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## Communia, the European Network on the Digital Public Domain Response to EC Consultation on Copyright in the Knowledge Economy

Communia Working Group 3 (Libraries, museums and archives, MEMORY) ([link](#))<sup>1</sup>, submitted a response ([link](#))<sup>2</sup> to the Commission Green Paper and Consultation ([link](#))<sup>3</sup> on Copyright in the Knowledge Economy.

The Green Paper issued in June 2008 a call for contributions intending "to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment", including on the extension of copyright exceptions.

Communia Working Group 3 endorses the **Science Commons** response to question 19 ([link](#))<sup>4</sup> as well as the complete response of **EBLIDA** ([link](#))<sup>5</sup>, and proposes a set of recommendations:

1. Europe needs interoperable rights expression languages. Otherwise, the pillar of our emerging digital culture, the public domain, will continue to remain invisible among a sea of commercial, exclusive content.
2. Analogue public domain material must stay in the public domain if digitised. Time-limited embargoes may be acceptable.
3. Fair use, limitations and exceptions (L&E) to copyright must be strengthened and simplified, not eroded. Information provision as a public service for citizens, science and education must co-exist on a level playing field with a dynamic commercial market, thus creating the most competitive and equal access information network.
4. Bottom-up stewardship and self-governance should be encouraged by a variety of mandates, policies, and incentives.
5. Evidence must not be ignored ([link](#))<sup>6</sup> when making european policy. Research into network economics and IP regime evaluation should be encouraged.
6. Protection term extensions must be postponed ([link](#))<sup>7</sup>. Term extensions create decades-long public domain "gaps" which not only dilute the value of the exclusive content pool (and earnings to authors and rightsholders) but also, in terms of lost public domain value, may prove to be impossible to catch up.



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## Full response below

Response from the COMMUNIA Thematic Network (Working Group 3 : Libraries, museums and archives, MEMORY) ([link](#))<sup>8</sup> to the Commission Green Paper and Consultation on Copyright in the Knowledge Economy.

### The Communia Thematic Network on the Digital Public Domain

Funded by the European Commission within the eContentplus framework ([link](#))<sup>9</sup>, the COMMUNIA Thematic Network is a three year long project (2007-2010). Its mission is to offer a European point of reference for theoretical analysis and strategic policy discussion of existing and emerging issues concerning the public domain in the digital environment - as well as related topics, including, but not limited to, alternative forms of licensing for creative material; open access to scientific publications and research results; management of works whose authors are unknown (i.e. orphan works).

In general, COMMUNIA intends to help framing the analysis, the debate and the general discourse on and around the public domain in the digital environment by highlighting the challenges arising from the increasingly complex interface between scientific progress, technological innovation, cultural development, socio-economic change on the one hand and the rise and mass deployment/usage of digital technologies in the European information society. In this context, any development concerning Directive 2001/29/EC on the harmonisation of copyright and related rights in the information society is of particular interest to the COMMUNIA network.

Additional to its own response, the working group fully endorses the EBLIDA response ([link](#))<sup>10</sup> to this consultation and the Science Commons response to question 19 ([link](#))<sup>11</sup> (submitted 21<sup>st</sup> november and reproduced below)

### Short overview of current issues

**The value of the public domain** is not seriously questioned anymore. The concepts and processes of the public domain have ceased to be a blind spot and it becomes increasingly clear that creative works are "elevated" into the public domain rather than, in traditional parlance, "fall" into it.

Yet value and price are not the same and someone has to pay for infrastructure and digitisation. The good news is that each analogue work, ideally, only needs to be digitised once. The real value gain comes in the second step, when the newly digitised works begin to mingle with the born digital works on the networks.



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Digital curators **enrich collections and aggregations** with public domain works. End-users benefit from **read-write access** to heritage and participate in the creation of digital heritage and semantic graphs.

How to ensure that such value is captured in information markets and by the citizens of the knowledge society?

The example of the information environment of the library world shows the importance of a **dual market**: on one side a strong public service, committed to giving free and remote access to information for citizens and scientists, for cultural and educational use. On the other side a commercial market, driven (mostly) by exclusive rights.

The duality of this market rests on the concepts of **fair use** as well as **limitations and exceptions (L&E)** to copyright law. Fair use and L&E have been massively neglected since the appearance of digital networks. They are hardly harmonised, generally a mess, and limited to a fixed superset. If the harmonisation process continues in the current hard law way (for example: by new directives), a further erosion of fair use and L&E seems inevitable. A telling example is the linguistic slip in German from "copyright barrier" ("Schranke") to the increasingly used "copyright exception" ("Ausnahme").

A worthwhile endeavour might be the drafting of a licence that captures fair use and L&E. Such a drafting process would point to another relevant and rich difference, namely:

### **Social practice vs. the law**

In the scientific community, it is expected, a social norm, that one cites one's sources, regardless whether a licence or law requires such attribution. Similar processes can be observed in the realms of **information freedom** and access to **public sector information** (see 29th november, report on psi consultation, [link](#))<sup>12</sup> and emerging sharing and copying practices as exemplified by the **piratebay** ([link](#))<sup>13</sup> or **youtube** ([link](#))<sup>14</sup> .

### **Self-governance**

Focussing on socially acceptable and desirable practices in relation to copyright, points to a set of organisations that are equally innovative and self-governed, to cite only the classic and lively **Free, Libre and Open Source Software** communities (FLOSS); **Creative Commons**, with its goal to be the "architects of open" and **Wikipedia**, which has build a quite enormous bureaucracy that has become a trusted steward of information.

### **CC-zero**

The Creative Commons zero ([link](#))<sup>15</sup> licence (draft) is the result of teh enlargement of the available spectrum of licences towards the public domain. CC-zero is to provide a way to relinquish as many as possible and retain only the thinnest possible layer of rights. It has proven technically impossible to make it waterproof and globally adaptable to all national, fair-use, L&E and copyright laws. While the resulting cc-zero licence is certainly legally clever, its success will depend on social practice.



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### Six recommendations

1. Europe needs interoperable rights expression languages. Otherwise, the pillar of our emerging digital culture, the public domain, will continue to remain invisible among a sea of commercial, exclusive content.
2. Analogue public domain material must stay in the public domain if digitised. Time-limited embargoes may be acceptable.
3. Fair use, limitations and exceptions (L&E) to copyright must be strengthened and simplified, not eroded. Information provision as a public service for citizens, science and education must co-exist on a level playing field with a dynamic commercial market, thus creating the most competitive and equal access information network.
4. Bottom-up stewardship and self-governance should be encouraged by a variety of mandates, policies, and incentives.
5. Evidence must not be ignored ([link](#))<sup>16</sup> when making european policy. Research into network economics and IP regime evaluation should be encouraged.
6. Protection term extensions must be postponed ([link](#))<sup>17</sup>. Term extensions create decades-long public domain "gaps" which not only dilute the value of the exclusive content pool (and earnings to authors and rightsholders) but also, in terms of lost public domain value, may prove to be impossible to catch up.

The above overview and recommandations on the public domain should be read as a positive answer to the current global financial and economic crisis; when the system as a whole comes under scrutiny and issues of sustainability, justice and access to knowledge jump to our, all to often, western, eyes.

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The COMMUNIA network working group 3 wishes to respond below to several questions of the call for consultation formulated in the Commission Green Paper on Copyright in the Knowledge Economy.

## 2. GENERAL ISSUES

Limitations on copyright are an integral part of the copyright system, for they are the recognition in positive law of the users' legitimate interests' in making certain unauthorised uses of copyrighted material.

Questions:

### **(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?**

The members of the COMMUNIA network agree that no encouragement from the legislator is needed for the conclusion of contractual arrangements between right holders and users of copyright material.



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**(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?**

Model licence agreements may be desirable, considering the weak position of cultural heritage institutions against monopolistic publishers and rights collectives. Possible model licences should meet the specific needs of online cultural heritage practices.

Global standardisation is desirable. It is also crucial that licenses consider the needs of end users. They have to be clear and simple and should facilitate reuse of cultural heritage. Creative Commons licenses could serve as an example here.

**(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?**

A fixed list of exceptions and limitations lacks sufficient flexibility to take account of future socio-economic and technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework. This should also differentiate between commercial and non-commercial uses.

In addition to the limited capacity of an exhaustive list of exceptions and limitations to adapt to new socio-economic or technological changes, one can entertain serious doubts as to the harmonising effect of the optional list of limitations on copyright and related rights, from which Member States may pick and choose at will. In practice, not only are Member States free to implement the limitations they want from the list, but they are also free to decide how they will implement each limitation. In addition, articles 5(2) to 5(5) of the Directive contain two types of norms: one set of specific, but broadly worded limitations, within the boundaries of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations. In other words, the Directive generally lacks concrete guidelines that Member States are to follow in order to determine the scope and conditions of application of the limitations. Since in many cases, simply reproducing the wording of the Directive was not an option, most Member States have chosen to interpret the limitations contained in the Directive according to their own traditions.

The lack of harmonisation described above has a direct effect on the legal certainty flowing from the regime of limitations. The fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the European Community, is bound to create a serious impediment to the establishment of cross-border services and projects.

To ensure a proper balance between the interests of rights holders and users, these exceptions should be mandatory – and based on a non-exhaustive list – on two domains:

These exceptions should not be allowed to – contractually or technically – be circumvented.

These exceptions should be mandatory for all member states.



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**(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?**

In order to ensure more legal certainty and better protection of beneficiaries of exceptions and limitations, the Community legislator should consider declaring a number of limitations mandatory for transposition in all Member States. Among the limitations that should be declared mandatory are those that reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, principles which are part of Community law. In addition, a list of mandatory limitations should include those that have a noticeable impact on the Internal Market or concern the rights of European consumers. These mandatory limitations should be reformulated in specific terms leaving little room for interpretation by the national legislators. Only then, would the rules concerning the limitations on copyright and related rights be sufficiently clear to incite rights owners and other content providers to invest in cross-border services. The adoption of any other exception and limitation that does not fall under these categories should be left to the discretion of the member state, according to the principle of subsidiarity.

Particular categories of users, including cultural heritage institutions, educational institutions and consumers are emerging as the weaker party in the transaction. To restore the balance of interests inside online contractual agreements would be to declare some limitations on copyright and related rights imperative. Wherever the European legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, private parties should be prevented from unilaterally derogating from the legislator's intent. At the European level, the Computer Programmes Directive and the Database Directive both specify that the exemptions provided therein may not be circumvented by contractual agreement.

At the national level, Portugal has adopted a measure to prevent the use of standard form contracts excluding the exercise of limitations on copyright to the detriment of the user. Following these models, a provision could be introduced in the copyright legislation according to which any unilateral contractual clause deviating from the limitations on copyright and related rights would be declared null and void.

**(5) If so, which ones?**

Among the limitations contained in article 5 of the Directive that could be given mandatory status based on the safeguard of fundamental rights are the following:

- Use for quotations for purposes such as criticism and review (art. 5(3)d);
- Use for news reporting and press reviews (art. 5(3)c);
- Use of political speeches as well as extracts of public lectures (art. 5(3)f);
- Use for the purpose of caricature, parody or pastiche (art. 5(3)k);
- Use for educational and scientific purposes (art. 5(3)a);
- Use by disabled persons (art. 5(3)b);

In addition, a list of mandatory limitations should include those that have a noticeable impact on the Internal Market or concern the rights of European users. Among the limitations contained in article 5 of





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the Directive that could be given mandatory status based on their potential or actual impact on the Internal Market are the following:

- Transient copies (assuming this would not be converted into a carve-out of the economic rights) (art. 5(1));
- Reprographic reproductions (art. 5(2)a);
- Private copying (art. 5(2)b);
- Reproductions by libraries, archives and museums (art. 5(2)c);
- Use of works for research and private study (art. 5(3)n); and
- Ephemeral recordings by broadcasting organisations (art. 5(2)d).

### 3.1. Exceptions for libraries and archives

#### Questions:

**(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?**

The question is ambiguous in its use of the word "catalogue" and its relation to library and archive exceptions. Publishers should not enjoy a monopoly position for the provision of electronic services in the future as publishers have not historically been able (nor interested) to guarantee long-term access or preservation of their content. Libraries, museums and archives would effectively play no active role in the electronic information environment anymore and such organisations will not be able to fulfill their role in the construction of national and european projects such as Europeana. While the Internet is becoming the most popular central information medium, libraries and archives should be enabled to carry out their offline core missions in the online world, keeping the dual system of commercial information products and public information services, including free access to information, alive.

**(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?**

Experience has shown that cultural heritage organisations have a particular bad bargaining position.

- Collective rights organisations are monopolistic by nature and use model contracts that often don't reflect the specific needs of digital cultural heritage practices.
- Commercial contracts that regulate access to library collections always rely on exclusivity, severely hampering the potential of creating european and international ressource sharing.

While successful licensing schemes surely exist from a commercial point of view, they have rarely been driving innovations (example: failure of collective rights organisations adopting open content licences), neither have they met the specific needs of online cultural heritage practices. Often, the only reason why heritage organisations have entered such agreements, is a lack of public funding combined with a political



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imperative not to "say no". Politics must ensure a level playing field. Also see 6.

### 3.3. Dissemination of works for teaching and research purposes

#### Questions:

**(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?**

The COMMUNIA network working group 3 endorses the Science Commons response to this question. Available at: <http://sciencecommons.org/weblog/archives/2008/11/24/response-question-19-ec/>

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#### **Copyright Policy at the European Commission - Science Commons' Response**

This past July, the European Commission released a green paper on issues pertinent to work in increasing access to scholarly content. The paper, "Copyright in the Knowledge Economy", raises a number of questions regarding licensing schemes for scholarly content. The following is Science Commons' submitted response to the Commission on Question 19.

Within the scope of the Green Paper (section 1.2) is the dissemination of research, science, and educational materials to the public, and question 19 asks whether the scientific and research community should enter into licensing schemes with publishers to increase access to work for teaching and research purposes.

With respect to governmentally-funded research, the fruits of research should be openly available to the scientific community and the public, in accordance with the principles laid out in the Budapest Open Access Initiative (<http://www.soros.org/openaccess/read.shtml>), the Berlin Declaration on Open Access to Knowledge in the Science and Humanities (<http://oa.mpg.de/openaccess-berlin/berlindeclaration.html>), and the Bethesda Statement on Open Access Publishing (<http://www.earlham.edu/~peters/fos/bethesda.htm>). We believe that these declarations already articulate principles that are appropriate for ensuring broad, digital access to the scientific and scholarly corpus. Such access is particularly important with respect to results arising from research projects supported with government funding, because broad-based, digital dissemination serves important social and governmental purposes that motivate such funding.

We recognize that publishers have a variety of business models, and while open access models used by publishers such as Public Library of Science and BioMed Central offer the fastest and most direct means of making scholarly works available to the public, other, so-called "traditional" publishers, pay for peer-review and publication-related costs through subscription and access fees. They have argued that an exclusivity or "embargo" period is needed in order to fund investments in quality control and to support publication



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costs. We believe that fee-for-access publishing models are not necessarily inconsistent with the broad goals of open access, as long as the embargo period(s), if any, are reasonable, and that subsequent to the embargo period, scholarly papers published in journals are deposited in an online repository and made available for download free of charge and free of technical or legal restrictions. An example of such a policy would be the NIH Public Access Policy (<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>) (April 7, 2008).

Furthermore, such works should be licensed to the public under terms that permit redistribution and appropriate reuse, including in certain circumstances, the creation of compilations, annotations, and other derivative works. Examples of licenses that support the ability to disseminate and to reuse works include the Creative Commons licenses, published by Creative Commons Corporation. The Creative Commons Attribution 3.0 license is an example of a license that is widely adopted by open access journals and recognized as consistent with the open access declarations discussed above. However, such open licenses need not be limited only to open access journals, but they can also be used a model for licensing works made available after any relevant embargo periods. Such licenses ensure that open access is not only available at a technical level through download (read-only access) but also at a legal level through appropriate licensing of copyright in order to permit the preparation of derivative works and other transformative uses (read-write access), which are central to scientific and cultural enterprises. Creative Commons has also worked with many international collaborators to make these licenses available in many languages, as well as to adapt them to the laws of many jurisdictions.

For almost two years, Science Commons has operated a portal and a tool called the “Scholars Copyright Addendum Engine,” which aggregates a wide variety of recognized “Author Addenda” by means of which scholars can enter into negotiations with publishers to retain rights of reuse for scholarly and teaching purposes. While such tools may indeed aid a few scholars in negotiation with publishers to retain rights to archive and reuse their own works for teaching and research, such case-by-case negotiations do not make a significant impact in the vast majority of cases, which represents the bulk of published research. This is due in part to the relative imbalance in negotiating power and legal expertise of the parties to such publication agreements, as well as an imbalance in incentives, with many authors having a larger stake in being accepted for publication than in promoting post-publication access. Therefore, we believe that effective policy intervention requires action at the funder or governmental level to set the appropriate standards, through mandates and incentives that ensure that fruits of research, and especially government-funded research, are disseminated as broadly as possible and with the fewest legal restrictions, consistent with sustainability and quality.

Science Commons also supports broad digital access to the scholarly and scientific corpus because we believe that many difficult and important scientific and social problems require that scientists and researchers be empowered to take advantage of software, Web tools, and other data management technologies to support advanced searching, querying, and information integration. However, in the present environment in which access to the corpus of scientific knowledge is restricted and fragmented into a variety of “wall gardens,” our ability to use that corpus and to apply modern computer technology to it is likewise fragmented and piecemeal. This has important implications for scientific productivity, impact of



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funding for research, knowledge dissemination and preservation, and the achievement of social and governmental goals.

Therefore, Science Commons encourages the Commission to consider strategies that incorporate the broad goals of open access, adoption of standardized licenses that facilitate appropriate reuse and exchange of knowledge and research products, and the enablement of digital information technology. We encourage the Commission to consider a variety of tools, including mandates, policies, and incentives to achieve this goal.

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<sup>1</sup> Communia Network Working Group 3 : <http://www.comuniaproject.eu/WG3/>

<sup>2</sup> Communia WG3 response : [http://www.luxcommons.lu/wp-content/uploads/2008/12/communia\\_wg3\\_response.pdf](http://www.luxcommons.lu/wp-content/uploads/2008/12/communia_wg3_response.pdf)

<sup>3</sup> Green Paper : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF>

<sup>4</sup> Science Commons response : <http://sciencecommons.org/weblog/archives/2008/11/24/response-question-19-ec/>

<sup>5</sup> Eblida response : <http://www.eblida.org/index.php?page=position-papers-and-statements-2>

<sup>6</sup> Out-law « European Commission is misleading EU on copyright extension » : <http://www.out-law.com/page-9378>

<sup>7</sup> Open Rights Group <http://www.openrightsgroup.org/2008/11/26/from-bad-to-worse-meps-to-rush-through-disembowelled-term-extension-directive/>

<sup>8</sup> Communia Network Working Group 3 : <http://www.comuniaproject.eu/WG3/>

<sup>9</sup> eContentplus programme : [http://ec.europa.eu/information\\_society/activities/econtentplus/index\\_en.htm](http://ec.europa.eu/information_society/activities/econtentplus/index_en.htm)

<sup>10</sup> Eblida response : <http://www.eblida.org/index.php?page=position-papers-and-statements-2>

<sup>11</sup> Science Commons response : <http://sciencecommons.org/weblog/archives/2008/11/24/response-question-19-ec/>

<sup>12</sup> Report on psi consultation : [http://ec.europa.eu/information\\_society/policy/psi/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/index_en.htm)

<sup>13</sup> The Pirate Bay : <http://www.thepiratebay.org>

<sup>14</sup> You Tube : <http://www.youtube.com>

<sup>15</sup> Creative Commons zero licence (draft) : <http://labs.creativecommons.org/licenses/zero/1.0/legalcode>

<sup>16</sup> Out-law « European Commission is misleading EU on copyright extension » : <http://www.out-law.com/page-9378>

<sup>17</sup> Open Rights Group : <http://www.openrightsgroup.org/2008/11/26/from-bad-to-worse-meps-to-rush-through-disembowelled-term-extension-directive/>

