

EUROPEAN NATIONAL LIBRARY DISCUSSION PAPER:

MASS DIGITISATION OF CONTENT WITH COMMERCIAL PARTNERS

**FOR SUBMISSION TO: CENL BOARD (POLICY and COPYRIGHT ISSUES)
CENL COPYRIGHT WORKING GROUP (COPYRIGHT ISSUES)**

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Disclaimer: European national libraries, many of which are legal deposit libraries, have a deep respect for copyright law, including moral rights. PPPs may involve third parties digitising in-copyright collections that sit in national libraries. In such cases, the digitising partner will be required to receive permission from the rights holder prior to any digitisation activities. In respect of orphan works the Library shall require any national procedures relating to orphan works to be followed. In the case of any conflict between the guidelines and this disclaimer, then the latter shall prevail.

DISCUSSION PAPER

MASS DIGITISATION OF CONTENT WITH COMMERCIAL PARTNERS

INTRODUCTION

The guidelines outlined in this draft discussion paper are to be seen in the context of the i2010 European Digital Libraries initiative, the European Union's Digital Agenda and in particular the recent European Commission discussion paper "Europeana – Next Steps". Both public funding as well as private funding has contributed to the digitisation of European content in the last decade, and both sources of funding are likely to be a facet of future programmes to digitise European content going forward.

Through digitisation, Europe currently faces a fundamental shift in the way that knowledge and the cultural memory is preserved and accessed, and this paper follows an exploration of Public Private Partnerships (PPPs) by the High Level Expert Group of the i2010 European Digital Libraries Initiative. This group explored a number of examples of PPPs and considered their benefits as well as their limitations.

A number of PPP arrangements have already been set up across Europe involving a range of Commercial Partners (CPs) and cultural heritage organisations. The work of Europeana has also involved discussions on the opportunities that PPPs provide, as well as the requirement for future public funding to encourage more digitisation of content. The highly ambitious Google Books Search service has also prompted much debate within Europe on the best way to digitise and make content available in partnership with a commercial entity.

Whilst PPPs create opportunities for making material available there are also limitations that need to be addressed. Firstly the accessibility of the material is bound by the terms of the contract between the public body and the CP and it is inherent in the arrangement that public access be restricted in order for the CP to gain a return on investment. This issue is particularly complex as often the subjects of the restriction are digital versions of public domain works which are free of copyright restrictions. National libraries are very mindful of the tension and compromise PPPs create between the Library's goal of broad and unhindered access to knowledge and the CP's need to restrict access to realise a return on investment. The purpose of the discussion paper is to try and address these tensions and how to balance public and private interest, with the ultimate aim of enriching the digital public domain. Secondly the result of pursuing PPPs as an approach to mass digitisation of content is unlikely to create a complete corpus of digital knowledge as it will generally focus on areas of most commercial potential at the expense of more research / educational orientated material. Other issues are also important such as market size of language groups, as well as the marketability and economic value of non-mainstream culture.

The use of significant public funds to ensure mass digitisation takes place has been adopted in some European countries, most notably in France and Norway. This public investment has in turn stimulated PPPs.

Further discussion of PPPs should not underestimate the fundamental importance of public funding in creating a digitised and widely accessible collection of cultural and scientific memory that the citizens of Europe can freely enjoy, and build on, thus in turn engendering further creativity.

NOTES

1. This position paper is not intended to be prescriptive, but simply to suggest a set of guidelines to allow public and private players in member states to draw their own conclusions as to the conditions relating to contractual discussions that would best benefit them.
2. Given that the legislative framework for orphan works varies from member state to member state, with some countries already having a comprehensive legislative solution, some none and others with partial solutions, any comments relating to orphan works will be dependent on the current status of play in a member state. Any wording herein that relates to orphan works is therefore not intended to be definitive for all member states but simply illustrative for the purposes of the guidelines and to be subject to legislation.
3. Although many business models may pertain for this exercise, the assumption is that the CP will pay for all additional costs of digitisation and any associated costs will be negotiated with the Library or cultural institution. Many economic models are possible such as Print on Demand, a corporate sponsorship model etc. An experience of access to copyrighted documents has also been made by Gallica. The access to in-copyright documents is granted by an e-distributor, according to an agreement concluded with the publisher concerned. Each publisher chooses its own economic model. For this exercise however only two economic models are outlined:

In the first one (**Model 1** below), the CP is reimbursed by getting revenue directly from the exploitation of digital resources. e.g. A secondary publisher selling databases of historical content. In the second model (**Model 2** below), the access to digital resources is free of charge and funding is obtained indirectly. e.g. An open-web based advertising supported access model.

GENERAL ASSUMPTIONS

- The mass digitisation project, which may form part of Europeana, may cover two different types of works: those out of copyright and, subject to permission, those in copyright among which some may be orphan and the others not. Differing conditions will apply to each category.
- The goal of a national library entering into a PPP is, beyond agreeing as short a period of licence as possible, to enrich the digital public domain.
- Copyright law shall not be undermined.

- Respect shall be shown for European data protection and privacy laws.
- Limitations and exceptions shall not be undermined by contract between the parties or by way of an End User Licensing Agreement (EULA.).
- All agreements are non-exclusive and shall allow the Library to enter into any agreement with any other party. A Period of Preferential Access (POPA) shall only pertain to the digitised objects that are the subject of the PPP.
- Given the importance to national libraries of both sustainable digital preservation as well as digital access, the Library will have the right to decide which works are digitised and to what standards of quality.
- Copies in a non-proprietary format will be supplied to the Library upon digitisation for the purposes of preservation (Preservation Standard Copies).
- Copies in a non-proprietary format will also be provided to the Library for the purposes of access (Access Copies).
- The Library assumes that material will not normally be re-digitised in the medium term; however there may be specific exceptions to this principle.
- Any agreement will be for specific uses of the digitised materials as specified in the contract.
- Competition rules shall be respected and where applicable the CP shall be chosen after a call for tender.
- Full acknowledgement of the source shall be made including use of the Library logo.
- Subject to member state legislation, and other than terms of material commercial sensitivity, it is presumed that any contract will be non-confidential.

ASSUMPTIONS PERTAINING TO MODEL 1 (e.g. A database / digital objects are created and access is sold to public and research libraries, businesses etc.)

- There will be a Period of Preferential Access (POPA) on the CP's website to the documents held by the Library that the CP has paid to digitise. The POPA duration will be no longer than 5 years, but where investment is significant this may be extended.

- Subsequent to the POPA the Library and other parties shall be unrestricted in their usage of the digitised material, and be able to use the digital objects as well as any derived data (e.g. OCR, metadata etc), subject only to copyright law.
- During the POPA there will be, at a minimum, free access to the digital object on Library premises for the term of the contract in line with Article 5.3(n) in the InfoSoc Directive, unless there is a limitation or exception in the national law, or there is a licence providing other access terms and conditions. The Library shall have unrestricted use of the digitised objects' bibliographic metadata.
- During the POPA the object will be fully searchable at the title and at the bibliographic metadata level on Europeana as well as on all other platforms.
- Subject to national copyright laws and the interests of rightsholders in regard to in-copyright works (whether orphan or not), the Library and others shall be free to reuse the digitised copies and derived data that result from the digitisation project. Subsequent to the POPA, there shall be no contractual restrictions on the Library and other third parties in regard to their use of the public domain digital copies and any derived data.

ASSUMPTIONS PERTAINING TO MODEL 2 (e.g. An advertising supported online model, free to consumers at the point of access.)

- Digitised material could be both in-copyright and out-of-copyright, though European projects of this category to date have been restricted to presumed out-of-copyright material only.
- There will be a Period of Preferential Access (POPA) to the digitised objects for the CP, meaning that the CP is likely to require that no third party is allowed to index the full text of the digital objects, or certain proprietary file formats or other technical protection protocols are employed.
- The POPA duration will be no longer than 5 years but where investment is significant this may be extended.
- At a minimum, during POPA, there will be free access to the digital object on the Library's website and the Europeana website, as well as free access to and indexation of bibliographic metadata on any search platform.
- Subject to national copyright laws and the interests of rightsholders in regard to in-copyright works (whether orphan or not), the Library and others shall be free to reuse the digitised copies and derived data that result from the digitisation project. Subsequent to the POPA, there shall be no contractual restrictions on the Library, its partners or end users in regard to its use of the public domain digital copies and derived data.

GUIDELINES FOR MODEL 1 (e.g. A database / digital objects are created and access is sold to public and research libraries, businesses etc.)

	COPYRIGHT STATUS		
	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Non-Exclusivity	The non-exclusive nature of the relationship allows the Library full freedom to make partnerships, commercial and non-commercial for in-copyright material, subject to copyright law.	The non-exclusive nature of the relationship allows the Library full freedom to make partnerships, commercial and non-commercial for in-copyright material, subject to copyright law.	The non-exclusive nature of the relationship allows the Library full freedom to receive public funding as well as enter into other commercial and non-commercial partnerships in regards to a Library's original collection.
Respect for IPR	Permissions for use will be negotiated by the third party; the Library reserves the right to review these permissions for use. Access to in-copyright material for digitisation will not be granted until permissions have been granted to the CP by rightsholders. Any privacy / defamation / IPR infringement / libel issues shall be the responsibility of the CP.	Where ownership is in doubt the CP must show best endeavours to trace rightsholders or follow any applicable measures relating to orphan works. The Library reserves the right to review the CP's efforts in this regard. Any privacy / defamation / IPR infringement / libel issues shall be the responsibility of the CP.	N/A
	Copyright, moral rights and cultural sensibilities will be respected.	Copyright, moral rights and cultural sensibilities will be respected.	Moral rights and cultural sensibilities will be respected. The public domain will be respected.
Ownership	Digitised copies and derived data (optical image, metadata and OCR etc) will be materially held by the Library; the Library makes no claim on the underlying IPR of in-copyright material.	Digitised copies and derived data (optical image, metadata and OCR etc) will be materially held by the Library; the Library makes no claim on the underlying IPR of in-copyright material.	Digitised copies and derived data (optical image, metadata and OCR etc) will be materially held by the Library. If national law leads to the creation of intellectual property rights in process of digitisation, the contract with the CP shall ensure the Library and others shall have free and unrestricted reuse of the digitised copies and derived data subsequent to the POPA.

	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Contractual Negotiations	Commercial terms with rightsholders will be brokered between the rightsholder and the CP.	Commercial terms will be agreed between the Library and the CP and other organisations as appropriate.	Commercial terms will be agreed between the Library and the CP.
	The Library will require contractual evidence of agreement to digitise between the CP and the rightsholder before it allows access to material for digitisation. There will be clear understanding between the Library and the CP that should a legitimate claim to IPR be made that a vigorous takedown policy be enacted.	National procedures on orphan works are to be followed. There will be clear understanding between the Library and the CP that should a legitimate claim to IPR be made that a vigorous takedown policy be enacted.	N/A
Library Access / Permanent Collection	There will be free access to the digital object, at a minimum, on Library premises for the term of the contract from the CP's servers. There shall be unrestricted usage on the premises. The CP will be expected to negotiate on-site access to in-copyright digitised material for the full term of copyright.	Subject to national procedures on orphan works there will be free access to the digital object, at a minimum on Library premises for the term of the contract from the CP's servers. There shall be unrestricted usage on the premises. The CP will be expected to negotiate on-site access to in-copyright digitised material for the full term of copyright.	There will be free access to the digital object on Library premises for the term of the contract from the CP's servers. There shall be unrestricted usage on the premises.
	Following the POPA there will be no CP-imposed contractual restrictions on the use of the object by the Library. Onward use of the digitised object shall be subject to copyright law and / or applicable licence with the rightsholder.	Following the POPA there will be no CP-imposed contractual restrictions on the use of the object. Onward use of the digitised object shall be subject to appropriate statutory procedure.	Following the POPA there will be no contractual restrictions on the use of the object within the Library or outside of the Library, including the right to give unrestricted access to third parties.
	In addition to the receipt of non-proprietary Preservation Standard Copies as well as Access Copies, the Library reserves the right to format shift to any format. This shall be contracted and agreed by the CP and the rightsholder prior to digitisation.	In addition to the receipt of non-proprietary Preservation Standard Copies as well as Access Copies, the Library reserves the right to format shift to any format, subject to copyright law. This shall be contracted and agreed by the CP in line with any statutory procedure.	In addition to the receipt of non-proprietary Preservation Standard Copies as well as Access Copies, the Library reserves the right to format shift to any format.

	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Partner Obligation	The Library makes no claim on fees for the sale of the digitised material. Any revenue share or decision on off-site access from the Library shall be between the rightsholder and the CP - to be agreed by way of separate negotiation.	Subject to national legislation the Library reserves the right to receive a share in sales of the digital object and / or require a national site licence for POPA. This will fund further digitisation.	The Library will reserve the right to receive a share in sales of the digital object and / or require a national / European site licence etc during POPA as agreed. This will fund further digitisation.
Web Discoverability	Subject to copyright law, the decision of the rightsholder.	Subject to national legislation the object at title level will be viewable to all search engines.	During POPA the object at title level will be viewable to all search engines.

GUIDELINES FOR MODEL 2 (e.g. An advertising supported online model, free to consumers at the point of access.)

	COPYRIGHT STATUS		
	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Non-Exclusivity	The non-exclusive nature of the relationship allows the Library full freedom to make partnerships, commercial and non-commercial for in-copyright material subject to copyright law.	The non-exclusive nature of the relationship allows the Library full freedom to make partnerships, commercial and non-commercial for in-copyright material subject to copyright law.	The non-exclusive nature of the relationship allows the Library full freedom to receive public funding as well as enter into other commercial and non-commercial partnerships in regards to a Library's original collection.
Respect for IPR	Permissions for use will be negotiated by the third party before any digitisation takes place; the Library reserves the right to review these permissions for use. Access to in-copyright material for digitisation will not be granted until permissions have been granted to the CP by rightsholders. Any privacy / defamation / IPR infringement / libel issues shall be the responsibility of the CP.	Where ownership is in doubt the CP must show best endeavours to trace rightsholders or follow any applicable measures relating to orphan works. The Library reserves the right to review the CP's efforts in this regard. The CP shall deal with any privacy / defamation issues during the POPA.	N/A

	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Respect for IPR	Copyright, moral rights and cultural sensibilities will be respected.	Copyright, moral rights and cultural sensibilities will be respected.	Moral rights and cultural sensibilities will be respected. The public domain will be respected. There will be unhindered web access to content by end users. However the CP may require that no other party such as a search engine will be able to index the full text of the objects during the POPA.
Ownership	Digitised copies and derived data (optical image, metadata and OCR etc) will be materially held by the Library; the Library makes no claim on the underlying IPR of in-copyright material.	Digitised copies and derived data (optical image, metadata and OCR etc) will be materially held by the Library; the Library makes no claim on the underlying IPR of in-copyright material.	Digitised copies and derived data (optical image, metadata and OCR etc) will be materially held by the Library. If national law leads to the creation of intellectual property rights in process of digitisation, the contract with the CP shall ensure the Library and others shall have free and unrestricted reuse of the digitised copies and derived data subsequent to the POPA.
Contractual Negotiations	Commercial terms with rightsholders will be brokered between the rightsholder and the CP.	Commercial terms will be agreed between the Library, the CP and other organisations as appropriate.	Commercial terms will be agreed between the Library and the CP.
	The Library will require contractual evidence of agreement to digitise between the CP and the rightsholder before it allows access to material for digitisation. There will be clear understanding between the Library and the CP that should a legitimate claim to IPR be made that a vigorous takedown policy be enacted.	National procedures on orphan works are to be followed. There will be clear understanding between the Library and the CP that should a legitimate claim to IPR be made that a vigorous takedown policy be enacted.	N/A

	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Library Access / Permanent Collection	There will be free unrestricted access on Library premises and Europeana for the term of the contract from the CP's servers. The CP will be expected to negotiate on-site access to in-copyright digitised material for the full term of copyright.	Subject to national procedures on orphan works, there will be free access to the digital object on Library premises and Europeana for the term of the contract from the CP's servers. The CP will be expected to negotiate on-site access to in-copyright digitised material for the full term of copyright.	Free access to end users will be available for the term of the contract from the Library's web site and Europeana, in addition to the CP's website.
	Following the POPA there will be no CP imposed contractual restrictions on the use of the object by the Library. Onward use of the digitised object shall be subject to copyright law and / or applicable licence with the rightsholder.	Following the POPA there will be no CP imposed contractual restrictions on the use of the object. Onward use of the digitised object shall be subject to appropriate statutory procedure.	Following the POPA there will be no contractual restrictions on the use of the object within the Library or outside of the Library, including the right to give unrestricted access to third parties.
	In addition to the receipt of non-proprietary Preservation Standard Copies as well as Access Copies, the Library reserves the right to format shift to any format. This shall be contracted and agreed by the CP and the rightsholder prior to digitisation.	In addition to the receipt of non-proprietary Preservation Standard Copies as well as Access Copies, the Library reserves the right to format shift to any format, subject to copyright law. This shall be contracted and agreed by the CP and any appropriate third party in line with statutory procedure.	In addition to the receipt of non-proprietary Preservation Standard Copies as well as Access Copies, the Library reserves the right to format shift to any format.
Partner Obligation	The Library makes no claim on fees from the sale of the digitised material. Any revenue share or decision on off-site access from the Library shall be between the rightsholder and the CP - to be agreed by way of separate negotiation.	Subject to national legislation the Library reserves the right to receive a share in sales of the digital object as agreed / appropriate. This will in part fund further digitisation.	During POPA the Library reserves the right to a share in sales of the digital object etc as agreed / appropriate. This will in part fund further digitisation.

	IN COPYRIGHT	ORPHAN WORKS	OUT OF COPYRIGHT
Web Discoverability	Subject to copyright law, the decision of the rightsholder.	Subject to national legislation during POPA, the object at title level will be viewable to all search engines.	During POPA the object at title level will be viewable to all search engines.

CONCLUSION

This position paper provides an overview of best practice for national libraries and other publicly funded cultural institutions entering into PPPs which should inform the terms of any agreements and governance arrangements that may be established.

However as previously highlighted, PPPs should form part of an ecosystem of digitisation solutions, along with funds from national government and central funding from the European Commission. The above guidelines highlight the difficulties and tensions that cultural heritage organisations face when negotiating such agreements in keeping to their core objective of making knowledge and cultural objects available to all European citizens. Therefore any consideration of PPPs in relation to the creation of European corpus of knowledge should take into account both the limitations they innately have, in addition to the value they bring.

GLOSSARY OF TERMS

Bibliographic Data – Information pertaining to an archived item, such as a book, journal or image which will allow cataloguing and referencing of material to aid discovery and access. This is a higher level and more generalised concept than metadata.

CP – Commercial Partner. This will be a private partner who will provide funding, expertise or a technology platform in return for the ability to commercialise a specific part of the Library’s collection. Partners could include corporate sponsors, publishing companies, software developers and search engines.

Derived Data – The data created from the original digitised object, including but not limited to metadata, OCR (optical character recognition data) etc.

EULA – End User Licensing Agreement.

Library – For the purposes of this paper the term Library is used to refer to national libraries and libraries and archives of other publicly funded cultural institutions in Europe.

National Site Licence – Licence allowing access to digital content within a specific country.

POPA – Period of Preferential Access. Whilst all agreements with Commercial Partners are non-exclusive the Library agrees to set a period during which time they will make reasonable endeavours not seek to digitise and commercialise the material which is subject to the agreement. This gives the Commercial Partner an opportunity to make a return on their investment.

PPPs - Public Private Partnerships. The agreement between public bodies – in this case libraries, archives and cultural institutions – and private entities that facilitate the digitisation of archive material. These partnerships should be of benefit to the tax payer as well as satisfying the CP's commercial aims.

Public Domain Material – Material in which all intellectual property rights have expired.