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Regime for Use of Out-of-Commerce Works

Lucie Guibault

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From the Selected Works of Lucie Guibault

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Regime for Use of Out-of-Commerce Works

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Regime for Use of Out-of-Commerce Works

Lucie Guibault

Copyright in the Digital Single Market

BVA-ABA

30.01.2020



The Vision



Europeana Website Demo

Explore artworks, artefacts, books, films and music from 3,500 of Europe's museums, galleries, libraries and archives.

Featured Content



About the Europeana Demo



Johannes Vermeer



Amalia Lindegren

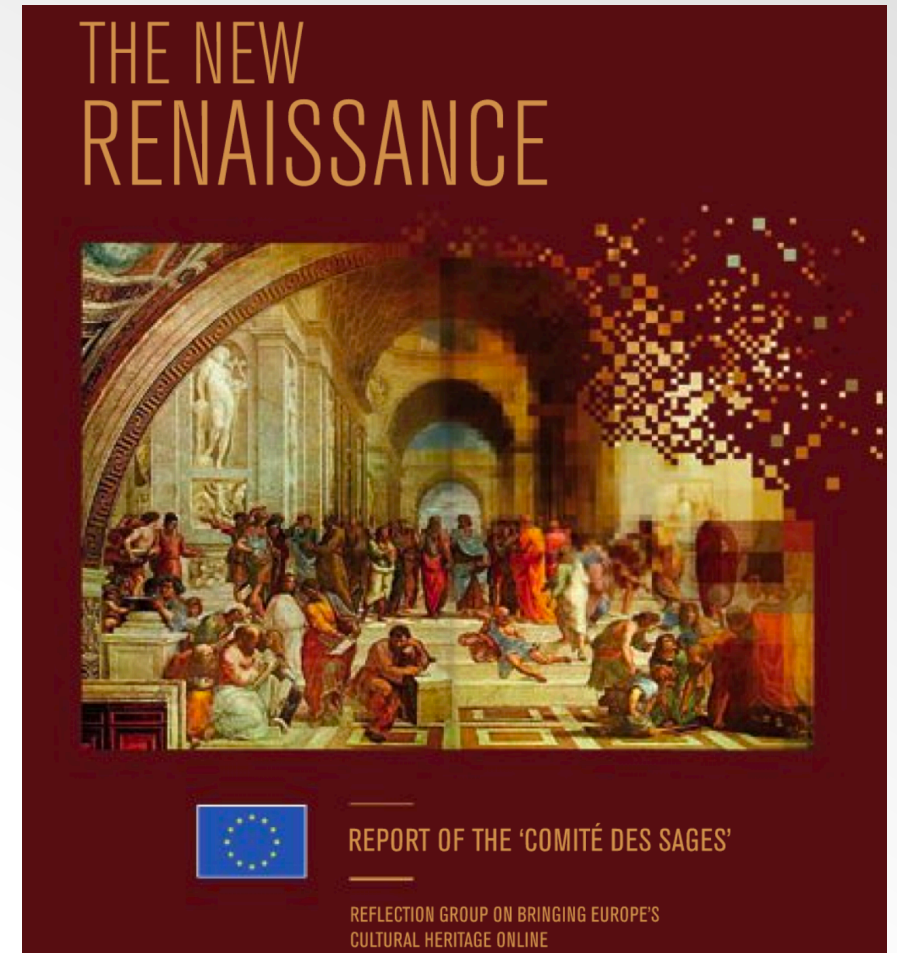


Vincent van Gogh

 Feedback

The situation beforehand...

- Directive 2001/29/EC Copyright in the Information Society:
 - *Art. 5(2)c) – certain acts of reproduction by cultural heritage institutions*
 - *Art. 5(3)n) – display on premises on dedicated terminals*
- Report of Comité des Sages 2011
- *TU Darmstadt v Ulmer* ECJ 2014
 - Incidental acts of reproduction allowed – no mass digitization
 - Dissemination on dedicated terminals





Digital reproductions of works that are in the Public Domain must also belong to the Public Domain.

www.communia-association.org/recommendations

(2011)



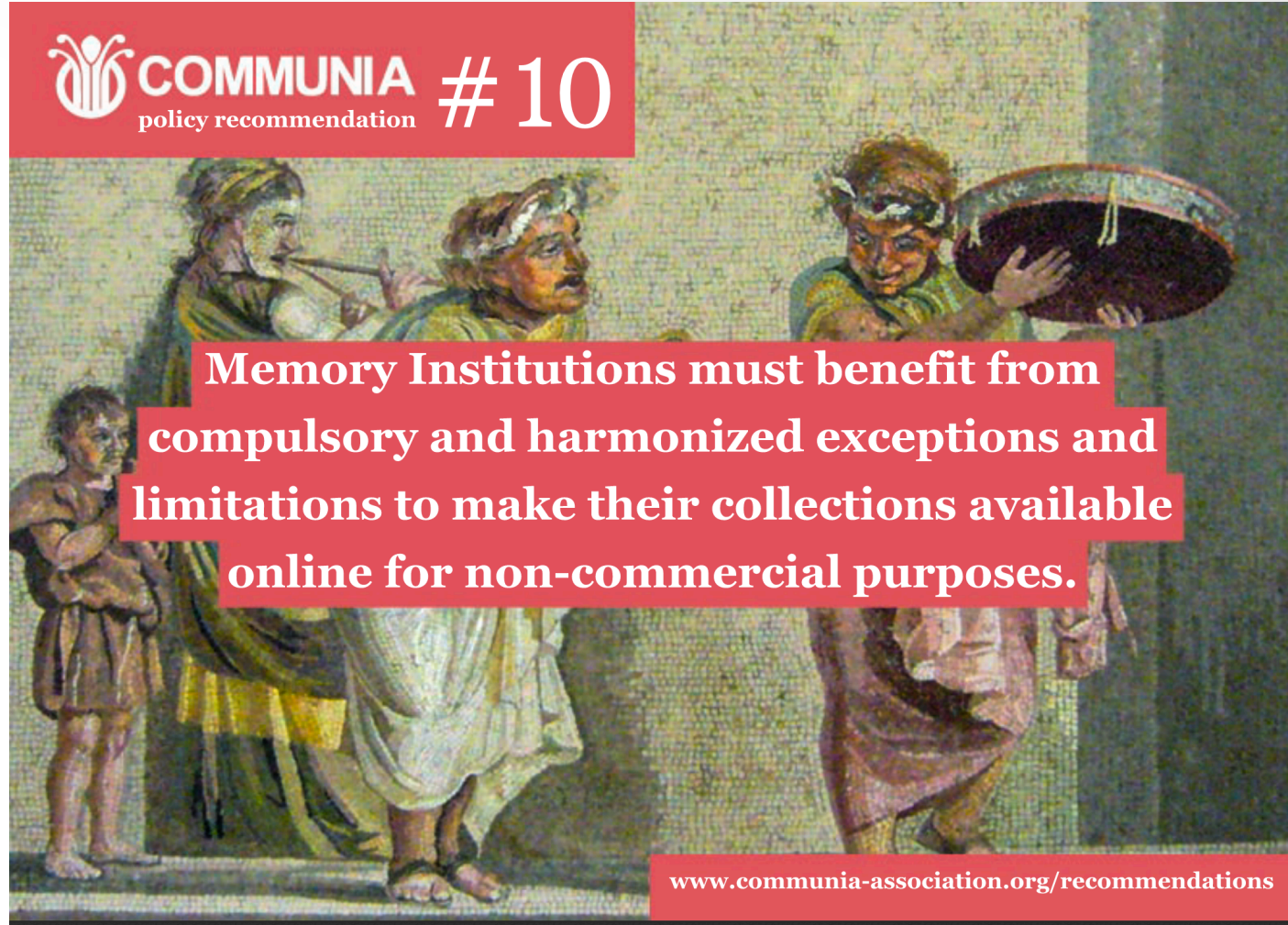
Europe needs an efficient pan-European system that guarantees users full access to orphan works.

www.communia-association.org/recommendations



COMMUNIA
policy recommendation

10



Memory Institutions must benefit from compulsory and harmonized exceptions and limitations to make their collections available online for non-commercial purposes.

www.communia-association.org/recommendations

... Interim measures

- Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (2011)
 - Voluntary agreement between stakeholders for the digitization and dissemination of books and learned journals that are out-of-commerce;
 - Non-commercial use premised on extended collective licensing (ECL) system;
 - Intervention of legislator necessary for cross-border uses;
- Directive 2012/26/EC on certain permitted uses of orphan works
 - Orphan work status recognized after diligent search;
 - Rights owner may opt-out, receive remuneration and get compensation;
 - Cross-border use based on mutual recognition of orphan work status;

Directive 2019/790 on Copyright in the Digital Single Market

Preservation of cultural heritage

- CHIs allowed to make reproductions of any works that are permanently in their collections, in any format or medium, for purposes of preservation of such works and to the extent necessary for such preservation (art. 6);
 - Fixes *Darmstadt v Ulmer* with respect to mass digitization;
- CHIs and/or third parties allowed to digitize (recital 28);
- Any contractual provision contrary to this exception is unenforceable (art. 7(1));

Out-of-Commerce Works (OOCW)

Definition

- A work is deemed to be out of commerce if:
 - It can be presumed in good faith that the whole work 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;
 - Specific requirements may be provided, such as a cut-off date, to determine whether works can be licensed;
 - Such requirements must not extend beyond what is necessary and reasonable and must not preclude an OOC determination if this can be reasonably presumed

Commercial availability

- Verification of availability of a work should normally take place in the Member State where the CHI is established,
 - unless verification across borders is considered reasonable;
- Licensing mechanism and exception should not apply to sets of OOCW where there is evidence available to presume that they predominantly consist of works of third countries
 - unless the collective rights management organisation (CMO) concerned is sufficiently representative for that third country, for example via a representation agreement

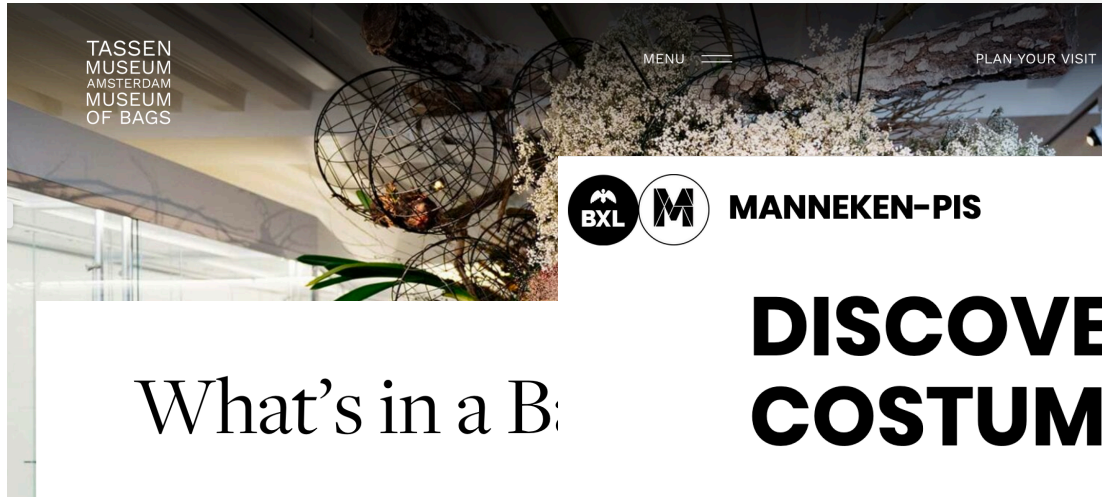
Solution # 1: Use of OOCW through Collective License

- CMO may conclude non-exclusive licence for non-commercial purposes with CHI for reproduction, distribution, communication to the public and making available of OOCW in the permanent collection of CHI, if:
 - CMO acts within its mandates;
 - CMO is ‘sufficiently representative of rightholders’;
 - All rightholders guaranteed equal treatment under the licence;
 - All rightholders may, at any time, easily and effectively opt-out;

Representativeness of CMO

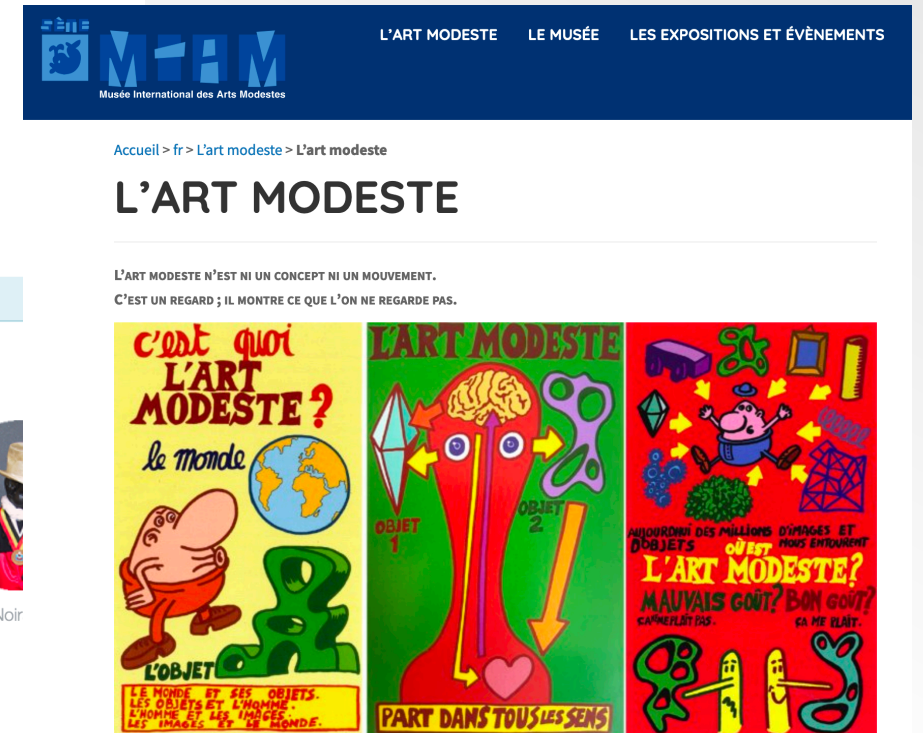
- Member States should determine the requirements to be satisfied for those organisations to be considered sufficiently representative, taking into account:
 - The category of rights managed by the organisation,
 - The ability of the organisation to manage the rights effectively,
 - The creative sector in which it operates, and
 - Whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use (recital 48)

What if there is no CMO to grant licences?...



What's in a Bag

Interview with Manon Sch...
director of the Tassenmus...



Solution # 2: Use of OOCW through Exception

- CHIs may make available to the public for non-commercial purposes OOCW in their permanent collection, if:
 - Name of the author is indicated, unless impossible;
 - OOCW made available on non-commercial websites;
- Exception only applies where no CMO exists;
- Rightholder may opt-out of application of exception at any time;
- Appropriate publicity measures to be taken in the Member State where CHI is established, unless evidence pointing to third country;
- Information about opt-outs and ECLs to be kept and maintained by EUIPO

Cross-border uses

Different regime Collective Licensing / Exception (art. 9)

- **ECL:** Member States shall ensure that licences granted in accordance with Article 8(1) may allow the use of OOCW by cultural heritage institutions in any Member State.
- **Exception:** The uses of OOCW under the exception provided for in Article 8(2) shall be deemed to occur solely in the Member State where the CHI undertaking that use is established.

Collective licensing with extended effect (art. 12)

- Member States may provide, as far as the use on their territory is concerned and subject to safeguards that where a CMO enters into a licensing agreement for the exploitation of works:
 - This agreement can be extended to non-members of the CMO;
 - The CMO has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly;
- Safeguards:
 - Sufficient representativeness of CMO
 - Equal treatment of all rightholders;
 - Opt-out possibility at any time;
 - Appropriate publicity measures are taken;

Works of visual art in the public domain

Article 14

Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.

Final remarks

- Art. 8-14 show a clear intention to give CHIs workable solutions for the digitization and dissemination of cultural heritage, while putting reasonable safeguards to protect rightholders' interests;
- The dual solution of ECL and Exception should enable CHIs to make available to the public the works held permanently in their collection;
- The EUIPO's record keeping function should be set up to offer the relevant information in the most useful way to the public;
- One last uncertainty: how can a collective license practically allow at once the use of OOCW in all Member States and restrict the extended effect only to the Member State where the CHI is established?