



Making Out-of-Commerce Works Available in EU Member States

Introduction

In September 2011, *Michel Barnier*, European Commissioner for the Internal Market and Services, presided over the signing of a Memorandum of Understanding (MoU) setting out key principles on the digitisation and making available of Out-of-Commerce Works (OOC) by publicly accessible libraries and similar institutions in the European Union. The MoU was agreed among 10 organisations representing national, research and public libraries and documentation centres, authors of literary works, and embedded visual works (eg illustrations, photographs etc), publishers of books and journals and relevant collective management organisations (CMOs)¹. It envisages a process at the Member State level whereby out-of-commerce works first published in that Member State may be made available, including through digital means and across borders.

Scope of the MoU

The MoU covers large scale digitisation and making available of out-of-commerce books and journals, including embedded images, by publicly accessible libraries, educational establishments, museums and archives in the EU Member States. Visual works have a life separately and apart from any literary work, which may embody, include or incorporate one or several visual works. They may themselves be “out-of-commerce” but need not be. The MoU recommends that the parties to a licensing agreement on out-of-commerce works reach out to specialised CMOs representing visual artists when granting licences. When translated works are included in the licensing agreement the MoU requires special arrangements to ensure that not only the rights subsisting in the original language version but also the distinct rights in any translation of the original are respected and accounted for.

What is an out-of-commerce work?

The MoU defines an “out-of-commerce work” as being “*when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).*” The method for the determination of commercial availability of a work is to be agreed between stakeholders in the country of first publication of the work.

Steps towards an Agreement at national level

A library or other cultural institution with digitisation projects that incorporates in-copyright but out-of-commerce books and/or journals should seek to create an open stakeholder dialogue with rightsholders and the relevant CMO before a project is embarked on, and subsequently observe the following steps where national arrangement allow:

¹ Conference of European National Librarians (CENL); European Bureau of Library, Information and Documentation Association (EBLIDA); Ligue des Bibliothèques Européennes de Recherche (Association of European Research Libraries, LIBER)); European Writers Council (EWC); European Visual Artists (EVA); European Federation of Journalists (EFJ); European Publishers Council (EPC); Federation of European Publishers (FEP); International Association of Scientific, Technical and Medical publishers (STM); International Federation of Reproduction Rights Organisations (IFRRO)

- a. Ensure that relevant organisations of rightholders have been consulted
- b. Agree on the criteria for the selection of works to be included in the project, preferably also the number of works (or at least an estimate) of the works involved
- c. Sign an agreement with the representative CMO, normally the national Reproduction Rights Organisation (RRO), including uses allowed and the corresponding conditions;
- d. Observe the mechanisms that the CMO has agreed with the authors' and publishers' associations concerned to allow rightholders to withdraw or withdraw works from the licensing agreement;
- e. Agree the best suited mechanisms to determine commercial availability/out-of-commerce status of a work;
- f. Observe the concrete individual steps that participants agree to take to ascertain a work's status according to a locally agreed mechanism and to allow for the revival of a work;
- g. Agree the way in which remuneration is to be paid;
- h. Ensure that the moral rights of authors are respected.

Implementation: Collective Licensing Schemes, Procedures and Presumptions

The MoU envisages that the licensing agreement is signed by a CMO situated in the country of first publication of the works in question and that it represents a substantial number of authors and publishers of the relevant category of works. In addition, authors and publishers should be duly represented in its key decision-making bodies. The Member States are encouraged to ensure legal certainty for publicly accessible cultural institutions and CMOs, where the CMO, which has the right to sign such licensing agreements, benefit from a presumption under the MoU to represent non-member rightsholders. This requires that the CMO has the lawful right to represent unrepresented rightsholders, and accepts to embark on information campaigns making "best efforts" to reach such rightsholders and comply with criteria defined in the MoU, including a number of minimum activities it has to undertake.

Rightholders shall retain the ability to opt out from the project or to withdraw some or all of their works that might fall under it. The CMO must therefore widely publicise the project with the aim to arrive at a situation where rightholders that the CMO acts for are empowered to evaluate the project and give what is known as "informed consent". The method and extent of the information campaign will be agreed with organisations representing authors, publishers and visual artists.

Where out-of-commerce works are used at a rate and at intensities not foreseen by either parties or the rightholders at the start of a project, especially in respect of cross-border or specifically agreed commercial uses, the CMO will make extra efforts to locate individual unrepresented rightholders of those works. Precise thresholds or triggers for such extra efforts will be decided by the relevant stakeholders. The located rightholders will then express their desire to continue participating in the project or to opt for another way of re-commercialising or reviving the works in question.

Access beyond borders

The signatories to the MoU agreed that, if the scope of the licensing agreement included cross-border and/or commercial uses, the CMO may limit it to the works of represented rightholders. They also called upon the Commission to consider legislation protecting publicly accessible cultural institutions and CMOs applying the MoU.

Further information

The signatories to the MoU have set up the Out-Of-Commerce Implementation Task Force (OMIT) to assist with its implementation. Although the stakeholder agreement will be negotiated at a national level, the OMIT is able to offer advice and support during and after devising a project.

You can contact OMIT on:

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