Cultural Base

Social Platform
on Cultural Heritage
and European Identities

The Digital
Single Market

**Vision Document
(cultural creativity axis)**

Philip Schlesinger, University of Glasgow
Aleksandra Uzelac, IMRO, Zagreb
and Charlotte Waelde, Coventry University
31 March 2016

info@culturalbase.eu
www.culturalbase.eu

Universitat
de Barcelona

University
of Glasgow

CEU CENTRAL
EUROPEAN
UNIVERSITY

US
University of Sussex

European
University
Institute

GLOBAL
GOVERNANCE
Programme

UNIVERSITÉ PARIS 1
PANTHÉON SORBONNE

inter
arts

Abstract

The Digital Single Market is a key plank of EU policy in the cultural field. The pursuit of a 'level playing-field' for the circulation of cultural content in the digital space involves addressing significant tensions between the territorial principle and the supranational market principle. How this proposed transformation comes about is of wide relevance. It concerns Member States and European cultural actors but as the EU is a major international cultural market place it has wide ramifications for cultural trade and how this is connected to questions of collective identity.

Introduction

The Digital Single Market (DSM) is Pillar I of the European Commission's Europe2020 Strategy and specifically aims 'to better exploit the potential of Information and Communication Technologies in order to foster innovation, economic growth and progress'. We briefly explore the background to the DSM and outline views and interests that are affected by proposed change as well as noting a wide range of conditions that are otherwise discussed in relation to the DSM. We also pay particular attention to how reform of copyright might influence the prospects for the creative and cultural industries in the EU.

Current Context

The 2010 report drafted by Mario Monti underlined the political purpose of completing the single market. It was then seen as providing a dual response - to nationalism inside the EU and to the challenge of globalization outside it. These remain important shaping points of orientation for understanding the wider implications of the DSM, although they now lie in the background of policy discourse rather than occupying the foreground. A digital single

market was initially conceived as creating a single regulatory space for electronic communications, overcoming the fragmentation of consumer legislation, offering a legal framework for online broadcasting and establishing a common framework for copyright clearance and management. With modifications, these broad policy ideas have persisted in the EC's official thinking. At the start of its mandate in 2015, the European Commission, now presided over by Jean-Claude Juncker, made it clear that the creative economy's development was deeply intertwined with that of the digital economy, and at the top of its ten policy priorities in this area.

Challenges

In December 2015, in setting out key planks of its Digital Single Market strategy, the EC set out its goals for broadening access to online content and modernizing EU copyright rules. This has several key dimensions that relate directly to the question of how culture (or 'creative content') might travel within the EU market.

1. Of key importance is a *Regulation on the 'cross-border portability' of online content*, intended to allow EU residents to travel with digital content purchased at home. The EC intends to improve the distribution of TV and radio programmes online and also, by way of innovative tools, to enable European cinema to reach wider audiences. This is an adaptation to the digital age of long-established strategies to develop audiovisual markets.

2. Of particular relevance for the digitization of heritage institutions' collections are proposals for *exceptions to copyright rules for educational purposes*.

3. There are also proposals to address *the remuneration of copyright-protected works* (particularly in relation to news aggregation intermediaries and platforms).

4. Proposals have also been made to improve *the enforcement of IPR in relation to infringements*.

5. Finally, the aim is to pursue *the effective and uniform application of copyright legislation across the EU* – a potentially far-reaching challenge to existing national regimes.

6. Related to these, although distinct, is the proposed *revision of the Audiovisual Media Services Directive (AVMSD)*, which raises questions about whether the existing Directive should be extended from live TV to 'TV-like' services. This would shift the scope of regulation from the well-known contours of broadcasting – increasingly challenged by changing delivery patterns and consumption behaviour - to the internet. This has major implications, not least in respect of the scope of what is, and can be, credibly regulated.

Keys for Change

This is a major agenda of change, regarding which there are presently divided views. The EC's intervention in seeking to build the DSM, as noted, has arisen from a concern to position the EU competitively in global market places. Exploiting the barrier transcending properties of digital technologies also carries a message about ways in which national borders can be transcended. Of course, technological affordances do not of themselves trump socio-cultural differences.

1. The Regulation on the *cross-border portability of on-line content* is clearly a key trade issue for the creative and cultural industries. It is a proposal that would both mark a significant change to the territorial nature of copyright (at least until now) and to business models within the creative industries.

While none of these is insurmountable, there is bound to be significant input on the part of the creative industries as to exactly what shape the final

proposals take, and the shape of new business models that will be built upon them.

2. In respect of *exceptions and limitations*, we wish to highlight two key areas: heritage collections and education and research.

Copyright is a framework that affects the digitization of heritage collections at its very core, as it affects their possible business models, access models and the services that can be provided to citizens/users. Models of access to digitized heritage fit into a wider framework of ensuring a balance between commercial and public interests and of ensuring users' rights to obtain and share knowledge as well as their full engagement with the creation, curation and aggregation of content. Thus, issues related to copyright as well as to open access provide a relevant framework for considering access to culture in the digital domain. They require us to consider what digital access means in the context of IPR, given that IPR and related rights of use and re-use both enable and limit what kinds of services the cultural heritage sector can offer in the digital domain.

Restrictions due to IPR are affecting the role and services of museums, archives and libraries in the digital era. These interests are voicing their concerns and asking for policy solutions that look ahead and ensure that heritage and the values that heritage institutions defend are transposed to networked cultures and societies. They are concerned that unless cultural policies recognise that access to culture is a fundamental aspect of our cultural memory and ensure ways to stimulate online accessibility of the copyrighted material, a significant part of our more recent culture will not be available for users to access. This particularly affects access to 20th century art that still has not entered the public domain, or for which the copyright holder is not known (namely, orphan works).

The issue of re-use has been regulated in a wider framework of the Open Data Strategy (European Commission, 2011) and the (PSI) Directive on Re-use of Public Sector Information (European Commission, 2003; European

Commission, 2013) that regulates re-use with the aim to stimulate a growing market in value-added products and services based on public sector information reuse. Until the revision of the PSI Directive in 2013, the cultural sector (i.e. libraries, museums and archives) had not been included within its scope, due to concerns about cost-related issues related to the clearance of third parties' IPR in heritage collections. Member States have been given two years to transpose the provisions of the revised Directive into their national laws, but this seems to be difficult transition.

In its response to the EC's strategy, the European Parliament (2016) stressed the importance of the text and data mining exception as well as the educational exceptions. However, it would appear that the text- and data-mining exception will be limited to public sector organisations for the purposes of scientific research – activities that are generally regarded as non-commercial. This raises the question as to what activities would fall within its parameters. For example, the UK has introduced a text– and data-mining exception for non-commercial purposes. Guidance issued with the exception stresses that outputs of academic research on text- and data-mining can be published in commercial journals, including those that permit commercial research. However, the original purpose of carrying out the text- and data-mining must be non-commercial. This leaves grey areas over swathes of research such as that carried out by the Digital Panopticon.[1] This publicly funded project uses digital technologies to interrogate existing and new genealogical, biometric and criminal justice datasets. The project not only pursues various academic questions, but one outcome may be to seek to raise interest among the paying public wishing to know more about their ancestors. It is unclear whether this would fall under the non-commercial text- and data-mining exception or not.

4. On *effective and uniform application of copyright legislation across the EU*, the Court of Justice has been doing a 'significant' job in harmonising the

---

[1] www.digitalpanopticon.org

application of copyright law in the EU. This has been done through interpretation of provisions of the EU Copyright Directives when questions are referred to it by national courts. Nonetheless, significant differences remain among and between Member States rooted in the territorial nature of copyright law. While the EC has said that uniform application of copyright law is an important part of the strategy, it still remains unclear as to how this would happen beyond opaque statements such as introducing moves 'to facilitate a structured dialogue between Member States to ensure a shared understanding of EU copyright law and foster convergence of national laws.

Future Scenarios

The barriers to the distribution of public digital content in Europe range from a lack of funding for digitisation, a lack of maturity in business models, a lack of adequate content rights management, to a lack of appropriate skills within public institutions and of user awareness regarding digital European heritage. Orphan works also present a barrier to mass digitisation projects or the free reuse of such objects if digitised. Additionally, so far only 31% of cultural institutions have an explicit policy regarding the use of digital collections, limiting the usability of content: such content cannot be re-used either by end-users or by businesses in their applications.

One emergent concern may regard the development of greater concentration of ownership and control as the cultural industries are reshaped in the digital age. Moreover, how do the EC's proposals fit in with the UKs international obligations in terms of both Berne and TRIPs? These instruments contain measures concerning national treatment, and TRIPs contains the most-favoured-nation clause. What consideration – if any – has been given to the impact of these in terms of the EU's obligations within the global marketplace?

Conclusion

In its response to the EC early in 2016, the European Parliament took a very broad approach to the DSM – one that embraced the multifold aspects of trade involved in e-commerce, for instance. In the present Vision Document, we restrict ourselves to matters most directly concerned with the cultural sphere recognizing, nevertheless, the interconnectedness of various EU legislative provisions. In its reaction to the EC's strategy, the EP welcomed 'the proposal to enhance portability and interoperability in order stimulate free circulation of legally acquired, and legally available, content or services, as a first step towards bringing an end to unjustified geo-blocking, as well as the accessibility and cross-border functionality of subscriptions'. Further relevant comments by the EP are made in relation to 'better access to digital content' – notably the 'modernization' of the copyright framework, and also in respect of 'modernizing' the media framework for the 21st century, specifically through reform of the Audiovisual Media Services Directive, notably by deregulating and creating a common framework for broadcasters and other comparable suppliers in the market.

Clearly, the IPR framework (in fact, 28 distinct national frameworks) influences what is accessible or not in the digital domain and what services cultural institutions can provide to users. If the cultural sector is expected to be a catalyst for creativity and to contribute to EU economy and growth in jobs, finding appropriate business models that allow for the digitization of collections' holdings in the cultural public sector, and for their use and reuse (for educational and touristic purposes as well as commercial ones) is very important. The Digital Single Market should strive to simplify existing regulations and also ensure that existing public cultural resources remain openly accessible to citizens, as the right to obtain and share knowledge and the right to create and re-create are central to survival of any culture. These arguments, of course, may come up against the resistance of rights holders.

One issue that is always not addressed is that of *moral rights*. These, which are significantly more deeply embedded in some EU cultures than others have their core the split between the ownership of, and interests in, cultural content. To what extent, if at all, might moral rights form an impediment to (international) cultural trade?

References

Dietrich, D. & Pekel, J. (2012) *Open Data in Cultural Heritage Institutions* (European Public Sector Information Platform Topic Report No. 2012/04, Epsi Platform - Open Data in Cultural Heritage Institutions) [online]. Available from: http://www.epsiplatform.eu/sites/default/files/Final%20TR%20Open%20Data%20in%20Cultural%20Heritage%20Institutions.pdf [Accessed 21 September 2015]

Dobusch L. (2014) *EU Commission's Consultation Report Shows: Current Copyright is Unbalanced* [online]. Available from: http://governancexborders.com/2014/07/25/eu-commissions-consultation-report-shows-current-copyright-is-unbalanced/ [Accessed 21 September 2015]

EC (2016) *Digital Agenda for Europe: A Europe 2020 Initiative*.

https://ec.europa.eu/digital-agenda/en/digital-agenda-europe-2020-strategy [Accessed 5 February 2016]

European Parliament (2016) *Report on Towards a Digital Single Market Act* (2015/2147(INI)). http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0371+0+DOC+PDF+V0//EN [Accessed 5 February 2016]

Feijoo, C. et al. (2013) *Public and Commercial Models of Access in the Digital Era*. European Parliament, (Directorate General for Internal Policies, Policy Department B, Structural and Cohesion Policies, Culture and Education), Strasbourg (211 pp.) Available from: http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=93070 [Accessed 21 September 2015]

Frau-Meigs, D. (2013) *Assessing the impact of digitisation on access to culture and creation, aggregation and curation of content*, Background Paper for Governance of Culture –

info@culturalbase.eu
www.culturalbase.eu
9 / 10 _ Cultural Base

Promoting Access to Culture, Moscow 15-16 April 2013 (MinConfCult (2013) 5) [online]. Available from: https://www.coe.int/t/dg4/cultureheritage/culture/digitisation/MinConfCult2013_5Meigs-EN%20def.pdf [Accessed 21 September 2015]

Uzelac A. (2014) *Digital shift and a pressure to survive – new audiences, new demands, new business models*, (Issue paper for the Baku Conference – First Platform Exchange on Culture and Digitisation "Creating an enabling environment for digital culture and for empowering citizens", At Baku, Azarbaijan), [online]. Available from: http://www.coe.int/t/dg4/cultureheritage/culture/digitisation/Input-paper-Uzelac_en.pdf

Uzelac, A.; Obuljen Koržinek, N.; Primorac, J. (2015) "Digital Access: sharing or selling?", pp. 73-86. In: *Access to culture - policy analysis: final report*. Vienna: EDUCULT. [online]. Available from: http://educult.at/wp-content/uploads/2013/04/Final_Report_Online_with-Annex.pdf [Accessed 21 September 2015]

Verbruggen, E. Oomen, J. (2012) *D7.6.2 Online Access to Audiovisual Heritage Status Report*, (Report on the project EUSCREEN Exploring Europe's Television Heritage in Changing Contexts) [online]. Available from: http://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/EUscreen/Deliverables/EUscreen%20D7.6.2%20OnlineAccesstoAudiovisualHeritageStatusReport.pdf [Accessed 21 January 2015].

Authors: Philip Schlesinger is Professor in Cultural Policy at the University of Glasgow, UK, and Deputy Director of CREATe, the RCUK Centre for copyright and new business models in the creative economy. Aleksandra Uzelak heads the Culture and Communication Department, Institute for Development and International Relations, Zagreb, Croatia. Charlotte Waelde is Professor of Intellectual Property Law at Coventry University, UK.

info@culturalbase.eu
www.culturalbase.eu
10 / 10 _ Cultural Base