanently in their collections.

What does Article 6 of the CDSMD provide?

Article 6 of the CDSMD mandatorily requires Member States to provide for an exception or limitation to copyright, so that CHIs can make copies of works in their permanent collections for the aim of preservation.

The exception allows CHIs to make copies of any works or other subject matter that are permanently in their collections, e.g., as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements. The copy can be in any format or medium and, according to recital n. 27 of the CDSMD, it shall also be made by the appropriate preservation tool, means or technology, in the required number, at any point in the life of a work.

On orphan works

What laws apply to the use of orphan works in Europe?

The essential European legal framework applicable to orphan works comprises the Orphan Works Directive, Directive 2012/28/EU ("OWD"), and its implementation at the national level. The same OWD specifies that its provisions shall not interfere with other national arrangements concerning the management of rights nor with national provisions on anonymous or pseudonymous works. Similarly, the OWD shall be without prejudice to other applicable legal provisions, including those referring to intellectual property rights, competition, data protection and privacy, legal deposit and access to public documents, contracts, freedom of the press and freedom of expression in the media.

What are the main elements of the Orphan Works Directive?

The OWD permits certain uses of orphan works by publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, to achieve their public-interest

missions. For that it requires that Member States provide for an exception or limitation to the right of reproduction and the right of making available to the public provided in the Infosoc Directive to ensure that the beneficiary organisations are permitted to use orphan works contained in their collections. Such uses are allowed provided that a diligent search prior to the use is undertaken.

(...)

What uses are permitted under the Orphan Works Directive?

Orphan works can be used in following ways: by making the orphan work available to the public or by acts of reproduction, within the meaning of the Infosoc Directive, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration. Such uses are only permitted in order to achieve aims related to the beneficiary organisations' public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.

The name of identified authors and other rightsholders in any use of an orphan work must be indicated.

On out-of-commerce works

What are out-of-commerce works?

Copyrighted works that are not available through customary channels of commerce, as no longer commercially exploited by rights holders, or that have never been intended for commercial exploitation, as if not published or disclosed. They can be, e.g., books that are out of print, films that are out of circulation, a leaflet not subject to commercialisation.

What are the main features of the EU out-of-commerce provisions?

Articles 8-11 CDSMD provide CHIs with the possibility to digitise out-of-commerce works and make these available to the public, through (a) a licensing mechanism issued by representative Collective Management Organizations (CMOs) that copyright holders appoint to manage their rights, or, in case of not sufficient CMO representation, (b) an exception to copyright. However, rightsholders may optout and request that the works made available be removed. The extended licensing mechanism allows use of out-of-commerce works in any Member States, while the copyright exception only applies in the Member State where the CHI undertaking that use is established. To guarantee the effectiveness of such provisions, the CDSMD urges Member States to facilitate dialogue between the representatives of users and of rights holders.

Who are the beneficiaries of the EU out-of-commerce provisions?

Articles 8-11 CDSMD concern cultural heritage institutions that should be allowed for 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 their collections. CHIs should sign under a non-exclusive licence for non-commercial purposes with a representative collective management organisation, or based on a copyright exception, also only for non-commercial purposes.