

Kluwer Copyright Blog

Licences for out of commerce works: the state of play

Ariadna Matas (Europeana Foundation) · Monday, December 23rd, 2024

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The out of commerce works ‘legal solution’ simplifies rights clearance, helping cultural heritage institutions to make materials from their collections that are not in commercial circulation available online. In some circumstances, it requires concluding a licence with a collective management organisation – Europeana Copyright looks into some of the conditions agreed so far.



The Lawyer's Office – 1628 – Rijksmuseum, Netherlands – Public Domain

Extended collective licensing and ‘presumptions of representation’

Today, cultural heritage institutions in almost all European Union member states can benefit from the [out of commerce works legal system](#) as a legal basis to publish certain materials online. As part of this system, for certain types of out of commerce works, cultural heritage institutions need to conclude a licence with [collective management organisations](#). In all other cases, an exception to copyright applies, and no permission is needed for making the materials available online.

In order to simplify rights clearance, under this system collective management organisations are granted an ‘extended’ representation power, or a ‘presumption of representation’. That is, they can authorise the cultural heritage institution to make out of commerce works available online on behalf of rights holders that they do not represent, and for works that are not part of their repertoire.

It is worth taking a look at the conditions agreed so far in these licences, because the terms can have a big impact on the possibilities to make out of commerce available online (depending, for example, on the price, scope of the dissemination or other obligations).

The Slovak National Library

The Slovak National Library has concluded a [licence](#) with the collective management organisation [LITA](#). It enables the National Library to make literary works published in the form of monographs, periodicals and magazines available online. This includes photographic works and works of fine art included therein or connected to them, as well as works of art in the form of postcards and cartographic works. The fee agreed is approximately €200,000 annually, which has now increased to €240,000. The agreement has a duration of a year, renewable for a second year.

The agreement enables the National Library to make digital copies, and to make these available to the public exclusively through the web interface of the Slovak National Digital Library. The sharing online is limited to the territory of the Slovak Republic and of the European Economic Area.

Additional conditions are established: users that are not registered to the Slovak National Digital Library can only see a preview; they are not entitled to any modifications or interventions in the content nor to download it; the National Library is obliged to provide a summary report on the use of out of commerce works on a monthly basis; and the National Library is in charge of making the declaration to the [EUIPO](#).

The National Library of the Czech Republic

In the Czech Republic, the National Library has concluded two licences that extend to all libraries in the country (that are enlisted with the Ministry of Culture and as such are part of the Library System), making it possible for them to also benefit from the system.

The [first licence has been concluded with DILIA](#), and covers monographs, periodicals and magazines within its scope. It is subject to an annual fee of approximately €800,000. The [second licence has been concluded with OOA-S](#), and it includes works of visual arts (various kinds of images) embedded or included in the literary works that fall under the scope of the licence with DILIA. The fee agreed is of approximately €200,000. The amounts are calculated on the basis of the number of libraries making use of the system, their registered users, and the scope of use of the National Digital Library. The licences have been concluded for the period of January 2024 until December 2026.

The two agreements limit the dissemination of the materials to online viewing via devices located in the premises of the libraries, and to remote viewing by registered readers of the National Digital Library platform, on the basis of authentication. They both indicate that access to the materials is limited to the territory of the Czech Republic.

Memorandums of understanding in the Netherlands

Three sectoral agreements have been concluded in the Netherlands, on periodicals, audiovisual works, and musical works.

The [first one has been concluded with LIRA and Pictoright](#) and extends to all publicly accessible

cultural heritage institutions in the Netherlands. The umbrella agreement enables newspapers, magazines, and other periodical publications to be made available online, including the works contained therein, as long as they have been published in the Netherlands. A cut-off date has been agreed: the materials need to be at least 10 years old. The agreement is subject to an annual fee of €115,000 (inflation corrected each year) paid by the Royal Library of the Netherlands. The conditions in the memorandum are agreed for a duration of 10 years.

The agreement solely gives permission for those works created by independent creators, freelancers. Cultural heritage institutions still need to require permission for works created by publishers and their employees, which often give permission (individually, outside of the out of commerce works system) without needing remuneration.

In addition to this, as part of the terms agreed, cultural heritage institutions are obliged to: check with the publisher of the publication on the availability in commerce of the materials; place a machine-readable rights reservation against the use of the materials for text and data mining with a commercial purpose, including use for AI training purposes; make reasonable efforts to ensure that the materials are not embedded in the website of a party that is not a beneficiary of the agreement.

A second [memorandum of understanding](#) has been concluded with [StOPnl](#) encompassing audiovisual works whose rights are held by the producer. The agreement extends to all publicly accessible cultural heritage institutions in The Netherlands, and enables the dissemination of this material is limited to cultural heritage sites in the Netherlands. Interestingly no fees will be charged, subject to a review after two and half years.

Finally, a third [memorandum of understanding](#) has been signed with [BUMA/STEMRA](#) allowing all publicly accessible cultural heritage institutions in The Netherlands to make musical works available online on cultural heritage websites. The memorandum is subject to an annual fee of €130 for up to 120,000 streams, which increases to €260 for up to 240,000 streams, and €650 for up to 600,000 streams. The agreement is in place for a year. Interestingly the statutes of the CMOs for neighbouring rights only makes them representative for in-commerce works. These CMOs are therefore not a party to this agreement.

Paving the way for other cultural heritage institutions

Up until now, only a [few institutions](#) have been making use of the out of commerce works system. The negotiation efforts undertaken by some institutions will hopefully make it easier for other cultural heritage institutions to start making use of the out of commerce works system as well.

However, not all of the conditions described above should be seen positively. First, because limitations to accessing the materials within a specific country seem to be slightly contrary to the spirit of the CDSM Directive, whose recital 30 reads ‘Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders’. And second, the possibility to share materials through a specific platform alone, and to prevent any embedding from happening in other cultural heritage platforms, is very worrying for the Europeana Initiative, and detrimental to multiple efforts over the years to facilitate the discoverability and availability of digital cultural heritage, including across-borders, not least through the deployment of a common European data space for cultural heritage.

Read more about this topic

If you want to learn more about this topic, check the various [resources](#) created by the Europeana out of commerce works working group, including a [page](#) with an overview of implementations per country, and the licences described above.

You can also [join the Europeana Network Association Copyright Community](#) to stay up to date with developments in this area.

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A promotional banner for the '2024 Future Ready Lawyer Survey Report'. The background is dark with vibrant, glowing blue and red digital lines and patterns. In the center, a wooden gavel rests on a circular base, both of which are covered in glowing digital data points and lines. To the left of the gavel, the text 'Legal innovation: Seizing the future or falling behind?' is written in a large, white, sans-serif font. Above this text, the title '2024 Future Ready Lawyer Survey Report' is displayed in a smaller, white, italicized font. Below the main text, there is a blue button with the text 'Download your free copy →'. At the bottom left, the Wolters Kluwer logo is visible. At the bottom right, there is a white box containing the 'FR Future Ready' logo and the word 'LAWYER' in bold, black capital letters.

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